THE UNIVERSITY OF ALBERTA

# LEGAL AID: A FACET OF EQUALITY BEFORE THE LAW IN ALBERTA

BY

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A THESIS

SUBMITTED TO THE FACULTY OF GRADUATE STUDIES AND RESEARCH

IN PARTIAL FULFILMENT OF THE REQUIREMENTS FOR THE DEGREE

OF A MASTER OF LAWS

FACULTY OF LAW

EDMONTON, ALBERTA

FALL, 1973

ABSTRACT

The right to equality before the law is a fundamental principle of justice. For this right to be in fact a reality the substantive law must apply equally to all. In addition, as the judicial system is so structured that it can only operate through lawyers, for there to be real equality before the law within that system no person should be denied the services of a lawyer, even if he is unable to pay for them.

Legal aid is the traditional method by which legal services have been rendered to those who would ordinarily be unable to afford them. It is the writer's thesis that if any legal aid plan is to achieve equality before the law it must provide the full range of services that lawyers provide to paying clients. Furthermore, a legally aided client should not be treated any differently than a paying client. In particular, the plan should not be based on charity or carry any charitable overtones.

With these considerations in mind this thesis, after a survey of the historical development of legal aid, examines the present Alberta Legal Aid Plan, its aims, structure, scope and certain aspects of its operations. It is shown that in many respects the Alberta Legal Aid Plan is not working in accordance with the concept of equality before the law and suggestions are made as to how this situation could be improved.

Included in this discussion is a study of the neighbourhood law office concept and it is suggested that such offices are feasible

and desirable in Alberta, if run in conjunction with a modified Alberta Legal Aid Plan.

Although this thesis is primarily concerned with the provision of adequate legal services to the poor and disadvantaged, it has been shown that people of moderate means may be denied equality before the law as in many instances they cannot afford to pay for a lawyer. In view of this, this thesis contains a discussion on prepaid legal services plans and it is suggested that such plans be established in Alberta, as they are a practical way of bringing people of moderate means within reach of legal services that they can afford.

This thesis therefore calls for modifications to the present Alberta Legal Aid Plan, including the setting up of neighbourhood law offices and for the implementation of prepaid legal services plans in Alberta. If this is done, Alberta will be much closer to fully attaining the concept of equality before the law.

ACKNOWLEDGMENT

To Professor Burke M. Barker, of the Faculty of Law, University of Alberta, I am greatly indebted for his continuous guidance, his numerous suggestions, and the representations that he made on my behalf to the Joint Committee of the Alberta Legal Aid Plan.

I would also like to express my gratitude to the Joint Committee of the Alberta Legal Aid Plan for allowing me access to the legal aid files at the Edmonton Office of the Plan, to Mr. David Morris, the Director of the Alberta Legal Aid Plan until March, 1973, who always found the time to answer my inumerable questions, and to the staff of the Edmonton Office of the Alberta Legal Aid Plan, who were ever helpful.

I am also grateful to Professor David R. Percy, Director of Graduate Studies at the Faculty of Law, University of Alberta, for his guidance throughout the year, to the Library staff, to the graduate students and to the students of the Faculty of Law, especially the members of Student Legal Services, and in particular, their Chairman for 1972-73, James Robb, whose thoughts on the subject matter were always helpful.

Finally, I would like to thank my typist, Mrs. Muriel Stuhlemmer, for arranging and rendering my script legible with such patience.

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# CHAPTER ONE

## INTRODUCTION

> First there can be no political, social or economic equality, no democracy, unless the substantive law by fair and equitable rules gives reality to equality by making it a living thing. Second, the substantive law however fair and equitable itself, is impotent to provide the necessary safeguards unless the administration of justice, which alone gives effect and force to substantive law, is in the highest sense impartial. It must be possible for the humblest to invoke the protection of the law, through proper proceedings in the courts, for any invasion of his rights by whomsoever attempted, or freedom and equality vanish into nothingness.
>
> To withhold the equal protection of the laws, or to fail to carry out their intent by reason of inadequate machinery is to undermine the entire structure and threaten it with collapse. For the State to erect an uneven, partial administration of justice is to abnegate the very responsibility for which it exists, and is to accomplish by indirection an abridgement of the fundamental rights which the State is directly forbidden to infringe. To deny law and justice to any person is, in actual effect, to outlaw them by stripping them of their only protection.[1]

These words emphasize the real importance of attaining equality before the law and why it is a concept that is worth realizing in our society. That people are entitled to the protection, rights and privileges granted to them by law and that they are to be treated equally before the law, whether they be rich or poor, has been a recurring theme throughout the history of the common law.[2] In theory it is one of the fundamental concepts of the common law, the law which Canada inherited. It was reiterated in 1960 by the Canadian Parliament with the passing of the Canadian Bill of Rights,[3] the first section of which reads, in part, as follows

> 1. It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely,
>
> (a) the right of the individual to life, liberty, the security of the person and the enjoyment of property, and the right not to be deprived thereof except by due process of law;
>
> (b) the right of the individual to equality before the law and the protection of the law ...

The Canadian Parliament has clearly recognized the concept of equality before the law and admitted that it is a concept worth realizing in Canada.[4] Furthermore, s.2 of the Bill of Rights[5] lays down a rule of statutory construction that every law of Canada, unless an Act of Parliament contains express direction to the contrary, shall be interpreted and applied so as not to bridge or infringe any of the rights or freedoms enumerated in the Bill of Rights. It is this provision that led the Supreme Court in R. v. Drybones[6] to hold that with regard to the right to equality before the law, if any Act of Parliament, in force when the Bill of Rights came into being, does in fact abrogate this right then it should be rendered inoperative.

In subsequent cases[7] a more definitive interpretation of s.1 of the Bill of Rights has been given. In these cases the courts were being asked to apply the Bill of Rights against the discretion which is vested in the Attorney General of a Province to decide what form a prosecution should take, i.e. by way of summary conviction or by way of indictment. It was held that this discretion did not infringe the provisions of the Bill of Rights, R. v. Drybones being distinguished

on the basis that national origin, colour, religion or sex are the only forms of discrimination which are protected against. In other words, if the legislation is such that it applies to all Canadians with equality, it cannot be said to be discriminatory in the sense aimed at by the Canadian Bill of Rights.[8]

However, in light of the opening quotation I would argue that merely ensuring that the substantive law applies equally to all is only the first step in attaining equality before the law. If there is to be true equality before the law the machinery of justice must be accessible and available to all. It must not allow anyone to be at a disadvantage compared to another. This means that because of the very nature of the judicial system, whereby the machinery of justice can be operated only through lawyers,[9] all persons must have an equal right and opportunity, to utilize the services of a lawyer, notwithstanding their inability to pay for those services.

The necessity for legal representation was well summarized by Sutherland J. in the United States' case of Powell v. Alabama,[10] when in reference to the criminal trial process he said;

> Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with a crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge and convicted upon incompetent evidence, or evidence irrelevant to the issue, or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defence, even though he has a perfect one. He requires the guiding hand of counsel at every step of the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.[11]

This is equally true of the judicial process in Canada with regard to both criminal and civil matters, for because of the law's complexity and the often ritualistic court procedure, a lawyer's services are often indispensable.

In the United States, the Supreme Court decision in Gideon v. Wainwright[12] and related cases has compelled the provision of counsel, at the State's expense, if necessary, at all kinds of criminal proceedings and at most stages of the criminal process[13] by acquiting those who had not had the benefit of counsel. However, the Supreme Court of Canada has refused to emulate the United States Supreme Court by applying the Bill of Rights to the problems of the right to counsel. By s.2 (c)(ii) of the Bill of Rights a person has the right on being arrested or detained not to be deprived "of the right to retain and instruct counsel without delay". This provision has been interpreted by the courts as only giving an accused the right not to be denied counsel, assuming that he can afford to pay for him, if he so requests.[14] They have refused to rule that an accused has an absolute right to counsel, at the State's expense, if necessary, as part of the "due process of law".[15] However, the very guarded decisions on the matter which in the main can be attributed to the Courts' anxiety over hampering the police,[16] suggest that there is still some doubt as to the true meaning of the Bill of Rights in this regard.[17]

As the courts have failed to ensure that people are brought within the reach of adequate legal services as a matter of right, legal aid[18] has emerged, in one form or another, as a means of enabling a person of limited means to avail himself of the services of a lawyer.

This, legal aid has an important role to play in the attainment of equality before the law. Indeed, it must now be considered an essential facet of the concept of equality before the law.

The administration of legal aid has emerged as a provincial responsibility, its coverage and basic format varying from province to province, although, with the advent of partial federal funding with regard to criminal legal aid, some degree of uniformity is developing.[19] In Alberta the provision of legal aid is carried out through the auspices of the Legal Aid Society of Alberta, which is the body responsible for running the Alberta Legal Aid Plan (A.L.A.P.).

As has been intimated, an effective legal aid plan is essential if there is to be equality before the law within the present judicial system. Such a plan, however, must not only provide the full range of services that lawyers provide to those clients who are able to retain them from their own resources, but it should also ensure that its recipients are in no way treated differently than an ordinary paying client. This means that the Plan should carry no charitable overtones, or place a legal aid recipient in a worse position than a paying client. For, as was said nearly fifty years ago, charitable efforts

> ...cannot give the poor their constitutional right to equality in the administration of justice, ... they can only touch the fringe of the problem and are most harmful because they produce national and self deception, blinding the eyes of those not acquainted with legal matters or the position of the poor, to a condition of things, amounting as it does to a denial of justice.[20]

Although many argue that legal aid should be operated as an additional social service,[21] akin to welfare services, I would argue

that it should be part of the philosophy of law itself, although as has been seen, the courts are not ready to accept such a submission. Welfare benefits carry the stigma of charity and it is difficult to see how any legal aid plan run on the same basis could avoid the same stigma. The concept of legal aid as a juridical as opposed to a welfare right is gaining increasing acceptance, particularly amongst the legal profession. This was recently exemplified by one commentator when, in talking of the Federal Government's funding of criminal legal aid he

> Legal aid can be considered part of the administration of justice, not part of the federal 'dole' and I view with some residual concern programmes which seem designed to operate on the legal system rather than within it. It is very much in the public interest for this association (Canadian Bar Association) to maintain some continuing vigilance concerning attempts to foster the notion that legal aid is simply an extension of the 'welfare state' concept.[22]

The purpose and methods of providing legal aid are often affected by differing ideological considerations with attendant restrictions.[23] Only by being considered as a part of the law itself and ridding itself of restrictive ideological considerations will legal aid become an effective instrument in attaining equality before the law.

Thus, with these considerations in mind this Thesis will examine the existing legal aid facilities in Alberta. The aims, structure and scope of the A.L.A.P. will be examined as well as certain aspects of the A.L.A.P. in actual operation. If it is felt that certain aspects of the A.L.A.P. are not in accord with the concept of equality before the law that has been outlined above, suggestions will be made as to what could be done to remedy the situation to bring Alberta closer to realizing this concept. Before examining the A.L.A.P. in

detail, it is considered necessary to look at the historical development of legal aid. Only will this place the A.L.A.P. and other legal aid plans in perspective, it will also show how many of the older, often charitable, views pertaining to legal aid are still entrenched in the legal aid plans of today. It is this historical development which will be examined in the next chapter.

## Footnotes to Chapter One

1. Smith, Justice and the Poor, 5 (3 ed. 1924).

2. id. at 3.

3. R.S.C. 1960, c.44.

4. In Alberta, the Alberta Bill of Rights, assented to November 1st 1972, in Article 1 enunciates the same fundamental rights and freedoms.

5. Supra, n.3.

6. [1970] S.C.R. 282.

7. Re McClary's Prohibition Application [1971] 1 W.W.R. 741, in accord with Smyth v. R. [1971] 71 D.T.C. 5252 (Can) which followed Lafleur v. Minister of National Revenue for Canada [1967]3 C.C.C. 244.

8. However, in Re Schmitz (1973) 31 D.L.R. (3d) 117, a provision contained in the Immigration Act which was discriminatory on the basis of sex, was allowed to stand by the court on the basis that it was being asked to amend legislation and not to declare it inoperative. This case, as do those cases in supra, n.7, illustrates the wariness with which the courts approach questions involving the Bill of Rights, and their extreme reticence in applying its provisions.

8, Smith, supra, n. 1 at 10.

10. 287 U.S. 45 (1932).

11. id. at 69.

12. 372 U.S. 335 (1962). For an excellent account of the history and eventual outcome of this case see Lewis, Gideon's Trumpet (1964)

13. See e.g. Escobedo v. Illinois, 378 U.S. 478 (1964) and Miranda v. Arizona, 348 U.S. 436 (1966).

14. R. v. Ballegeer [1969] 3 C.C.C. 353. For a discussion by an Alberta court of this provision and the consequences that can ensue from denying a person access to a lawyer see R. v. Martel (1968) 64 W.W.R. 152.

15. O'Connor v. The Queen (1966) 57 D.L.R. (2d) 123.

16. A good example of a court expressing anxiety in this regard is R. v. Steeves (1964) 1 C.C.C. 266. Again, as with the cases concerned with s.1 of the Bill of Rights, supra, n. 7 and 8, the courts have been extremely wary in their interpretaion of this

provision of the Bill of Rights.

17. For a full analysis see Grosman, The Right to Counsel in Canada, (1967) 10 Can. Bar J. 189, and more generally, Lowry, Social Justice Through Law, 38-43 (2ed. 1971).

18. The term "legal aid" will be used throughout the text to describe any method by which a person is furnished with the services of a lawyer, notwithtanding his inability to pay.

19. Fairbairn, Comments on Federal Legal Aid Proposals, (1973) 4 Can. Bar Assoc. J. 8.

20. Gurney - Chapman, Justice and the Poor in England, preface (1926).

21. See e.g. The Cobden Trust, Legal Aid as a Social Service (1969)

22. Fairbairn, supra, n.19 at 9.

23. See Gordley, Legal Aid: Mdoern Themes and Variations, Part Two: Variations on a Modern Theme, (1972) 24 Stan. L. Rev. 387 for a good discussion of how differing ideologies have produced differing legal aid plans, and how by their very nature these ideologies have prevented some plans from being fully effective in achieving equality before the law.

## CHAPTER TWO

## THE HISTORICAL DEVELOPMENT OF LEGAL AID

Legal aid is not a product of the Twentieth Century. Since Roman times different societies have adopted varying methods by which legal services have been provided for those persons who would ordinarily be unable to afford them. Distinct institutional solutions were often produced, some bearing a striking resemblance to some modern plans, but although it is important to look at such solutions in order to trace the development of legal aid, they should be viewed as products of their own peculiar social and economic systems. Today's solutions should be viewed in a Twentieth Century context and reflect the concept of equality before the law as outlined in the previous chapter. This chapter will show that in many respects they may not and they they may still be influenced by older solutions and older ideas.

### I. Rome.

During the Roman Empire a party engaged in litigation was usually represented by one of the class of _advocati_ or _patroni_. These persons were not trained lawyers nor were they part of any organized legal profession. They were merely what were known as _oratores_.[1] Their services were brought within the reach of the poor through the _clientela_ system,[2] a system whereby the weak and impoverished attached themselves to a powerful man, a _patronus_, who, in return for certain services and political support, gave assistance in many areas, including litigation. The obligation of the patronus seems to have extended beyond a simple legal assistance to include all extra legal help necessary to prosecute a case against a powerful opponent in a Roman Court.

However, as a class of advocates appeared who earned their living through the collection of fees, the clientela system began to wane and there was no emergence of an effective alternative which was to enable the poor to pay the advocates' fees. Indeed, on the whole this new class of advocates seemed totally indifferent to the legal problems of the poor.[3]

Thus the political solution of the clientela system was the most significant means of providing legal aid under the Romans. Dependant on strong contractual ties, it was a peculiarly Roman solution, and because of the ideological and social conditions of the Empire, it was perhaps the most effective answer that could be given. Other approaches were attempted for providing some form of legal aid, again, mainly as a means of gaining political support from the poor, but they were invariably short lived.

II. The Middle Ages to the Present Day

1. Civil Matters.[5]

By the middle ages such a political solution was not possible. Because of the feudal structure of society the poorer man could not shift his political allegiance to whomsoever favoured his legal claims. It was the church with its dominant influence on the moral and intellectual forces of the age, which provided a new approach to the legal problems of the poor. Legal aid was considered as a form of charity, furnished by the church and Christian men as part of their pious work. It was therefore at this time that legal aid was stamped with the mark of charity, from which it was not to divest itself, and then only partially, until the present day.

Much of the protection provided was in the form of spontaneous assistance by pious men, such as St. Yves de Brittany, the patron saint of lawyers, who earned the much quoted epithet, "a lawyer and yet not a thief, to the wonder of the people".[6] Organized assistance was available in the ecclesiastical courts and this was gradually to spread to the secular courts, with several church councils commanding the courts to forgive the court fees of poor persons and sometimes assign them lawyers to help gratuitously.[7]

There were also the sporadic impulses of various monarchs, motivated by a feeling of paternal duty to support the oppressed. In England the maxim that the poor should not pay for writs was accepted by the time of Henry II,[8] and with regard to civil matters, a tradition of seeking justice for the poor culminated in 1495 in a statute of Henry VII, "An Act to admit such persons as are poor to sue in forma pauperis".[9] This Act authorized the Chancellor to admit poor plaintiffs to sue in a court of record. Persons using this procedure were entitled to have their writ issued free of charge and were entitled to the free services of solicitor and counsel. Such representatives were assigned to them by the Chancellor or by the Court upon return of the writ.[10]

The Act was confined to the assistance of a Plaintiff and it really did no more than codify and extend to all courts of record what had been the usual practice in the courts of Kings Bench and the Borough Courts. For some time prior to the passing of this Act, free counsel for indigent persons or persons of limited means had been obtained by these courts by asking counsel for gratuitous help; should such counsel refuse to act, they took the risk of being deprived of future

audience before the court in question.[11]

Since appointed counsel were paid neither by the client nor from the King's treasury, such statutes as the Forma Pauperis Act came to be interpreted as meaning that counsel would be assigned when the client's action was likely to recover damages.[12] A similar situation still exists in Alberta where lawyers can take a case on a contingent fee basis, i.e., the lawyers fees are calculated as a percentage of the damages recovered in a particular action.[13]

In 1729 the forma pauperis procedure was extended by statute[14] to include all classes of defendants.[15] This Act gave defendants the same rights as plaintiffs with regard to using the forma pauperis procedure. However, it included the restriction that a person would not be allowed to avail himself of this procedure if he were worth more than five pounds.[16]

There was no substantial revision of the Forma Pauperis Act until its abolition in 1883, and, despite its long life it was considered a failure. Two major reasons are given for its failure;[17] firstly, it made no provision for paying a poor person's advisor and secondly, it contained no machinery for distinguishing good cases from bad. As Egerton has said,

> History shows that the great practical defect of all in the forma pauperis procedure has been the lack of administrative machinery. Without this machin... much vexatious litigation found its way into the courts to the annoyance of Judges, lawyers and defendants and the result was a tendency to place restrictions on the procedure and eventually to make it practically useless.[18]

This defect of the forma pauperis procedure emphasizes the need for an effective administrative machinery to operate any legal aid plan; without such machinery the success of any plan would be jeopardised.

In Western Canada, the courts were faced with the question of whether the forma pauperis procedure was to be considered part of the law of Canada after Confederation when the new Dominion adopted the laws of 1870 England as its own.[19] There appears to have been no mention of it or any other form of legal aid before Confederation,[20] but during the 1920s the applicability of this procedure in Canada was discussed in two cases. The Manitoba Court of Appeal in the case of Paul v. Chandler[21] held that such a procedure was still in force in Manitoba by virtue of the fact that the Manitoba King's Bench Act[22] provides that the practice and procedure in the Manitoba Courts shall be governed by the "modes of practice as they were, existed and stood in England in the day and year aforesaid", i.e., July 15, 1870.

However, in Alberta, the Supreme Court of Alberta in the case of Augustine v. C.N.R.[23] held that such a procedure was not allowed under the Alberta Rules of Court. Harvey C.J.A. argued that even though the right to sue in forma pauperis was a substantive right, like the rights under the Statute of Limitations it should be considered as a matter of procedure. As Alberta, unlike Manitoba, had abandoned resorting to the English practice where their own Rules of Court did not provide for a particular procedure, the Supreme Court said that in unprovided cases the practice had to be governed by principle and analogy, and they found that

> there is certainly nothing in our rules to which the practice of suing in forma pauperis could be deemed analogous. In my view that practice is entirely out of harmony with our rules respecting costs and in no way could it be applied as being analogous to them.[24]

Resulting from this decision, which, although unwelcome in spirit, was a healthy one when one considers the defects of the forma pauperis procedure, the whole question of legal aid was debated by the Law Society of Alberta, and a Needy Litigants Committee was formed in 1932.[25] This Committee established a limited legal aid plan, its legal basis being provided for in the "Needy Litigants Rules" contained in the Consolidated Rules of the Supreme Court of Alberta.[26] Under these rules all court house charges and court reporters' fees were absorbed by the Department of the Attorney General, but the plan relied primarily on the charity of the legal profession in providing the manpower; lawyers were precluded from collecting any sort of fee except in certain circumstances,[27] for example, if a recovery were made. In that event he would receive such remuneration as was specifically authorized by the local Needy Litigants Committee. This was usually a minimal amount to cover their costs.[28]

By 1967 it was felt that the Needy Litigants Plan "was not compatible with the sociological or political conditions prevailing in our society",[29] and a pilot project was set up, in conjunction with the Criminal Legal Aid Plan, whereby a participating lawyer was remunerated for his services.[30] Because of the success of the 1967 project, a project incorporating both civil and criminal legal aid was set up in 1969. Choice of counsel in both matters was the prerogative of the local committee which processed the applications.[31]

In 1970, under the authority of s.4 of the Legal Professions Act,[32] the present Alberta Legal Aid Plan (A.L.A.P.) was established by agreement between the Attorney General of the Province and the Law Society of Alberta. The new Plan was based in the main on the recommendations of a special Joint Committee on Legal Aid[33] which had examined the results of the pilot projects and the whole question of legal aid in Alberta.

Generally, in civil matters the applicant first applies to the Plan itself. He may then be sent on a "referral letter"[34] to a lawyer to whom he pays a $5 "nuisance" fee. The lawyer interviews the applicant and gives the Plan an opinion on the case - the chance of success and the probable length and complexity of the proceedings, plus whether he is willing to act on behalf of the client.[35] The local committee then makes a decision as to whether or not to grant a person a legal aid certificate.[36] If it does grant a certificate the client can use that lawyer, and the lawyer will be paid according to a set tariff of fees for his services. Unlike many other plans, the client does not have the right to use the counsel of his choice; choice of counsel is still the prerogative of the local committees. Thus, as with the forma pauperis and needy litigants procedures, he is still assigned counsel.

2. Criminal Matters.

There does not seem to have been as much "charitable" concern during the middle ages for providing legal aid in criminal matters as there was with regard to civil matters. Indeed, the major question was often whether the accused was entitled to be represented at all. During the 12th century those accused of a crime commonly availed

themselves of legal representation in the form of professional pleaders. This assistance was, however, restricted to the case of misdemeanours, but no form of legal aid existed.[37] Throughout the middle ages it was felt that felonies constituted a greater threat to society and that only a harsh and swift criminal procedure could protect society.

As the feudal aristocracy declined and the territorial state was established, there was a tightening up of the fabric of society and the state became that much more powerful than the individual. With this change, the state felt that it could afford to be more humane and gradually, for certain felonies, the accused was allowed to avail himself of the services of counsel. In Britton, issued by Edward I during the 13th Century there are enumerated certain types of felonies, such as forgery where the accused was permitted to have counsel. In other instances of felonies punishable by death, Britton also recommended that the accused be permitted the services of a pleader.[38] This marked a transition towards a humanization of the law.

In 1523 Christopher St. Germain recognized the right of even the indigent to have counsel assigned in appeals of felony; however, the court was to become counsel for the prisoner.[39] By the 17th Century the right of benefit of counsel had been transferred to indictments; in questions of law the courts were to assign counsel to the poor. The rules were spoken of in Coke's writings and refer to the right to obtain counsel. However, the court was known to assign counsel in law matters even when it was not asked,

> for seeing the offender is allowed no counsell the court ought to do him justice and assign him counsell in favorem vitae though he demand it not, to plead any matter in law appearing to the court

for his discharge.[40]

Thus, by Coke's time, the right to have counsel assigned for questions of law in indictments was recognized and was not limited to felony appeals. Further, the distinction between questions of law and questions of fact was established by Coke, and clearly one indicted might have counsel in all questions of law upon the facts, whereas in St. Germain's time the Judge was only to aid the accused in his pleadings to indictment. This was therefore a definite growth, from Judge counselling to assigned private counselling and from aid in pleadings to aid in all questions of law.[41]

In 1695 came the first example of a concrete statutory provision for legal aid in criminal proceedings with the passing of the Treason Act.[42] This Act gave all persons charged with treason the right to counsel, in respect of both matters of law and of fact. Should the accused be unable to afford counsel, the court was obliged to appoint counsel for him.

By the middle of the 18th Century a rule appears to have developed by which "questions of law" were extended to include both direct examination and cross-examination.[43] But it was not until 1836 that all distinctions between counsel for facts and law were abolished by statute and a full defence was guaranteed to the accused of felony.[44]

During the 19th Century a poor prisoner could pay a flat fee of a guinea to obtain the services of a barrister under the dock brief system[45] or ask a Judge for assistance, who in turn would solicit the gratuitous services of counsel. Such counsel would only speak on matters

of law.[46] This situation existed in England until 1903 when new statutory provisions were enacted to provide legal aid in criminal matters.

Before 1870, and the passing of the British North America Act the procedural enactments and court practices dealing with the provision of counsel for the indigent accused which had grown up in England do not seem to have been adopted by the Canadian Courts,[48] despite the fact that they were governed by the laws of England.[49] After Confederation legal aid was not the subject of legislative action for many years. On the federal level with the enactment of the Criminal Code[50] it was provided that an accused should be assigned counsel if he

> is party to an appeal or to proceedings preliminary or incidental to an appeal, where in the opinion of the Court or Judge, it appears desirable in the interests of justice that the accused should have legal aid and it appears that the accused has not sufficient means to obtain that aid.[51]

This enactment appears to be a codification of the law that had existed in England during the 19th Century. This concept of judicial assignment of counsel is still evident today. In the case of R. v. Happenay[52] it was held that while a province may establish a legal aid system and assign counsel to indigent appellants in criminal appeals, it is still intra vires Parliament to provide for judicial assignment of counsel for legal aid.

As has been mentioned,[53] it was left to the Provinces to devise their own systems for providing legal aid, which has meant that no uniform plan for providing legal aid has developed across the country as a whole. In Alberta, it is not quite clear when any form of legal aid in criminal matters came into existence.[54] However, by the 1930s

a practice had developed whereby the Attorney General with the co-operation of the Bar permitted Judges to appoint counsel for people who had been charged with an indictable offence to represent them at their trial. In serious criminal matters counsel were appointed by the Deputy Attorney General or his agent prior to the preliminary hearing. Counsel so appointed were paid on the same basis as agents of the Attorney General were paid in rural areas where they had part-time employment.[55] Fees were therefore lower than the normal fee and the Plan, as with the Needy Litigants Plan, depended on the charitable instincts of the legal profession.

In 1963 it was realized that this was not an acceptable solution to the problem. It neglected the vast majority of criminal cases which were disposed of in the Magistrates' Courts. In many cases there was no counsel present to conduct the accused's case at the preliminary hearing which meant that possible defences were not explored at that appropriate time. In consequence of this, a committee of the Law Society and representatives of the Attorney General met and drew up a memorandum which recommended an extension of criminal aid.[56] On the basis of this memorandum a pilot project was implemented in Edmonton with the cooperation of the Edmonton Bar Association. Out of this pilot project was to develop the criminal legal aid scheme, which was made Province-wide, that was to stay in existence until the setting up of the present plan in 1970.[57] Though more extensive in its coverage than the Plan which had previously existed, it was still an assigned counsel system, which left the accused with no choice as to who his lawyer was to be.

As has been said, the present A.L.A.P. was set up on July 1st, 1970, on the general lines suggested in a report made in 1970 which had studied the question of legal aid in Alberta.[58] The present Plan incorporates both civil and criminal legal aid under the auspices of a body known as the Legal Aid Society of Alberta. Since January 1st, 1973, the Federal Government by agreement with the Attorney General[59] is partially financing criminal legal aid and this has meant that the A.L.A.P. now has to comply with certain Federal requirements relating to the provision of criminal legal aid. As a result of this more offences are covered by the Plan.

Generally, as in civil matters, a recipient of criminal legal aid, on being granted a legal aid certificate,[60] is assigned a lawyer from the ranks of private practice. The lawyer bills the Plan for his services in accordance with a set tariff of fees. Thus, as with older forms of legal aid, the A.L.A.P. works on the basis of an assigned counsel system.

3. The Philosophy Behind the Present Plan.

As with other modern legal aid plans, the A.L.A.P. aims to rid legal aid of its charitable connotations.[61] However, it does not go as far as the Ontario Legal Aid Plan which moots legal aid as being a juridical right,[62] it regards itself as another social welfare programme. The stated philosophy of the Plan is that "every person is entitled to receive such legal representation and assistance that a man of modest means could provide for himself."[63] To rid legal aid of its charitable connotations the Plan has adopted a new approach to legal aid in this Province. This approach has been stated thus,

> It is fundamental to the Alberta Legal Aid Plan that it is not a make work scheme for lawyers but is designed to provide a service for the poor and disadvantaged which they could not obtain without this Plan. The Plan rejects the concept which earlier prevailed that it was the duty of the legal profession, on its own initiative, to provide this service. The interest of the State in the members of society that cannot provide legal aid for themselves requires that the State participate in any such plan.
> 64

The impetus for many of the new legal aid plans, including the A.L.A.P., came from the legal profession itself, after it had pioneered many earlier efforts to provide legal aid to those unable to afford normal fees. However, it is questionable whether this was in response to a changing consciousness on the part of the legal profession as to the legal needs of the poor and disadvantaged, but rather, in response to the increasing burdens, financial and otherwise, that the older plans were placing on them. This appears to have been a major consideration in the founding of the A.L.A.P.[65]

Government financing has indeed taken the financial strain off the legal profession and the provision of legal aid is no longer dependant on the charity of the profession. However, the question arises as to how closer is this Province to attaining equality before the law since the inception of the A.L.A.P. It is now accepted that the "political" solutions of the Roman Empire and the "charitable" solutions of the last five hundred years have no place in present day society, but is the A.L.A.P. the ideal Twentieth Century solution? An assigned counsel system has its roots in the ideas of the previous centuries, ideas which were fostered by charitable considerations, and one wonders whether the A.L.A.P. has in fact divested itself of these considerations.

It is this aspect of the A.L.A.P., in addition to the actual mechanics and scope of the A.L.A.P., which will be examined in more detail in the following chapters.

## III. Footnotes to Chapter Two

1. Cappelletti, Legal Aid: Modern Themes and Variations, Part One: The Emergence of a Modern Theme, (1972) 24 Stan. L. Rev. 349

2. Kelly, Roman Litigation, 27(1966). This author believes that the prevalence of this institution accounts for the fact that in his research he found "no serious complaints that advocate's fees prevented the small man from litigating" during the Republic and Early Empire. Cited by Capelletti, supra, n. 1, at 349.

3. Cappelletti has said, "This indifference can be largely attributed to the tendency of Roman law, despite its striking perfection in so many respects to allow litigation to become in practice a political struggle in which wealth and power weighed heavily in the balance", supra, n. 1 at 350.

4. Capelletti, supra, n. 1, at 351.

5. See generally, Maguire, Poverty and Civil Litigation, (1923) 36 Harv. L. Rev. 361 to which the early part of this chapter owes a great deal. See also, Egerton, Historical Aspects of Legal Aid, (1945) 61 L.Q. Rev. 87, and Egerton and Goodhart, Legal Aid, 1-9 (1945).

6. Cappelletti, supra, n. 1, at 351.

7. id. at 352.

8. Pollock and Maitland, The History of the English Law Before the Time of Edward I, 195 (2ed. 1968)

9. 7 Hen. (1495) c. 12.

10. Egerton and Goodhart, supra, n. 5, at 7.

11. Maguire, supra, n. 5, 363-372.

12. Maguire, supra, n. 5, at 363.

13. Contingency arrangements are strictly governed by the Alberta Rules of Court.

14. 2 Geo. (1729) c. 28.

15. id. s. 8.

16. Maguire, supra, n. 5 at 375.

17. Egerton, supra, n. 5 at 87.

18. id.

19. British North America Act, 30-31 Victoria (1867) c.3.

20. Books and articles on the subject of the early administration of justice in Western Canada make no mention of any form of legal aid, see e.g. Harvey, Early Administration of Justice in the Northwest, (1934) 1 Alta. L.Q. 1, Some Further Notes on the Early Administration of Justice in the North West (1934) 1 Alta. L.Q. 171. Stubbs, Prairie Portraits (1954), Four Recorders of Ruperts Land: a Brief Survey of the Hudson's Bay Company Courts in Ruperts Land, (1967), Lawyers and Laymen of Western Canada, (1939).

21. [1924] 3 D.L.R. 282.

22. R.S.M. 1913, c.46, s.11.

23. [1928] D.L.R. 1110.

24. id. at 1112.

25. Watts, A History of Legal Aid in British Columbia to 1969, (1969) 27 Advocate, 199.

26. Alta. Rules of Court, 679-711.

27. id. Rule 692.

28. Clark, Legal Aid in the U.S.A., Canada and the U.K. 51 (1967)

29. Alberta, Report and Recommendations of the Joint Committee on Legal Aid, 4 (1970)

30. id. at 6.

31. id. at 6.

32. R.S.A. 1970, c.65. Appendix VII.

33. Alberta, supra, n.29.

34. Appendix IV.

35. Appendix V.

36. Appendix VI.

37. Historical Arguments for the Right to Counsel During Police Interrogation, (1964) 73 Yale L.J. 1000 at 1018.

38. Britton, 81 (a statute drafted by the jurist Britton) as cited by Heidelbaugh and Becker, Benefits of Counsel in Criminal Cases in the Time to Come, (1951) 6 Miami L.Q. 546 at 548.

39. Saint Germain, The Doctor and Student, 250 (1874) as cited by Heidelbaugh and Becker, supra, n.38 at 549.

40. Coke, The Third Part of the Institutes of the Laws of England: Concerning High Treason and other Pleas of the Crown and Criminal Cases, 136-137, (1795) as cited by Heidelbaugh and Becker, supra.

n. 38 at 550-551.

41. Heidelbaugh and Becker, supra, n. 38, at 551.

42. 7 & 8 Will. 3 (1695) c.3.

43. Supra, n. 37, at 1027.

44. Trials for Felony Act, 6 & 7 Will. 4 (1836) c. 114, s.1.

45. Abel-Smith and Stevens, In Search of Justice, 20(1968).

46. Poor Prisoners' Defence Act, 3 Ed. 7 (1903) c.38.

47. 30-31 Victoria (1867) c.3.

48. See citations, supra, n. 20, where no mention is made of these procedural enactments.

49. See Hannington v. McFadden (1836) 2 N.B.R. 260 (C.A.)

50. R.S.C. 1953-54, c.51.

51. id. at s.611.

52. [1970] 5 C.C.C. 353, 12 C.R.N.S. 116(N.B.S.C.)

53. Chapter One, infra.

54. Supra, n. 20.

55. Alberta,supra, n. 29, at 2.

56. Alberta, supra, n. 29, at 3.

57. Alberta, supra, n. 29 at 4. For a detailed explanation of this initial Plan see Clark, supra, n. 28 at 51-57.

58. Alberta, supra, n. 29.

59. Appendix VIII.

60. Appendix III.

61. Area Directors' Handbook, Legal Aid (Criminal,The Legal Aid Society of Alberta, (July, 1972).

62. "The overwhelming opinion today is that legal aid should form part of the administration of justice, it is no longer a charity but a right". Ontario, Report and Recommendations of the Joint Committee on Legal Aid, 33 (1965)

63. Handbook, supra, n. 61.

64. id.

65. Handbook, supra, n. 61.

## CHAPTER THREE

## THE AIMS AND STRUCTURE OF THE ALBERTA LEGAL AID PLAN[1]

In this chapter the actual aims and the administrative and financial structure of the A.L.A.P. will be examined to elicit how far they are in accord with the concept of equality before the law. For it is obvious that before a legal aid plan can hope to work towards achieving equality before the law it must be geared towards achieving such equality.

### I. The Aims of the Plan

As has been said, the A.L.A.P. has as its stated philosophy the principle that every person is entitled to receive such legal representation and assistance as a "man of modest means" could provide for himself.[2] It is the aim of the Plan to provide him with such counsel. The Plan does not subscribe to the principle that an eligible applicant is entitled to the counsel of his choice but rather it assigns such counsel to him.

Sometimes in civil cases, if a successful applicant expresses a desire to be represented by a particular lawyer, the Plan may assign that particular lawyer to him. This usually occurs when an applicant has already seen a lawyer who has referred him to the Plan on learning that this person could not afford his fee,[4] or when the applicant has had previous dealings with the lawyer in question in less impecunious days. The Plan does this for the sake of convenience for these lawyers are usually familiar with the case or are familiar with the applicant's affairs.

In criminal matters the Plan denies an absolute choice of counsel to a recipient of legal aid, although it appears that with the agreement relating to criminal legal aid signed with the Federal Government, a province wide choice of any lawyer willing to act will have to be given to persons charged with certain serious offences[6].

The articulated reasons for not providing a legal aid recipient with a free choice of counsel are that this enables the "burden" of legal aid cases to be spread equally among the Bar[7] by means of a roster system, and that it may also discourage certain applications.[8] The interests of an accused do not appear to have been considered.

By not providing a legal aid recipient with a free choice of counsel the A.L.A.P. differs from the other legal aid plans in Canada that utilize the existing profession.[9] On its face the A.L.A.P. aims at fostering a normal solicitor-client relationship for legal aid recipients as this is the relationship which the "man of modest means" enjoys with his lawyer.[10] However, other plans argue that in order to foster a normal solicitor-client relationship a legal aid recipient must, from the outset, be entitled to choose his own lawyer. They also argue that by giving a person this choice you are relieving him of some of the stigma of charity.[11]

This facet of the Plan appears to contradict one of its main aims, that of placing a recipient of legal aid in the same position as a "man of modest means", for, a "man of modest means" always has this free choice of lawyer. It is conceded that a "man of modest means", as may a legal aid recipient, may not know a lawyer who could deal with his particular problem, but at least the "man of modest means" has that

basic choice of counsel which is generally denied to a legal aid recipient in Alberta.

Giving legal aid recipients this freedom of choice may mean that lawyers noted for their expertise would be inundated with legal aid cases, but those lawyers would always have the right to accept only those people that they have time to cater for.[12] This problem was used by a Joint Committee Report on legal aid in Alberta as support for the argument that an assigned counsel system does not necessarily mean that a legal aid recipient is not put in the same position as a man of modest means. They said that, for all practical purposes, the private citizen does not have a completely free choice of counsel as many solicitors are beyond his reach for "they are too busy or do not handle his type of case or command a fee he can afford".[13] It is submitted that this does not seem to recognize the fact that the private citizen still has this basic freedom of choice of counsel. He may have to "shop around", but a legal aid recipient is denied the opportunity even to "shop around" for a lawyer. In Ontario a lawyer is assigned to a legal aid recipient only as a last resort, that is, if the recipient is unable to find a lawyer or if he does not want to select one by himself.[14] To be true to its stated aim the A.L.A.P. should give a legal aid recipient the same right and opportunity to "shop around" as a man of modest means.

A second and more nefarious reason given by the A.L.A.P. for refusing to give a legal aid recipient freedom of choice of counsel is that by not giving such a recipient this choice certain applications will be discouraged, i.e. an applicant, usually an "experienced criminal", on being told that he cannot choose his own lawyer will withdraw his application and provide for his own defence.[15] No details are available, or

have ever been given, on how often this situation has arisen and consequently it is not a valid reason for rejecting the concept of freedom of choice of counsel.

It is therefore suggested that the A.L.A.P. give legal aid recipients this freedom of choice of counsel, only then will it rid legal aid of its charitable connotations and be able to place a legal aid recipient in the same position as a paying client.

The Plan intends to provide just compensation to those lawyers who act for legal aid clients but at the same time does not intend to be a "make work scheme" for lawyers. Whilst the remuneration is supposed to be sufficient enough for the lawyer to provide a good service to his legal aid client, the Plan states that it "should not" provide or supply an adequate living for lawyers. [16] In view of the fact that the remuneration a lawyer receives from the Plan is not intended to be sufficient to provide him with an adequate living there must be a great temptation to do a second rate job.

The Plan itself refers to legal aid cases as being a "burden" and wants this "burden" to be spread evenly across the whole profession. The idea that legal aid cases are a burden on the profession was the same idea that prevailed when legal aid was in toto a form of charity. It appears that by this one fact alone, the A.L.A.P. though professing to rid legal aid of its charitable connotations has, from the outset, failed to rid legal aid of these connotations.

This fact, which appears to contradict one of the main aims of the Plan, when coupled with the denial of free choice of counsel, would seem to refute any claim that the A.L.A.P. ensures that equality before

the law exists in this Province. It is not suggested that the Plan is not performing a useful function in enabling certain individuals, in certain circumstances, to have access to a lawyer's services, but rather that because of the basic contradictions between the stated philosophy behind the Plan and the actual working of the Plan, it is not working as effectively in the interests of justice as it could.

II. The Administrative and Financial Structure of the Plan

In Alberta, legal aid is available to anyone of small and moderate means who satisfies the required conditions. Unlike similar plans, however, legal aid is not available by virtue of a statute.[18] It was implemented under the auspices of section 4 of the Legal Profession Act[19] by agreement between the Government of the Province of Alberta and the Law Society of Alberta. It was felt that "an agreement is preferable to an Act of Legislature because of its flexibility in the event of necessity for amendment or change".[20]

The fact that the Plan has no specific statutory basis does support the argument that it is a more flexible structure than other plans in operation, but it means that it does not have the air of permanence that pervades other plans in operation. In Manitoba and Ontario the Legal Aid Statutes are that type of Statute that are sometimes referred to as "streamlined"; they enact the general principles on which legal aid may be granted, and specify the courts, tribunals and matters for which legal aid is to be available. In these Provinces the machinery by which these principles are to be implemented is embodied in regulations.[21] Regulations can easily be changed and it is submitted that giving a plan a general statutory basis would not mean that an inflexible

structure would be created, as has been feared. The only "inconvenience" that could ensue from giving a legal aid plan some statutory validity would be in the litigation that could arise with regard to the correct interpretation of the Act and Regulations. This is what has happened in England[22] with regard to their legal aid statutes, statutes which were the models for the Ontario Legal Aid Plan.[23]

A profusion of statutes and regulations could only serve to reinforce a bureaucratic superstructure, but it is suggested that giving the Plan some kind of statutory validity would mean that the administrators of the Plan could be held accountable to the courts or some other agency. Such a statute may have a limiting effect on the discretionary powers of the various legal aid committees, but at least there would be some guarantee that that discretion was being exercised properly.

The Law Society is responsible for the administration of the Plan in conjunction with the Provincial Government (through the aegis of the Attorney General's Department). This responsibility still remains with the advent of Federal funding in respect of criminal legal aid.[25] The Law Society has delegated most of its supervisory functions to a selected committee, namely, the Joint Committee on Legal Aid. The Joint Committee carries out supervisory and policy making functions, and is the body to which the Regional Legal Aid Committees are responsible.

All but one of the members of the Joint Committee are lawyers; the only "lay" member being a chartered accountant.[26] It is submitted that this preponderance of lawyers on the Joint Committee is wrong and unwise. Such a committee, bearing in mind the service that it performs, should be as broadly representative as possible of the other segments

of the community. In particular, possible legal aid recipients should be represented, as the Fact Finding Committee on Legal Aid in Manitoba pointed out in their report

> "...this latter objective can, but need not necessarily be accomplished by appointing to the Board (Joint Committee) one or more people on the welfare rolls; alternatively, legal aid recipients can be represented on the Board (Joint Committee) by competent soical workers, ministers, those elected for public office and others.[27]

A broader representation of the community at large would foster a greater public trust in the plan and could dispel any criticism that the plan was exclusively benefiting the legal profession. Furthermore, as public money is being used, on the whole, to finance the plan the public should have the right to take part in the administration of the plan. More than one writer has pointed out the potential conflict that could arise between the government and the legal profession if the latter had absolute control over a legal aid plan.[28] Such a conflict could possibly be avoided if the administrators of the plan represented the population at large for, presumably, the legal profession would then be seen to be acting with the population and not in isolation. An equitable composition of the Joint Committee would be 50% lawyers and 50% laymen, for as the plan itself is not furnishing legal aid recipients with legal assistance directly, but merely reimbursing private practitioners who take on legal aid clients, it is not itself practising law and a fortiorari does not necessarily have to be under the absolute control of the legal profession.

Regional Legal Aid Committees are responsible for the administration of the Plan at the local level. They are centred in each of the Judicial Districts in Alberta, although the Judicial District of

Calgary is in control of the Judicial Districts of Hanna and Drumheller. The committees are composed of practising solicitors and their primary role is the determination of applications for legal aid. It is suggested that the comments directed toward the composition of the Joint Committee hold equally true of the composition of the Regional Committees.

The Plan is headed by a full time legally trained Director, responsible to the Joint Committee, who is located in Edmonton. The Director is responsible for the day to day running of the Plan and for the implementation of the policy decisions of the Joint Committee.

The Law Society of Alberta is responsible for maintaining a fund from which expenses are to be met and to which all receipts accrue in connection with the running of the Plan. The Plan is financed in part by the Provincial Government, the Federal Government, and by money recovered from some of the recipients of legal aid.[29] The money which is received from the Federal Government is a set amount allocated each year and the Legal Aid Society must budget the Plan accordingly. This "budget" restriction is characteristic of the various legal aid plans now in operation in Canada[30] and other countries.[31]

In England an alternative method of financing is used. Their legal aid plan does not have to operate within a set "budget" but is allocated funds on the basis of an "estimate"; if the estimate is insufficient a supplementary award is made. The British Parliament has said that legal aid shall be given and it assumes the cost, whatever it may be.[32] This seems a preferable way of financing a legal aid plan as the administrators of the plan could continue to issue certificates, even if they had exceeded their estimated expenses, confident that the

government would meet the cost. At the present time if the funds for the A.L.A.P. are running low, the number of certificates issued decreases.[33] This means that a person who may have been granted legal aid earlier in the year could be denied such aid later in the year if the Plan had used up most of its allocated funds.

It is not felt that financing the Plan as the English Plan is financed would escalate the cost of legal aid to any appreciable degree. The money for legal aid only represents less than 2% of what this Province spends on its social services, which is hardly a great financial burden. Furthermore, it would mean that the Plan's administrators would not be so constrained, and that they could effectively supply the services that they are meant to supply. It has been said that you "cannot sell legal aid by the yard"[35]. Once the extent of legal aid that is to be provided has been decided upon, it should be provided whatever the cost.

While partial Federal funding eases the financial burden of the Province and achieves some degree of uniformity amongst different provincial legal aid plans,[36] it is felt that the general revenues of the Province must be considered primarily responsible for financing the Plan. However, a supplemental method of financing could possibly be the interest that is earned on solicitors' trust accounts. Some legal aid plans in Australia are financed in this way and for some time the Legal Aid Society of British Columbia has been using money from this source to finance the office expenses of its legal aid plan.[38]

The idea of using the interest earned by solicitors' trust accounts to partially finance legal aid was discussed in detail by the

Fact Finding Committee on Legal Aid in Manitoba.[39] In their report the Manitoba committee suggested that all solicitors should be required to deposit in interest bearing accounts in a pre-selected bank or trust company, all "monies held by them in trust under circumstances rendering it impractical or of no value to the client the maintenance of a separate trust account for the client in question."[40] The interest which would accrue would be paid directly to the Legal Aid Society. They argue forcefully in favour of such a measure and it is suggested that such a cheme would be equally feasible in Alberta and would prove to be a useful source of additional revenue for the A.L.A.P. Indeed, by a recent amendment to the Legal Professions Act,[42] the machinery now exists for the implementation of such a scheme. Members of the Law Society of Alberta are now required to maintain such interest bearing trust accounts, the interest from which is to be remitted to the Alberta Law Foundation. It would be perfectly feasible for the Alberta Law Foundation to follow the example of the Law Foundation of British Columbia and apply some of this money to legal aid.

The question of finance is crucial to legal aid; every possible source of revenue should be utilized. By using the interest from such trust accounts, those members of the legal profession who fear the encroachment of government control and supervision of legal aid, a fear which is often sounded,[41] would be assured of some degree of independence from government funding.

Financing and how it relates to the control of any system for providing legal aid can have a marked effect on the actual operation of a legal aid plan. In the following chapters, it will be seen how these factors have had a marked effect on the scope of the A.L.A.P.

## III. Footnotes to Chapter Three

1. Because of the scarcity of material on the Alberta Legal Aid Plan, most of the information contained in this and subsequent chapters was gathered during January and February, 1973, when the writer worked in the Edmonton office of the Plan interviewing legal aid applicants. Some information was also elicited from an examination of past files on legal aid applicants and recipients kept in the Edmonton office.

2. Area Directors' Handbook, Legal Aid (Criminal), The Legal Aid Society of Alberta, July, 1972.

3. id.

4. This was a common occurrence with civil cases when the writer was working in the Edmonton office.

5. It is interesting to note that in England the Law Society has drawn the attention of solicitors, whether or not they are members of legal aid panels, to the need always to consider whether a client would be likely to benefit under the Legal Aid Acts and advise him accordingly, Legal Aid Handbook, 315. Also, failure to advise a client that he was eligible for legal aid could amount to professional negligence, Matthews and Oulton, Legal Aid and Advice, 34 (1971).

6. Appendix VIII, clause 5(2)

7. Handbook, supra, n.2.

8. Handbook, supra, n.2.

9. Probably the two most comprehensive legal aid plans operating in Canada are those in Ontario and Manitoba, both of which give a legal aid recipient a completely free choice of counsel.

10. Alberta, Report and Recommendations of the Joint Committee on Legal Aid, 16 (1970).

11. Ontario, Report of the Joint Committee on Legal Aid, 55 (1965). Manitoba, Report of the Fact Finding Committee on Legal Aid, 19 and 23 (1971).

12. The Manitoba Committee were quite emphatic in pointing out that whilst a legal aid recipient must have a complete freedom of choice of counsel, counsel should have the same freedom of choice to accept or decline the retainer. Manitoba, supra, n. 10 at 19.

13. Alberta, supra, n. 10, at 20.

14. Parker, Legal Aid Canadian Style, (1968) 14 Wayne L.Rev., 471, at 481.

15. Handbook, supra, n.2.

16. Alberta, supra, n. 10.

17. Handbook, supra, n. 2.

18. In Ontario the statutory basis of the Ontario Legal Aid Plan is the Legal Aid Act S.O. 1966, c.80.
In Manitoba the statutory basis of their plan is The Legal Aid Services Society of Manitoba Act, C.L. 105, s. 17, 1971, as amended by S.M., 1972, c.63.

19. Appendix VII.

20. Alberta, supra, n. 10 at 25.

21. See e.g. Man. Reg. 106 (1972) A Regulation under The Legal Aid Services Society of Manitoba Act.

22. See e.g. Taylor v. National Assistance Board [1958] A.C. 532.
R v. Legal Aid Committee No. 1 (London) Legal Aid Area ex parte Ron[illegible]l, [1969] 2 Q.B. 482.

23. Lowry, Social Justice Through Law, 8. (2ed 1971)

24. In England it has been held that legal aid committees are under a duty to act judicially, so an aggrieved party can apply for an order of certiorari, R. v. Legal Aid Committee No. 9 (North Eastern) Legal Aid Area, ex parte Foxhill Flats (Leeds) Ltd., [1970] 2 Q.B. 152.
For a good description of the English Legal Aid Plan see Pelletier, English Legal Aid: The Successful Experiment in Judicare (1967) 40 U. of Colorado L. Rev. 10.

25. The agreement with the Federal Government (Appendix VIII) only stipulates the offences which are to be covered by the Plan (clause 4) and, except for those offences which are punishable by death and life imprisonment (Clause 5) the administrators of the Plan still have a complete discretion as to the form of legal aid and who should be eligible therefor.

26. The Legal Aid Society of Alberta, Annual Report, 1972.

27. Manitoba, supra, n.11at 11. A recent report by the Law Society of Upper Canada, Community Legal Services, (1972) has also stressed the importance of lay representation.

28. Callon, The Government and the Society: Their Roles in Legal Aid, 2 Gazette (1968), 10.

29. For the year ending March 31, 1973, the estimated receipts were $900,000 from the Province of Alberta and $50,000 received in recoveries from clients. The Legal Aid Society of Alberta, Annual Report, 1972. The Federal Government from January 1st, 1973 is also contributing 50 cents per capita of the population of the Province, (Appendix VIII, clause 6).

30. E.g., British Columbia, Ontario and Manitoba.

31. See e.g., Cranston and Adams, Legal Aid in Australia (1972) Australian L.J. 508 at 513.

32. Information contained in a letter to the writer from Seton Pollock, Secretary of the Legal Aid Committee of England and Wales, 24th January, 1973.

33. Per D. Morris, past Director of the A.L.A.P. February, 1973. The first area in which the Plan usually cuts back is in granting legal aid for divorces.

34. Province of Alberta, Department of Health and Social Development, 1972.

35. Callon, supra, n. 27 at 12.

36. Fairbirn, Comments on Federal Legal Aid Proposals, (1973) 4 Can. Bar Assoc. J. 8.

37. Cranston and Adams, supra, n. 31 at 520.

38. The interest monies are collected by the Law Foundation of British Columbia which applies the money to legal aid, amongst other things, e.g. law reforms and research etc. The Legal Aid Society of British Columbia, Annual Report, (1972).

39. Manitoba, supra, n. 11 at 12-14.

40. id. at 13.

41. Callon, supra, n. 27 at 11.

42. The Legal Profession Amendment Act (No. 2) R.S.A. 1972, c.114, s.109.

# CHAPTER FOUR

## THE SCOPE OF THE ALBERTA LEGAL AID PLAN

Legal aid in Alberta is available to all Canadian nationals, resident foreigners, non-resident foreigners, and stateless persons. It is not available to persons other than in their individual capacity. In other words, legal aid will not be granted to a body of persons whether corporate or incorporate. In general, legal aid may be granted to any person irrespective of nationality, domicile or residence, who can show that he has reasonable grounds for taking, defending or being a party to proceedings for which legal aid is available in court in Alberta. This is, of course, subject to the general qualification that to be entitled to such assistance the person must be unable, or would find it difficult, to pay for a lawyer from his own resources.

Thus two basic criteria are used to determine a person's eligibility for legal aid: his means and the nature of the problem. It is these criteria and the consequences that ensue from their use which will be examined in this chapter.

### 1. The means of the applicant

It is inherent to the concept of legal aid that some sort of means test will be applied to determine financial eligibility. Under the Alberta Plan, unlike some jurisdictions[2], no strict financial limits are laid down, i.e. there are no specific amounts concerning income and capital below which an applicant has to be before he will be granted legal aid. This is in keeping with the informal nature of the Plan. It means that the local committee has total discretion to

decide each case on its merits. The general "rule of thumb", however, for deciding whether a person is financially eligible, is in essence, governed primarily by considering whether the proposed cost of a lawyer would cause undue hardship to the applicant by placing upon him an intolerable financial burden.[3]

It is admitted that this leaves the Plan with a great deal of flexibility which can be utilized to a considerable advantage. Apparently ineligible applicants would often be caused undue hardship if they had to pay the cost of a lawyer themselves. For example, if a young person was living at home with his parents, with no debts and responsibilities and was earning $400 a month and he was charged with theft, in all probability he would not be granted legal aid, as the local committee would feel that he could afford a lawyer on his salary. However, if a man was married with six children and deeply in debt, with a mortgage on his house and was earning $400 a month, if charged with theft he would probably be granted legal aid, as in all probability he could not afford a lawyer. This sort of flexibility can therefore be advantageous in some instances, but it is submitted that it is preferable to establish more concrete guidelines. Allowances could easily be made for persons such as the second individual in the above example. As the Economic Council of Canada has said,

> ... the exercise of drawing statistical poverty lines, while bound to be somewhat arbitrary, is necessary for good social planning, because without it, there is a great danger that the policy makers will take the easy way out and either concentrate exclusively on the totally destitute or worse still, beam much of its programme emphasis to the moderately well off.[4]

It is not suggested that such guidelines should be exclusive. If, in the opinion of the committee, a person who is outside the guidelines that have been established, is deserving of legal aid they should be able to grant that person legal aid. If established, such guidelines should be subject to a periodical review; otherwise, criticism may well arise that the limits are out of date.[5]

A person who applies for legal aid must make a full disclosure with his application form[6] of all his financial resources, including his assets, such as a car or furniture. He must also list any debts he has incurred. In addition, if applicable, he is required to disclose his spouse's and parents' incomes and to state whether any of his friends may be able to help him financially. In practice this last question is invariably answered in the negative, nor do many people furnish the Plan with information concerning the means of their spouse or parents.[7] This information is required as the Plan has stated that it is only fair, when considering an application, to take into consideration the "family unit". A man of "modest means" may have to go to friends or relatives to help pay for a lawyer and it is felt that a legal aid applicant should be encouraged to do this as well.[8]

It is interesting to note that no formal check is made on the information given by the applicant. In the past a Statutory Declaration was incorporated into the application form. This often proved to be fraudulent, but because of the administrative difficulties which ensued from having to have a solicitor attesting every application, the practice was discontinued.[9] In Ontario the Department of Public Welfare carries out an exhaustive investigation of each application, the cost of the

investigations being absorbed by that particular department, not the Legal Aid Plan.[10] The Department of Health and Social Development has been approached in Alberta to see if it would consider carrying out similar investigations in Alberta, as the Legal Aid Plan could never absorb the cost of such investigations. However, the response so far has been negative.[11]

If, however, there is a suspected case, Credit Bureau investigative facilities are often utilized to make a thorough check on the applicant. Suspicion is usually aroused from information given by the other party to the proceedings,[12] by accident,[13] or from information supplied by the legal aid recipient's assigned lawyer. When a person applies for legal aid he waives any legal professional privilege with regard to anything he says to his lawyer concerning his application. This is supposed to enable the lawyer to inform the Plan if he finds out that any information given by the applicant to the Plan is untrue. Although this is only intended to concern information related to an applicant's financial means, the wording of the waiver is so wide that it could, it is submitted, cover any communication between the legal aid recipient and his assigned lawyer. The wording reads as follows:

> 7. Waiver - In the event that a solicitor is assigned to me under the provisions of the Alberta Legal Aid Plan, I hereby waive any legal professional privilege which I have arising out of any communications passing between the said solicitor and myself, or between the said solicitor or any other person or persons, or between myself and any other person or persons for the sole purpose of permitting the Alberta Legal Aid Plan and those persons participating in its operation to assess the merits of this application or any subsequent application which I may make for legal assistance under the Alberta Legal Aid Plan.[14]

The "merits of a person's application" could easily be construed as covering any facet of his case. In this respect the legal aid recipient is treated differently or to be more accurate, has less rights than the ordinary citizen, with regard to what he says to his lawyer. If, however, a comprehensive investigative apparatus could be established there would probably be no need for a legal aid recipient to waive this privilege, and consequently the A.L.A.P. would be nearer to creating a normal solicitor-client relationship between a legal aid recipient and his assigned lawyer. To this date,[15] no one has been prosecuted for giving false information on his application form. In such cases, if a certificate has been issued it has just been withdrawn.

The reason for there being no formal check on an applicant's financial resources is merely because the Plan could not absorb the costs of making such checks. It is suggested, however, that money could be made available to establish some kind of investigative apparatus. This would mean that it would be possible to delete the waiver provisions on the application form and could prevent any criticism that the Plan was being abused by those who could easily afford to pay for a lawyer from their own resources. Our society is becoming increasingly sensitive to abuses in various social welfare programmes and it would be unfortunate if legal aid were to be subject to the same criticism that the Unemployment Insurance Commission has been subjected to in recent months,[17] i.e., that the Plan was being abused.

Thus, an applicant's means are crucial when his eligibility for legal aid is being determined. However, it is not always the case that

a legal aid recipient does not have to pay any money at all. Some control over the cost of legal aid is exercised by sometimes requiring the recipient to pay a proportion of the cost, that is, if the committee feels that he is able to do so. Again, no specific criteria are used to determine whether a person should be required to pay a contribution to the cost of his case, and in this sense the same criticisms can be made of this facet of the Plan as were made about the general means test. Recipients are also sometimes required to sign a promissory note, so that if in the future they are able to repay the costs which they have incurred there is no difficulty in recovering such money from them.[18] This procedure is provided for on the application form where the applicant acknowledges the fact that he may be asked to repay the Plan any costs incurred on his behalf.

Sometimes an applicant may be able to pay a lawyer's fee, but there is something exceptional about his case which requires that the lawyer spend more time or money on it than is usual, and consequently the client finds that he is unable to afford this extra expense. In such cases a "limited" certificate may be issued, i.e., the certificate limits the amount of money that the Plan will pay to the lawyer to specific expenses. These cases are not frequent but such certificates have been issued when the committee has considered that it is in the interests of justice to issue such a certificate.[19]

Once a person's financial eligibility has been determined, it is then necessary for the committee to decide if the applicant's problem is one which is covered by the Plan.

II. The nature of the problem

When applying for legal aid an applicant must also complete a form[20] which, in theory, should contain sufficient information and be supported by any necessary documents to enable the appropriate committee to decide whether it is reasonable for legal aid to be granted, i.e. the application should be granted because of the applicant's means and the problem is one which is covered by the Plan.

Unlike similar plans,[21] no civil matter is excluded from coverage under the Plan by reason of the nature of its action, although it is not intended that the giving of legal advice be covered by the Plan.[22] On the criminal side, however, certain offences are excluded. These include all offences which are punishable by way of summary conviction. Although, as is stipulated in the Federal Agreement on Legal Aid,[23] if there is a likelihood that upon conviction there will be a sentence of imprisonment or the loss of means of earning a livelihood, legal aid will be provided.[24] It is difficult to see how this question can in fact be answered by the local committee, for it means that the local committee has to predict what a particular court's decision will be. Having to make such a decision ought not to be part of their function and furthermore, is not within our concept of criminal justice.

No such problem arises if the offence is one which is punishable by way of indictment; such offences are automatically covered by the Plan.[25] This includes those offences against which the Crown can proceed either by way of indictment or by summary conviction, but has elected to proceed by way of indictment. Proceedings pursuant to the Extradition Act and the Fugitive Offenders Act are also covered, as

are appeals in matters which have been mentioned as being covered.[26]

It has been suggested,[27] and the writer agrees, that for a legal aid plan to go towards achieving full equality before the law, all financially eligible persons who have been charged with any criminal offence should be entitled to legal aid. The A.L.A.P. fails to provide such coverage, mainly because it lacks the financial resources, which would lead one to the conclusion that before it can be a vehicle for attaining equality before the law it would have to provide such coverage.

If an applicant is not in custody, whether or not he should be granted legal aid is usually decided on the basis of an interview. In practice it is only the "doubtful" cases on which the Area Committee as a body decides. In most cases, the Director, in his capacity as secretary of the committee, and in other centres the local secretary, is able to make a decision one way or the other without referring the application to the committee. Before an application is granted in most civil cases the applicant is referred to a lawyer who is asked to report back to the Plan on the merits of the applicant's case and whether he would be willing to handle the case. The lawyer is entitled to charge a $5 "nuisance" fee for an interview with the applicant, although it is not all that common for them to do so. Invariably the lawyer recommends that the applicant be granted legal aid and that he or someone in his office will handle the case.[28]

As the Plan is presently constituted these "screening" interviews both in the Legal Aid Office and by private lawyers, are necessary because in many cases people are unable to put down on paper what their "legal" problem is.[29] Indeed, in some instances their

problem is not one which could be strictly termed as being "legal". In these cases if it is possible they are referred to the appropriate agency that can help them.[30]

In considering whether a case is deserving of assistance the Committee is guided by one of the fundamental principles of the Plan, i.e., that of placing a legal aid recipient in the same position as the "man of modest means".[31] Thus, legal aid will only be given in those cases where a "man of modest means", for whom the cost of the proceedings would be something of a sacrifice and the risk of losing a factor to be weighed up with care, would proceed. In essence, therefore, an applicant has to prove that he is a reasonable man with a reasonable chance of success. This is because it is not intended that the Plan should become a means of furthering litigation which is vexatious in character, which the reasonable citizen does not pursue, e.g., an action for trespass or assault arising from a backyard quarrel. Nor is it intended to give aid where aid is available through other channels,[32] nor where a man of modest means would not be able to afford to take the same measures,[33] for it is argued that this would mean that you were placing a legal aid recipient in a better position than the man of modest means.

This is, in fact, a virtual admission that equality before the law does not exist in this Province, for though a man of modest means may not be able to afford to pursue a particular course of action, a wealthier person may well be able to afford such an action. Furthermore, in some cases a man of modest means may not bother to pursue a course of action for the recovery of say $100; he may feel he can absorb his losses, but to a potential legal aid recipient $100 may mean a

great deal more than it does to a "man of modest means" and it seems that in such a case to refuse him legal aid would be most unjust.

Although the "man of modest means" is one of the fundamental concepts of the A.L.A.P., he has never been defined. Like the "man on the Clapham omnibus" he appears to be yet another convenient legal fiction. It is suggested that before such a concept was adopted by the founders of the Plan, there should have been some attempt at a definition of what this mythical figure constitutes. However, it is suggested that in all probability it would be virtually impossible to define such a nebulous concept in legal terms, i.e. by his income or capital, as the variables involved are too diverse to be covered by a singular definition.

In view of this fact, a different "model citizen" should be used by the Plan. A much more worthwhile concept would be the "man of adequate means". Using such a concept would mean that legal aid would not be denied purely on the twisted reasoning that the concept of the man of modest means has generated. The criticism that a legal aid recipient would then be in a better postiion than a "man of modest means", could be countered by the argument that a "man of modest means" is being denied justice if you assume that in some circumstances he cannot afford a lawyer. If this is then the case, the "man of modest means" should also have access to adequate legal services that he can afford. In this regard it has been suggested[34] that a prepaid legal service plan[35] could be a practical method of achieving this end.

The overall effect of the concept of the "man of modest means" has been that too many people have been denied legal aid when they have

had urgent need of a lawyer but could not afford one. This has been especially true where appeals to a superior court are concerned, despite the fact that a would-be appellant was granted legal aid when the matter was before a lower court. The reasoning used is that if a "man of modest means" could not afford to appeal, which is highly likely when one considers the costs involved in an appeal, then legal aid should not be granted.

In fact the A.L.A.P. is very strict in granting legal aid for appeals[36] and because the concept of the "man of modest means" gives the administrators of the Plan an enormous amount of discretion in deciding when to grant legal aid, it is very uncertain as to whom legal aid will be granted for appeals.

Some guidelines are laid down with respect to appeals in criminal cases[37] but it is doubtful whether they can ensure that legal aid will be given for deserving appeals. If the proposed appeal is from conviction then it is necessary for the applicant's trial counsel to set forth the grounds of appeal. The Area Committee, if in any doubt, is required to obtain a second opinion as to whether or not the appeal should proceed. This second opinion usually treated with more favour than the trial counsel's, the effect being that if the second opinion is against appealing then legal aid will normally be refused.

If the proposed appeal is from sentence only, the Area Committee can exercise even more discretion. They are instructed[38] to look at the offence charged, the record of the accused, and the sentence imposed, taking into consideration the age and education of the accused. In this regard they are performing the function of the court,

and it is submitted that this should not be their concern. With respect to all appeals, if an applicant is financially eligible a lawyer should be appointed and it should be for that lawyer to decide on the desirability of an appeal, whether it be from conviction or sentence. The Area Committees should restrict themselves, as far as is possible, to administrative functions and not to judicial functions.

III. Consequences

Thus what is striking about the methods used by the Plan to determine eligibility is the amount of discretion which the Area Committees have in deciding who is, and who is not, eligible for legal aid. As has been said, this makes the Plan very flexible in character, but it is a vacuous flexibility, and there should be more concrete guidelines laid down as to how eligibility should be determined.

At the present time a person can appeal from a decision that refuses him legal aid, up to the Joint Committee. This right of appeal is not at all well publicized, in fact, it is only mentioned on the notice which informs the public on the availability of criminal legal aid.[39] Apparently if an applicant does not ask about this right of appeal he will not be informed of it by the Plan. Presumably this is because the administrators of the Plan are more concerned with keeping the costs of legal aid down than with providing good service.

In Manitoba an applicant, if he is refused legal aid, is informed of his right to appeal in the refusal letter.[40] It is suggested that the administrators of the A.L.A.P. cannot ethically argue against following Manitoba's example and that information on the applicant's right of appeal should be contained in every refusal letter forthwith.

Even if a person does decide to make such an appeal, he will find it very difficult to articulate any grounds for appeal. The flexibility of the rules for determining eligibility means that the Area Committees have an almost unlimited discretion in such matters. He would find it very difficult to prove that the Committee had not exercised its discretion properly.

These aspects of the eligibility provisions taken with the concept of the "man of modest means" call for a total re-examination of those provisions. Frivolous civil actions ought to be discouraged but the exclusion of certain criminal offences from the Plan's coverage means that from the outset you are denying some persons accused the right to equality before the law.

Furthermore, clear and effective, though not exhaustive, rules are necessary to act as guidelines for determining eligiblity, not only to ensure that the Plan assists those who need help but also to prevent abuse. It must be seen that if the Plan is wisely administered its eligibility provisions can be an effective means of preventing abuse. What can happen if you leave a plan open to abuse was well instanced by the forma pauperis procedure, as Maguire has said

> The [forma pauperis] procedure unless wisely administered is susceptible to gross abuse either by the persons whose causes are not meritous or by persons who are entirely able to pay the prescribed costs and fees. So as soon as the Judges find that the law is unbarring the gates for imposters, cranks, frauds and deadbeats, with highly dubious and shady complaints, the inevitable reaction is to shut down.[41]

This is a danger of which all legal aid administrators should be wary, for a plan is effective only so long as its administration is

efficient and does not leave the plan open to abuse.

## IV. Footnotes to Chapter Four

1. Area Directors' Handbook Legal Aid (Criminal), The Legal Aid Society of Alberta, 1972.

2. In Manitoba and Saskatchewan such limits have been imposed, although in Ontario and British Columbia no such limits have been imposed.

3. Handbook, supra, n. 1. and Appendix VIII, Clause 4(1).

4. As cited in Manitoba, The Report of the Fact Finding Committee on Legal Aid, 16 (1971).

5. This is a perennial criticism of the legal aid scheme in England. See e.g. The Cobden Trust, Legal Aid as a Social Service, 15(1971).

6. Appendices I and II.

7. This is a personal observation made by the writer whilst working in the Edmonton Office of the A.L.A.P. and examining the files of past applicants.

8. Alberta, Report and Recommendations of the Joint Committee on Legal Aid, 27 (1970).

9. Per D. Morris, Past Director of the A.L.A.P.

10. Silverstein, The New Ontario Legal Aid System and its Significance for the United States, (1967) 25 The Legal Aid Briefcase, No. 3,83.

11. Morris, supra, n. 9.

12. It has been found that the other party to an action sometimes claims that the legal aid recipient can well afford to pay for a lawyer. However, only in a few cases has this been found to be true.

13. For example, the Past Director of the A.L.A.P., D. Morris, saw by chance an advertisement in a newspaper featuring a legal aid recipient as the model. The recipient in question had claimed that she had been unemployed for some months!!

14. Appendix I.

15. June, 1973.

16. Morris, supra, n. 9.

17. Edmonton Journal, 9th March, 1973 at 2.

18. The total amount recovered from legal aid recipients during the year

ending March 31st, 1972 was $34,356. The Legal Aid Society of Alberta, Annual Report, 1972. For a critique of the concept of legal aid recipients contributing towards the costs involved in providing them with assistance see, Zander, Contributory Criminal Legal Aid, (1967) 117 New L.J. 247.

19. For example, legal aid was once given to a person to the amount that it cost his lawyer to make a visit to a foreign country. Such a visit was necessary if the lawyer was to conduct the case properly, but his client could not afford to pay this additional expense.

20. Appendices I and II.

21. For example, in Manitoba will not be granted for an action of alienation of affections. Man. Reg. 106.20(1972). A Regulation under The Legal Aid Services Society of Manitoba Act.

22. See infra, Chapter Four.

23. Appendix VIII, clause 3.

24. id. clause 3(1)(b).

25. id. clause 3(1)(a).

26. id. clauses 3(1)(c), 3(1)(d), 3(1)(e).

27. Canadian Corrections Association, Suggestions for a Good Legal Aid System in Canada, (1966) Can. J. Corrections, 173.

28. Supra, n. 7.

29. Supra, n. 7. Lack of perception as to what problems are legal problems is discussed in Chapter Six.

30. For example, Small Claims Court, Debtor's Assistance Board, Family Court.

31. Handbook, supra, n.1.

32. Supra, n. 30.

33. This is a common argument used by the A.L.A.P. to justify the refusal of legal aid for appeals.

34. Smethurst, Prepaid Legal Services, (1972) 20 Chitty's L.J. 303.

35. See infra, Chapter Seven for a discussion on prepaid legal services.

36. A separate application form has to be completed by a person seeking legal aid for an appeal, see Appendix VI.

37. Handbook, supra, n. 1.

38. id.

39. Appendix IX.

40. Form 4, The Legal Aid Services Society of Manitoba.

41. Maguire, Poverty and Civil Litigation, (1923) 36 Har. L. Rev. 361 at 378.

# CHAPTER FIVE

## THE ALBERTA LEGAL AID PLAN IN PRACTICE

In the preceding chapters the aims, structure and scope of the A.L.A.P. were discussed and it was suggested that, because of its very structure and restrictive eligibility provisions, it could only partially aim at attaining equality before the law in this Province. In this chapter it is intended to examine certain features of the Plan in operation.

The first part of the chapter concerns actual access to the Plan and whether the Plan affords or can afford those that do receive legal aid, the same standard of legal services as those who pay for a lawyer from their own resources.

In the second part some general observations are made with regard to two features of the Plan; publicity for the Plan and the exclus f legal advice from its coverage, which illustrates further how the Plan may be working against, rather than towards, the attainment of equality before the law.

### I. Access to the Plan and the Service it Provides

#### 1. Criminal s

If the accused is not in custody, his application has to be made in person to the legal aid committee in the judicial district in which he has been charged. This means that he has to take the initiative in applying for legal aid and presupposes that he knows of the Plan's existence and what its function is.[1] If he is found eligible,

as has been said,[2] he will be assigned a lawyer, and, in theory, that lawyer will represent him as he would represent any paying client.

If the accused is in custody, it is not possible for him to apply for legal aid in the above manner. Also, it is usually of the utmost importance that he receive speedy legal advice; however, the A.L.A.P. does not appear to be able to provide such speedy legal advice. Unless the accused is in custody in Edmonton or Calgary, to obtain legal aid he must take the initiative and apply from his place of custody.[3] This means that he has to rely on his custodians, who may not always be sympathetic towards him, to facilitate his application. This means that after a person has been arrested there may be a considerable time lag before he is able to receive any legal advice whatsoever.

If the accused is in custody in Edmonton or Calgary, his first contact with the Plan is usually when a representative of the Plan makes the regular morning visit to the cells.[4] Such representatives are not allowed to give any legal advice but are merely there to assist those who wish to apply for legal aid in filling out the application forms. They can only advise the accused that if a lawyer has not been appointed for him by the time of his next court appearance he should advise the Judge that he has applied for legal aid and ask for a remand or adjournment; indeed, such advice is contained on every application form.[5] This means that although the court is not supposed to know that an individual a recipient of legal aid,[6] in many cases, of necessity, an accused has to inform the court that he has applied for legal aid due to delays which are inherent in the present procedure, in providing him with a lawyer.

Thus, under the Plan it is virtually impossible for the accused to obtain legal aid during the period immediately following his arrest and prior to his first appearance.[7] Decisions of the United States Supreme Court[8] have shown that legal advice and assistance may be too late if it is only provided after the first court appearance. Indeed, the Report and Recommendations of the Joint Committee on Legal Aid in Alberta[9] stressed the point that this kind of delay can lead to

> ... unwarranted guilty pleas entered by reason of ignorance, frustration or persuasion; sentences unmitigated by representations of counsel, particularly in the case of the more unsophisticated prisoner, unnecessary not guilty pleas, and to unnecessary reservations of plea and remands while awaiting the processing of the legal aid application and the appearance of his assigned counsel who in many cases, advises the accused to plead guilty.[10]

The same report suggested that a viable method by which these problems could be overcome would be to establish a duty counsel system[11] as the Province of Ontario did in 1966[12] and which other Provinces are planning to do or have in fact done so.[13] The planners of the Ontario Plan were concerned with providing legal aid as early as possible[14] and wanted to ensure that no administrative red tape robbed the accused of the legal help he needs. In Ontario the accused's first contact with the legal aid plan is not with the lawyer who will necessarily take his case in court, but with the duty counsel. In the early morning the police cells are visited by a team of duty counsel (one for each sitting) who offer their services to those in custody. All those who desire a lawyer are interviewed and preliminary advice is given to plea, adjournment and bail or any other help. Those who desire further

advice, as to pleas in mitigation of sentence or to defend the charge against them, are then referred to the legal aid office. If they are eligible under the Plan they are provided with a certificate which entitles them to the services of a lawyer.[15]

The most important aspect of this system is that no one is deprived of legal advice at the crucial first appearance in court, even if it is later determined that they can afford to pay for a lawyer from their own resources. The duty counsel also sits through court hearings as a watch dog and will sometimes intervene in cases, even where the accused has decided to proceed without a lawyer.[16] In addition, as the police realize that a lawyer will be seeing the accused very soon after his arrest there is a very salutary effect on police practices. It also has a therapeutic effect on those who are upset by their experience who "otherwise might have made a precipitous decision about their plea or other personal matters".[17]

Needless to say, the system depends on having conscientious duty counsel who can exercise fast and responsible judgment in the cell interviews and who are prepared to do the same in the court room, even if it means displeasing the Judge or the prosecutor.[18]

It is suggested that it would be feasible, and desirable, to establish such a system in Alberta. It is probably the most effective method of ensuring that an arrested person sees a lawyer within twenty-four hours of his arrest. As has been shown, the A.L.A.P. presently fails in this regard.

Although the duty counsel system in Ontario ensures that an

accused receives speedier legal advice, it is felt in that Province that an arrested person should be able to receive legal advice even sooner, i.e. at the time of his arrest. Consequently, an experiment is underway in Toronto, whereby free legal counselling on a twenty-four hour basis will be available to all accused persons. Under the experiment any person accused of a crime and held by the police will be provided with the telephone number of a standby lawyer who will be able to arrange bail, provide advice, or direct the accused to the regular legal aid channels.[19] Despite the fact that there is a much lower incidence of arrests in Edmonton and Calgary than in Toronto, it is suggested that such an experiment would be worthwhile in those centres. The administrators of the A.L.A.P. are following the Toronto experiment,[20] but it is suggested that the full worth of such a scheme in Alberta can only be gauged from experiments within Alberta itself.

Once a successful applicant under the A.L.A.P. has made contact with his assigned lawyer does he receive the same service as a paying client would receive? And is his lawyer as conscientious as he would be with a paying client? There is apparently some discontent amongst some lawyers as to the set tariff of fees as they feel that they are too low.[21] This would tend to suggest that they are tempted to perform a second rate job where a case is a legal aid case, e.g. it may only be worth their while to plead guilty. Whether lawyers do in fact perform second rate jobs with legal aid cases can only be a matter of conjecture as it is something which is impossible to determine from the files. If the fees are too low, then they should be raised to a more equitable level, for if the lawyer is not receiving an adequate fee he is bound to regard legal aid work as 'charity work' and be

subject to the suspicion that he is not doing his best for his client.

In theory, the assignment of lawyers is done on a roster basis,[22] i.e., the next name on the list is assigned the case. Two panels are maintained, one which is used for all but the more serious criminal cases, the other for the more serious cases. The first panel is composed of those members of the Bar who have been called for a period of up to ten years or longer if they wish to remain on this panel. They are not necessarily experienced criminal lawyers. The second panel is composed of lawyers who are competent and experienced in criminal matters.

It is the purpose of the Plan to spread the bulk of criminal legal aid work across the whole of the profession. However, a small core of lawyers appear to handle the bulk of the cases.[23] This development has also taken place in Ontario and it is envisaged that this will lead to the growth of a "legal aid bar", i.e. that there will be a group of lawyers who will come to specialize in legal aid cases. Although the A.L.A.P. does not intend to be a "make work scheme for lawyers"[24], it appears that this is what it may indeed become in future years.

Some fear that this development will result in the profession degenerating into strata although it has been pointed out that two classes of lawyers have always existed[25] and that if any professional trend were to emerge it would probably be a slight narrowing of the gaps between the graduations of the profession.[26]

It is suggested that if the lawyers are performing their

duties competently and assiduously there is nothing unethical in such lawyers concentrating on legal aid work. Furthermore, it may lead to such lawyers developing expertise in this line of work, an expertise that they have never really had the chance to develop until now.

2. Civil Matters

As has been pointed out, if a person is not in custody it is incumbent on him to "seek out" the Plan in order to apply for legal aid. This is also the situation with regard to civil matters. It appears that very few people approach the Plan on their own volition, but are being referred to the Plan either by lawyers in private practice[27] or the social welfare agencies.[28]

As with criminal cases, once a certificate has been issued, in theory, the lawyer will proceed with the case as if the legal aid were a normal paying client. But, as with criminal cases, there have been some protests as to the inadequacy of the fees that are paid,[29] and it is suggested that the comments made earlier on in this regard are equally pertinent to civil cases.

The bulk of the civil cases handled by the Plan are either concerned with divorce or other matrimonial disputes,[30] but it would be wrong to assume that these comprise the bulk of the poor's legal problems. It has been shown that the poor face a wide range of legal problems,[31] problems which are not being dealt with by the A.L.A.P. One therefore gets the impression that the Plan is under-utilized in this regard, and it is intended to examine the probable reasons for this in the rest of this, and the following chapter.

## II. General Observations

### 1. Publicity for the Plan

From an examination of the files and working in the Edmonton Legal Aid Office, the writer was able to formulate an impression of the typical legal aid client. In criminal matters the majority of recipients are in custody, or have applied from custody, and are invariably unemployed. In civil matters, the majority of recipients are female, on welfare, and are seeking help with regard to their marital affairs; e.g. they are seeking a divorce, a judicial separation, maintenance, etc.

Usually in both civil and criminal matters such recipients had not applied for legal aid upon their own volition. Those in custody had been approached by the plan whilst in custody and in the majority of the civil cases the recipients had either been referred to the Plan by their welfare agencies or by lawyers in private practice. Of those who had applied on their own volition, many had applied for legal aid before and therefore knew the procedure that was involved.

This would lead one to surmise that the publicity for the Plan, as to its purpose and coverage, has not been very successful. As evidence of this, a large number of those applying for legal aid were unaware of what was involved. They imagined the Legal Aid Office to be something akin to a neighbourhood law office[32] and were most surprised to learn that the Legal Aid Office refers them to lawyers in private practice.

In fact, publicity for the A.L.A.P. is notable only for its virtual non-existence; one wonders whether this is a deliberate policy

decision of the administrators of the Plan as a part of their attempt to "discourage applications".[33] Publicity is of paramount importance if the Plan is to reach those people it is intended to help: "The best legal aid scheme in the world will serve little purpose and few clients unless its potential clientele is told about it".[34]

Indeed, it is incumbent upon the Attorney General of the Province, by virtue of the agreement relating to legal aid with the Federal Government, to take reasonable steps to give publicity to the Plan so that the public is "adequately informed in this regard".[35] However, apart from the notices in the Provincial jails,[36] which give details of the Plan, little has been done to publicize the service.

In England, informative brochures and pamphlets on the availability of legal aid, prepared by the Law Society, have been given wide distribution; even television commercials have been produced.[37] It is suggested that similar methods be used in Alberta in order that the A.L.A.P. is given the widest possible publicity. In addition, in order that those accused persons who are not in custody are informed of the Plan's services, when a person is served with a summons it would be a good idea if a printed notice were attached to the summons giving the necessary information.[38]

2. Legal Advice

The A.L.A.P. is primarily concerned with providing legal aid of a remedial nature, i.e. defending accused persons and providing lawyers for those people who are party to a civil action. It does not intend to give advice, although sometimes summary advice may be given at the Legal Aid Office. This is one of the most glaring

omissions of the Plan, an omission that is common to most plans run on a similar basis to that of the A.L.A.P. However, some of these other plans have recognized the importance of making such advice available,[39] for, not only does it mean that you are nearer to achieving equality before the law, it could also be beneficial to the Plan - making legal advice freely available could mean that future litigation is prevented, thus saving the Plan the money it would have expended.[40]

An attempt to remedy this defect of the Plan has been made by the Alberta Branch of the Canadian Bar Association. It has established a lawyer referral service whereby a person can receive for $10 a half hour interview with a participating lawyer. Apart from the fact that once again the charity of the profession is being called upon, it is questionable whether such a scheme, distinct and separate from the present Plan, is desirable.[41]

The Plan itself should be working towards a viable solution to this problem. The establishment of a neighbourhood law office may be beneficial in this regard. For this reason, in the following chapter it is intended to examine the concept of the neighbourhood law office and whether such an office could provide some of the remedies for this, and other defects of the A.L.A.P.

## III. Footnotes to Chapter Five

1. See infra, at for a discussion on publicity for the Plan.

2. Infra, Chapter Three.

3. Application forms are kept at every custodial institution in the Province. Notices, informing the inmates of such institutions as to the availability of Legal Aid, are also posted.

4. In Edmonton, such visits are made by members of Student Legal Services. In Calgary, willing lawyers are utilized on a roster basis.

5. Appendix I.

6. Alta. Rules of Court, 933, reads as follows,

> Where a legal aid certificate has been issued in favour of a party to any proceedings, the existence of the certificate or of the fact that the person is receiving legal aid under a legal aid plan in those proceedings shall not be disclosed to the court.

7. From 100 files perused, the average time taken in appointing a lawyer in Edmonton was three to four days.

8. See e.g. Escobedo v. Illinois, 378, U.S. 478 (1964) and, Miranda v. Arizona, 348 U.S. 436 (1966).

9. Alberta, Report and Recommendations of the Joint Committee on Legal Aid, (1970)

10. id. at 21.

11. id. at 27.

12. Such a system has been operating in Scotland for many years, and the concept was adopted by the Ontario Legal Aid Plan in line with the recommendations contained in the Report of the Joint Committee on Legal Aid in Ontario, 48 (1965).

13. In Manitoba, the provision of duty counsel is allowed for by virtue of The Legal Aid Services Society of Manitoba Act, S.M. 1971, c.76, s.20, Am. S.M. 1972, c.63, s.4. In British Columbia, discussion is underway as to the feasibility of such a scheme in that Province. The Legal Aid Society of British Columbia, Annual Report, 1972.

14. Parker, Legal Aid Canadian Style, (1968) 14 Wayne L. Rev. 471, at 479.

15. The Function of the Duty Counsel, (1970) 12 Crim. L.Q. 124.

16. For a good example of duty counsel acting in this capacity see, supra, n. 15 at 1218, and Bolsby, Duty Counsel in Magistrate's Court, (1969) 17 Crim. L. Q. 11.

17. Parker, supra, n. 14 at 486.

18. Supra, n. 15 at 130.

19. Edmonton Journal, 27th January, at 53.

20. id.

21. This discontent was voiced during a workshop on Legal Aid at a Canadian Bar Association (Alberta Branch) meeting in Edmonton, February, 1973.

22. Area Directors' Handbook Legal Aid (Criminal), The Legal Aid Society of Alberta, July 1972.

23. This was noticeable from the files that the writer examined. According to Mr. David Morris, the past Director of the Plan, this is because a large number of lawyers are unwilling or unable to take criminal cases which amount to over 2/3 of the cases handled by the Plan.

24. Handbook, supra, n. 22.

25. Carlin, Lawyers on Their Own (1963).

26. Parker, supra, n. 14 at 485.

27. Chapter Three, supra, n. 5.

28. Many welfare recipients who have legal problems, usually matrimonial in nature, are referred to the Plan by their social worker.

29. Supra, n. 21.

30. The Legal Aid Society of Alberta, Annual Report, 1972.

31. See infra, Chapter Six.

32. See infra, Chapter Six for a discussion of the concept of the neighbourhood law office.

33. Handbook, supra, n. 22.

34. Manitoba, Report of the Fact Finding Committee on Legal Aid, 28 (1971). This was also stressed in the Ontario Report of the Joint Committee on Legal Aid, 69 (1965).

35. Appendix VIII, clause 7.

36. Appendix IX.

37. The Law Society of Upper Canada, Community Legal Services, (1972).

38. Clark, Legal Aid in the United States, Canada and the United Kingdom, 102-104, (1967).

39. Supra, n. 35, and the Report of the Advisory Committee on the Better Provision of Legal Advice and Assistance, Cmnd. No. 4249 8 (1971).

40. In England they have tried to bring legal advice within the reach of the poor by establishing what is colloquially known as the "twenty-five pounds" scheme, under which scheme eligible persons are able to receive up to twenty-five pounds' worth of legal advice from a solicitor with a minimal amount of red tape. Legal Advice and Assistance Act, 1972, c. 50. A good explanation of the new scheme is contained in Pollock, Legal Aid: The New Advice Scheme, (1973) 117 Sol. J. 176.

41. For the arguments against establishing such a scheme separately from the main legal aid plan, see Samuels, The Legal Advice and Assistance Act 1972: The Scheme an Appraisal, (1972) 122 New L.J. 693.

CHAPTER SIX

THE CONCEPT OF THE NEIGHBOURHOOD LAW OFFICE

The concept of the neighbourhood law office has been receiving a great deal of attention in many jurisdictions during the last few years, particularly the U.S.A.[1] The purpose of a neighbourhood law office, as with the more traditional judicare type of legal aid plan (of which the Alberta Legal Aid Plan is a modified example) is to provide legal services to those who would ordinarily be unable to afford a lawyer. However the aims and methods of either type of plan can differ considerably. Under a judicare plan legal aid is often mooted as a juridical right, the aim of the plan being to enable poor men to redress their individual rights and the method is to rely on uniform application. The proponents of neighbourhood law offices regard legal aid as a welfare right, the aim being to attack poverty as a social condition and the method is to rely upon 'rational planning for the efficient allocation of resources'.[2] Despite the fact that there can be this fundamental ideological difference between the two types of plan, it is proposed to show that the establishment of one type of plan does not necessarily exclude the other, and that the ideal legal aid plan may well be a synthesis of both types of plan.

I. The Nature of a Neighbourhood Law Office

Under a neighbourhood law office programme the public funding is used to hire full time lawyers to work for poor and disadvantaged people in offices located in lower income communities. This sort of programme was developed in the U.S.A. through the aegis of the Office of Economic Opportunity (O.E.O.) as an adjunct to the "war on poverty",[3] and

today there are over 1,000 projects throughout the U.S.A. The projects under the programme vary widely in the type of work done, the involvement of the community residents in policy making and the actual working of the project, the utilization of law students, the relationship of the project with other community agencies and the like. Qualifications for the use of the service vary widely but have tended to become more restrictive recently, due to the overwhelming case loads most offices have experienced.[4]

II. Judicare vis à vis Neighbourhood Law Offices

There has been fierce debate on the relative merits of judicare programmes as opposed to neighbourhood law office programmes, and vice versa.[5] However, before examining the arguments that have been used, it must be pointed out that the bulk of the existing literature has been written by those with an interest in promoting one model or the other, which means that many of the arguments used are at least partially self serving and should be placed in perspective. Also, whilst a particular structure does tend to place particular limitations on the activities which can be successfully engaged in, structures can be administered in such a way as to maximise or minimise their potential. So it is important to realise that criticisms levelled at existing judicare plans, for example, may be more properly directed towards their present administrators than at the structure per se.[6] Because of this it is proposed to try and elicit those features of the neighbourhood law offices programme which could be beneficial to Alberta, i.e. those that could rectify some of the shortcomings of The A.L.A.P.

There is a trend in Canada towards developing of a compromise system of legal aid in some Provinces, whereby traditional judicare plans

are being established but as an adjunct to those plans neighbourhood law offices are being established in their major urban areas.[7] In many Provinces during the last few years law students have been instrumental in the establishment and operation of such offices[8] and their enthusiasm now appears to be spreading to the higher echelons of the legal profession. There is an increasing willingness to accept the fact that both plans have their advantages and disadvantages and that both are worthy of experimentation in a local setting.[9] Even in England, where the first judicare plan was set up in 1949, it is now accepted that the very comprehensive legal aid plan in existence there, is not completely filling the need for legal services, successive reports by persons of all shades of political opinion have advocated that neighbhourhood law offices be established in their major urban areas.[10]

What advantages are to be gained from establishing a neighbourhood law office and could they bring Alberta closer to attaining equality before the law? One of their best features is their availability and accessibility. One of the major problems of those people within the lower income bracket, particularly those living in the poorer urban areas, is that too few lawyers practice in those areas. Much of the work is unnattractive as it is uneconomical, also too few lawyers have sufficient knowledge on which advice and assistance is needed by the poorer section of the community, e.g. welfare appeals. It has been shown that the poorer sections of the public in England are reluctant to go to an ordinary solicitor's office regarding it as unfamiliar and unsympathetic.[11] A recent Canadian study, in Ontario,[12] has found this to be equally true in that Province and it is suggested that Alberta is no exception to this phenonenum.

It may be that the A.L.A.P. may in fact be compounding this problem. In Edmonton the plan forces those applying for help to travel to the legal aid office downtown, which can often be difficult for women with children, who form the bulk of the civil cases.[13] Nor is the office open in the evenings, which means that a person working would have to take time off work to attend to his application, although the appointment system helps in this respect. After making this journey the applicant has to face the possibility that his problem does not fall within an area for which legal aid is granted. It is only after going through these time consuming administrative procedures that, if the application is successful, he will get to see a lawyer. Furthermore, as has been said, the A.L.A.P. operates on the assumption that people can identify their problems as being legal problems, although numerous studies have shown that the underutilization of lawyers by the poor can be attributed to the fact that they fail to identify many problems as b ing legal problems.[15]

With an office in their community, it has been argued that people will be encouraged to use its services, and with the office operating education programmes within that community and with the training of community residents, a greater awareness is fostered of what are legal problems as opposed to other problems.[16]

Another advantage that a neighbourhood law office has over the present plan is that as neighbourhood law office lawyers work fulltime for poor people, they can develop a body of expertise in the area of poverty law. Such expertise is often lacking amongst private practitioners who have had little exposure to such practice. [illegible] it could be argued that if a "legal aid bar" were allowed to [illegible]

something which the A.L.A.P. does not want to see happen, this body of expertise would be developed amongst the ranks of the private practitioners.

In the U.S.A. it has been shown that a knowledge of the district and the problems of its inhabitants has enabled the lawyers employed in such centres to discover ways in which the law was proving inadequate or oppressive, so that reform has been initiated on the basis of test cases taken for the benefit of the underprivileged people.[18] Indeed, the O.E.O. Legal Services Program guidelines specifically inform their lawyers that 'advocacy of appropriate reforms in statutes, regulations, and administrative practices is a part of the traditional role of the lawyer and should be among the services afforded by the program'.[19]

As has been intimated, under the present A.L.A.P. lawyers may be tempted to do a second rate job on legal aid cases because of the small remuneration they sometimes receive. A lawyer in a neighbourhood law office, however, does not have to concern himself with the need to gross a given number of dollars per month or per annum, and he can give his clients his undivided attention. In a neighbourhood law office the poor

> do not have to compete for attention with better paying matters as they do in private law offices where they are likely to receive secondary treatment, however well motivated the private lawyer may be. 21

It would also appear that the cost of operating a neighbourhood law office, per case, is less than under a judicare plan. In Alberta the approximate cost to the plan per case is $140 for criminal matters and $210 for civil matters. Under the O.E.O. neighbourhood law office programme the average cost of all cases is $48.39.[23] Costs are also

extremely difficult to control in a judicare programme. For example, the A.L.A.P. has found it necessary to issue what are known as "restricted" or "preliminary" certificates[24] as too many lawyers were taking their criminal cases further (for example, to trial when the preliminary disclosed the hopelessness of the accused's case) or to a higher court (to the Supreme Court when it could have been disposed of in the Provincial Court) than was necessary or even in the client's best interests. The obvious reason for this was the higher fee. The possibility of ever increasing costs in operating the Plan is also evident from complaints by participating lawyers that the fees are too low, and the intent of the plan to increase fees as more money becomes available.

There is some force to the argument, however, that neighbourhood law offices whatever their virtues, discriminate against poor people as they force them to go to staff lawyers,[27] whereas under most judicare plans they may choose any lawyer just as the rich person can. As has been shown,[28] this choice does not even exist in theory in Alberta, and consequently it could be argued that this line of argument is irrelevant in this Province. However, having argued[29] that freedom of choice of counsel is essential if one is to attain equality before the law, and having suggested that a legal aid recipient in Alberta be given this freedom of choice, it is therefore necessary to consider this argument which on its face appears to carry considerable weight.

This problem may not be as irreconcilable as it may first appear. If a person, when he first attends a neighbourhood law office, could be given the option of either using a staff lawyer or, if he wishes, a lawyer in private practice under the auspices of the official

legal aid plan to whom the neighbourhood law office could refer him, the dichotomy would appear to be resolved. This would depend on the neighbourhood law office being closely linked to the main legal aid plan. The feasibility of such an arrangement has been borne out by the experience in Manitoba, where the neighbourhood law office in Winnipeg is authorized to act as a referral agency for the main legal aid plan, e.g. they often refer people if they do not feel that they are competent to handle that person's particular problem.[30] It would be equally feasible to refer someone to the main plan if that person would rather use a lawyer from private practice than one of the staff lawyers.

The A.L.A.P. assumes that it is better to involve the bulk of the legal profession in providing legal services to the poor instead of utilizing a mere handful of staff lawyers.[31] Although this is an attractive argument on the surface, it is questionable whether involving the bulk of the legal profession will be of great benefit to potential recipients of legal aid if the bulk of the profession knows nothing about the laws that affect them.

A neighbourhood law office would not necessarily exclude private practice. As an integral part of the legal aid plan it could deal with many of the minor problems leaving the main legal aid plan more time to deal with the more serious matters. Much time is wasted under the present plan in interviewing people who only require summary advice or who do not really need a lawyer. In Manitoba the neighbourhood law office acts as an ideal 'sifting' agency leaving the main plan more time to deal with the more serious cases.[32]

The success of a neighbourhood law office would depend on the

approval and cooperation of the organized Bar, if it is shown that a neighbourhood law office could complement rather than replace the present legal aid plan. It is suggested that this approval could be won. In the U.S.A. the organized Bar saw the growth of neighbourhood law offices as a threat to the profession.[33] This fear has also manifest itself in Canada.[34] They fear the government intervention aspects of the neighbourhood law office programmes,[35] and that neighbourhood law office lawyers will become typical civil servants, taking orders from above, i.e. the government, and unaccountable to those below. However, is interesting to note that the most frequent defendants in neighbourhood law office initiated actions in the U.S.A. is the government itself.[35] Also when one considers the fact that it is the government who holds the purse-strings of any judicare plan, and that accountability in many neighbourhood law office programmes, while not yet at an ideal level, is surely much better than under the present A.L.A.P. which has no client involvement whatsoever, these arguments seem rather untenable.

Many lawyers fear that neighbourhood law offices would take business away from the Bar, but the American experience has been just the opposite. The neighbourhood law offices have operated as a referral service for those who can pay for a lawyer (about 10%). Further, the neighbourhood law office programme has increased the general awareness about the law, and greatly enhanced the public image of the lawyer. All of this has been good for business.[37] But, despite this fact, such a "fear" may have a salutary effect on the lawyers of this Province, for it could mean that the organized Bar would have an incentive to encourage improvements in both the quality and the avail-

ability of the service provided through private practice.

III. Suggestions

It therefore appears that a neighbourhood law office programme has certain advantages over the present A.L.A.P. Not only can it remedy some of the defects of the present Plan, but from various studies that have been made it is a more practical type of programme providing a superior service at a much lower cost.[38] For those reasons I would suggest that it would be worthwhile to establish, under the auspices of the A.L.A.P., a neighbourhood law office in Edmonton initially as a pilot project. This would mean that the feasibility and usefulness of such offices in Alberta could be fully examined in a local setting. Recent studies[39] have suggested that this is the only way in which a true evaluation of their usefulness can be made. Although the burgeoning caseload of Student Legal Services, which operates part-time neighbourhood law offices in Edmonton, would suggest that such an office would never be short of clients.[40]

The function of such an office should be similar to the function of the Neighbourhood Law Office in Manitoba where it was proposed that the Neighbourhood Law Office

> while by no means restricting itself to comparatively minor problems, would be able to deal with them (minor problems) dispense adv[illegible], refer to the Legal Aid Society any matters of apparent gravity that could not be readily handled at the Neighbourhood Law Centre level, act as a sieve whereby much of the needless work on the part of the Executive Director could be avoided, and serve as a constant reminder to the people living in the immediate area that help is in fact available.[41]

In addition such an office should be able to refer a person to a lawyer in private practice, through the A.L.A.P. if he so wishes.

Such an office would therefore be an integral part of the A.L.A.P.

If such an office is established care should be taken not to alienate the organized Bar and the writer endorses the sentiment that neighbourhood law office lawyers would have to be constantly on guard "lest they anoint themselves the sole possessors of virtue"[42] and would agree that the organized Bar

> has a muc greater residual capacity for altruism - and for humanity - for the basic principles of decenty and equality before the law than it is fashionable for the young and zealous to admit. The entire profession must be put to the test. And one thing is for sure you can make their moral and professional abdication into a self fulfilling prophecy, if you try to abrogate to yourselves a monopoly on concern for equal justice for the poor.[43]

Most neighbourhood law offices in operation, in particular those which were used as a basis of comparison with judicare programmes, deal entirely with civil matters. In consequence the advantages perceived may not be transferable to criminal matters. It is probable that in respect to criminal matters the present Plan, if improved on the lines suggested in the previous chapters, would prove to be superior. If a neighbourhood law office was to concern itself with criminal cases it may come to resemble a public defender programme and although one Province, Quebec,[44] has decided to adopt such a programme, these programmes have been subject to protracted criticism over the years as not being a good solution.[45] Indeed, although the Neighbourhood Law Office in Winnipeg does handle some criminal matters and its lawyers act as duty counsel, the operators of the office have recently professed that lawyers in private practice are in a better position to carry out these functions.[46]

It is therefore suggested that in Alberta a Legal Aid system on the lines outlined above should be developed, i.e. a synthesis of the judicare and neighbourhood law office types of legal aid programme. Not only is such an approach gaining wider acceptance throughout this
47
country and throughout the world, it would bring this Province much closer to attaining equality before the law.

The discussion in this and the preceding chapters has been concerned with the provision of adequate legal services to the poor and disadvantaged. While this is a matter of the utmost concern, it is becoming apparent that another segment of the population may, because of the cost of legal services, be short of attaining equality before the law. As has been noted the A.L.A.P. admits that the "man of modest means" may not be able to afford certain legal services. This state of affairs, given as the reason for refusing legal aid in certain instances, would tend to suggest that not only are the poor denied an equal right to legal services because of the high costs involved, but also the person with an average income.

For this Province to attain real equality before the law, not only should legal services be freely available to the poor and disadvantaged, but also freely available to the rest of the population. Furthermore, if the "man of modest means" is able to afford adequate legal services, his "destitution" could no longer be given as a reason for refusing legal aid to those who need it. In the following chapter it is intended to examine the development of a new type of plan, i.e. the prepaid legal services plan, whose proponents believe can be an effective answer to this problem.

## IV. Footnotes to Chapter Six

1. For a history of legal aid in the United States and a discussion of the neighbourhood law office concept, see, Lowenstein and Waggoner Neighbourhood Law Offices: The New Wave in Legal Services for the Poor, (1966-67) 80 Harv. L. Rev. 805, and Johnson, The O.E.O. Legal Services Program (1968) 14 Catholic Lawyer, 99.

2. Gordley, Legal Aid: Modern Themes and Variations, Part Two: Variation on a Modern Theme. (1972) 24 Stan. L. Rev. 387 at 419.

3. The conceptual basis of the N.L.O. programme was an article by Cann and Cann, The War on Poverty: The Civilian Perspective, (1964) 73 Yale L.J. 1317, The legal basis is The Economic Opportunity Act, 1968, 42 U.S.C. s.2701-2981 (1964).

4. Silver, The Imminent Failure of Legal Services for The Poor: Why and How to Limit Caseloads, (1967) 46 J. Urban L. 217.

5. e.g. Lowry, Social Justice Through Law, (2ed. 1971) Taman, The Legal Services Controversy: An Examination of the Evidence, National Council on Welfare, Ottawa, (1971). Ewart, Why The N.L.O. (1972) 20 Chitty's L.J. 159. Robb, Alternate Legal Assistance Plans, (1968) 14 Catholic Lawyer, 127. Goodman and Feuillan, The Trouble With Judicare, 8 (1972) 58 Am. Bar. Assoc. J. 476. Brakel, The Trouble with Judicare Evaluations, (1972) 58 Am. Bar. Assoc. J. 704.

6. Taman, supra, n.5 at 43.

7. The pioneer in this respect is Manitoba, which is the only Province in Canada to have legislation which provides for the implementation of N.L.Os. The Legal Aid Services Society of Manitoba Act, S.M. 1971, c.76, s.19. For a description of the new Manitoba Legal Aid scheme see, Larsen, Poverty Law in Manitoba: The Beginning, (1972) Manitoba Bar News, 283. Nova Scotia and British Columbia are now considering such an integrated system.

8. Apart from Manitoba, where such offices exist in Canada they have been established in the community usually by way of special grants and as extensions of law clinics operated out of the Universities. In Alberta law students at the University of Alberta have established "Student Legal Services" which operates N.L.Os. in three poor areas of Edmonton. A description of the founding of "Student Legal Services" can be found in Laing and Koziack, The Student Legal Services Project, (1970) 8 Alta. L. Rev. 141. Descriptions of N.L.O.s in operation in other provinces are to be found amongst the following, Waddell, The Vancouver Community Legal Assistance Society, (1972) 30 Advocate, 23; Harcourt, Taking the Law to the People, (1970) 28 Advocate, 89; Fairbirn, Student Legal Aid Society, (1970) 4 Gazette, 140; Evart, supra, n. 5 at 44.

9. See e.g. Manitoba, Report of The Fact Finding Committee on Legal Aid, 23 (1971). A synthesis of both types of plan has also been suggested for the United States, see Pye and Cochran, Legal Aid; a Proposal (1969) 47 North Carolina L. Rev. 528. At least one

critic of judicare plans per se has suggested such a system is worthy of experimentation, Robb, supra, n.5, at 150.

10. See, Society of Labour Lawyers, Justice For All, London (1968). Society of Conservative Lawyers, Rough Justice, London (1968) Both reports were considered by the Government in the Report of the Advisory Committee on the Better Provision of Legal Advice and Assistance, Cmnd. 4249, (1970) which tentatively accepted the idea that the N.L.O.s were worth developing in England.

11. Zander, The Legal Profession and the Poor, (1969) 20 Northern Ireland L.Q. 109. The Society of Conservative Lawyers, supra, n.10, also pointed out in their report that

> For many people the idea of consulting a solicitor is alien, even repugnant. For some people solicitors represent a wholly unknown middle-class realm of life, to be avoided at all costs, and for others the idea of consulting a solicitor simply does not occur to them.

12. Cruickshank and Manson, Legal Services in London: An Empirical Study, (1972).

13. See infra, chapter Five.

14. id.

15. e.g. Lowry, supra, n.5, and Cruickshank and Manson, supra, n.12.

16. Ewart, supra, n. 5 at 160.

17. Manitoba, supra, n. 9 at 24. Also as Robb has pointed out

> Full-time lawyers can also become more familiar with the related needs of the impoverished and with the policies and personnel of numerous employment, housing, medical, social and welfare agencies, the services of which must be utilized effectively if the whole person is to be treated. Problems of the poor are seldom entirely legal; contemporaneous treatment of these related difficulties is frequently necessary in order to obtain maximum benefit from the Legal Services. Robb, supra, n. 5, at 134.

18. See Justice For all, supra, n. 10 at 73, for a catalogue of examples.

19. Robb, supra, n. 5 at 134.

20. See Chapter Five.

21. Robb, supra, n. 5 at 134.

22. Legal Aid Society of Alberta, Annual Report (1972).

23. Lowry, supra, n. 5 at 29.

24. Area Directors' Handbook, Legal Aid (Criminal), The Legal Aid Society of Alberta, July 1972.

25. Chapter 5, n. 21.

26. per D. Morris, past Director of the A.L.A.P.

27. The Law Society of Upper Canada, Community Legal Services Report, (1972)

28. See Chapter Three.

29. id.

30. Morris, Report on the Proceedings at the Neighbourhood Law Centre Workshop, sponsored by Legal Aid, Manitoba, March 2-3, 1973 (unpublished).

31. Handbook, supra, n. 24.

32. Morris, supra, n. 30.

33. A typical reaction can be found in Bethel and Walker, Et Tu Brute, (1965) I Tenn. Bar J. 11, where the writers said in reference to the growth in the number of N.L.O.s

> At this very moment the legal profession is clinging to the brink of the most serious threat ever posed to the independency and individuality of the profession.

34. Supra, n. 27.

35. id.

36. Lowenstein and Waggoner, supra, n. 1 at 815.

37. Lowry, supra, n. 5 at 69.

38. id.

39. Brakel, supra, n. 5 at 708, has expressed the opinion that

> There are now no grounds for conclusions that judicare is either better or worse, cheaper or more costly than staffed programs in either rural, urban, semi-urban, most rural or super-urban areas. The data to support these conclusions have not been gathered, the analysis has not yet begun.

40. Student Legal Services, supra, n. 8. It could be argued that the concept has been given tacit approval by the A.L.A.P. as it gives

some support to the operations of Student Legal Services. Indeed, the A.L.A.P. even provides the salary of the full time director of Student Legal Services. In view of this fact it is strange that the concept was not even considered in the Report and Recommendations of the Joint Committee on Legal Aid in Alberta (1970)

41. Manitoba, supra, n. 9 at 23.

42. Cahn and Cahn, Policy Approaches for the Delivery of Legal Services to the Poor, An address to the National Conference on Law and Poverty. Ottawa, 1971.

43. id.

44. A good description of the Legal Aid Plan in operation in Quebec can be found in Merricks, Legal Aid: Quebec's New Plan (1972) 122 New L.J. 853.

45. This was the well reasoned conclusion contained in the Report of the Joint Committee on Legal Aid in Ontario, 101-109 (1965). There views were endorsed in the Alberta report, supra, n. 40 at 27, the Manitoba report, supra, n. 9 at 19 and by the founder of the New Brunswick Legal Aid Plan, Aslin, Legal Aid in New Brunswick (1971) 2 Can. Bar Assoc. J. 3:23.

46. Morris, supra, n. 30.

47. Supra, n. 7, n. 9, and n. 10.

# CHAPTER SEVEN

## PREPAID LEGAL SERVICES

During the last few years there has been an increasing amount of interest on the subject of prepaid legal services, i.e. legal services provided through legal cost "insurance" plans comparable to health insurance plans. They are seen by many as an effective way of ensuring that legal services are more accessible to the population at large[1] without drastically changing, or threatening, the traditional mode of delivery of legal services. This interest, which has been most evident in the U.S.A., is now manifesting itself in Alberta and the rest of Canada,[2] and it is envisaged that they will come to play an ever increasing role in the delivery of legal services both in the U.S.A. and Canada.[3]

### I. The Nature of Prepaid Legal Services

Primarily, the aim of existing and envisaged plans is to provide legal services to that segment of the population which is "too poor to pay cash for a lawyer and too rich for legal aid".[4] This is generally considered to be those in the "middle income" group earning between $4,000 and $12,000 per annum,[5] people who have been referred to as the legal profession's "forgotten clients"[6]. It is felt that this segment of the population has an unmet need for legal services[7] and that they are afraid to utilize the services of a lawyer, as they feel the costs involved would be prohibitive. Prepaid legal service plans are therefore being mooted as a means of ensuring that these people can afford the cost of a lawyer and a fortiori meeting their unmet legal needs.

The American Bar Association (A.B.A.) has broadly defined a prepaid legal services plan as being "a program in which legal services

are rendered to large members of the public who are associated in groups rather than to individuals without such a group assocaition."[8] Admitting that such programmes have existed in a variety of different forms over the years the A.B.A. has decided to endorse a type of plan which allows the group member a free choice of lawyer within his community or in whatever locality the need for legal service arises.[9] They point out that "Most other legal service programs do not allow such free choice, but restrict the group member to the use of lawyers or law firms selected by the leadership of the group."[10]

The type of plan which the A.B.A. has endorsed has been termed an open panel plan, whereas plans which use a preselected lawyer have been termed closed panel plans. However, there is no necessary difference between the two in respect of how they are financed; the funds to provide for payment of legal fees in either case may come from the individual, the group or a third party, e.g. an employer, usually by way of regular monthly contributions. The older closed panel plans were usually restricted in the scope of legal services offered, often limited to job related matters, suspension, disciplinary proceedings, workmen's compensation, etc., but most of the prepaid plans now evolving "offer a wide range of services covering normally occuring personal legal problems: consumer difficulties, domestic problems and the like."[11]

Although the idea of prepaid legal "insurance", on the scale envisaged by the A.B.A. has been around since the early 1950s.[12] It is only in recent years that concrete studies have been made as to its feasibility. The most authoritative is a study, commissioned by the A.B.A., undertaken by a Professor Preble Stoltz[13] who concluded that the

concept held significant promise of value and "sufficient expectation of feasibility" to warrant carefully controlled experimentation. This prompted the A.B.A. to initiate two pilot programmes, one in Shreveport, Louisianna, the other in Los Angeles.[14] Both are administered by a non-profit corporation and in cooperation with the local Bar Associations and local labour unions. Although the results of these experiments have not been fully analyzed there is a consensus of opinion that they are proving very successful, at least for the lawyers involved.[15]

This has spurred many local Bar Associations into developing plans of their own, invariably of the "open panel" variety. No uniform plan seems to have developed. However, the scale of benefits under any particular plan depends entirely on what the members of a particular group can afford or are likely to need.[16] Although some people have come to a conclusion as to the ideal plan, it is too early for any detailed cost-benefit analysis to have been made of the different plans in operation and therefore it is impossible to say which type of plan is best in terms of service to their clients.

This wave of interest in prepaid legal services raises a number of questions which will be examined in this chapter: why has there been this upsurge of interest? are open panel plans preferable to closed panel plans? do they have a place in Alberta? if so, what are the implications of such plans for Alberta?

## II. The Growth of Prepaid Legal Services

Has this sudden interest been prompted by a genuine concern on the part of the legal profession that people should not be denied access to legal services merely because of their financial circumstances,

as was expressed with the growth of legal aid, or is it because of a more n[redacted]s reason, i.e. the profession is attracted by the money that can be [redacted]e from these plans? The medical profession has profited from the introduction of medicare plans across the continent, and there is ample reason to believe that the legal profession will profit from "legal-care", as prepaid plans are coming to be termed.[17] It is suggested that many lawyers, who have seen how successful medicare has been for the doctors, would now be willing to endorse "legalcare" as being a viable proposition.

Canadian interest in such plans has been prompted by the current activity in the U.S.A. where the first tentative plans have been imitated across the country by the majority of local Bar Associations who, if they have not already established some kind of plan are at least considering them. This "snowball" effect is manifesting itself in Canada also; successive Provinces are also establishing committees to examine such plans.[18] Indeed, it seems that because of this tremendous growth, the organized Bar feels duty bound to consider these plans, if only to reject a call for such plans by interested groups within their Province.

What prompted the initial interest in the U.S.A.? Stoltz argues[19] that a number of factors combined to cause this interest, the United States' Supreme Court decision in the case Gideon v. Wainwright[20] and related cases has compelled the provision of counsel at more kinds of criminal proceedings and at more stages of the criminal process.[21] On the civil side, the O.E.O. programme with its government financed neighbourhood law offices, which were started on an assumed need for

legal services by the poor,[22] has, according to Stoltz, stimulated interest in assessing the legal needs of the public generally and in devising new ways of meeting this need. There is no doubt that the O. offices have been filling a genuine need[23] and this has led to a comparable assumption that there is also an unfulfilled need for legal services by people of modest means.[24] In support of this assumption the A.B.A. has said that it "has long been aware that the middle 70% of our population is not being reached or served adequately by the legal profession."[25] Arguing that this is because

> the public fears the costs of legal services. They are frequently not aware of what problems are 'legal' and what lawyers can do to solve such problems. They seldom avail themselves of the counselling skills of the lawyer to plan for the future or to prevent future difficulty. Their contact with a lawyer occurs only when a crisis situation demands it.[26]

Stoltz, however, gives an additional and possibly more significant reason why the majority of the population do not utilize lawyers' services, a reason that the A.B.A. fails to mention, namely, "that the public profoundly distrusts the law and all its institutions."[27] Although he does go on to argue that if people are encouraged to go to lawyers under prepaid plans, this distrust will gradually disappear.

The A.B.A. hints at further reasons for the current interest of the legal profession in these plans, reasons which tend to give the lie to any claim to altruism on their part. One wonders why, when the A.B.A. has stated that it has "long been aware" that the majority of the population is not being served adequately by the legal profession, it has finally decided to try and rectify this situation. It is suggested that it may be no more than an attempt to prevent any spread of the more

traditional closed panel plans which they see as a threat to the established profession. Various local Bar Associations have been vitriolically attacking established closed panel plans for some time, as the author has noted,

> The debate began in the 1930s when the organized bar as part of its depression engendered campaign against the unauthorized practice of law, undertook to prohibit groups or organizations from furnishing lawyers' services to their individual members. The bar considered this to be the unlawful practice of law by lay organizations and the improper solicitation of legal business by the particular lawyer. [28]

However, in a series of cases, various local Bar Associations have had their "knuckles rapped" by the courts for trying to prevent these plans from operating. The courts articulated the principle that State restrictions on professional conduct that operate to impair or interfere with the constitutionally protected rights of citizens to take concerted action to obtain help with their individual legal problems, are justifiable only when genuinely necessary to prevent some real evil, demonstrable in terms of actual or substantial injury to the public.[29]

It would therefore appear that the organized Bar finding itself unable to combat this growing trend through the courts is now trying to protect itself by establishing, what is to them, a more acceptable alternative, i.e. open panel plans. The A.B.A. argues that the concept of free choice of lawyer is an important part of our legal tradition and is worth preserving.[30] They believe that " a lawyer must always remain independent, able to serve his client zealously without any interference from an organizational superstructure",[31] and that "a plan of prepaid legal services (open panel) is the only solution that will retain such values".[32] By promoting these plans they are able to stave off any

radical change in the way in which law is practiced, and thus placating the bulk of the profession.

These assertions of the A.B.A. have, as one writer has pointed out,[33] placed the A.B.A. in a rather paradoxical position. In 1965 the A.B.A. played a central role in the creation of the legal services programme of the O.E.O., and has since defended that programme from those who felt that the reform elements of the programme were either too controversial or too effective. Thus,

> In its support of the O.E.O. Legal Services Program, the A.B.A. has endorsed closed panel group legal services for those who cannot afford to pay at all. The poverty client does not receive his choice of lawyers. Yet the A.B.A. has opposed this approach if the client can pay something, even though without pooling funds with others he cannot pay enough to command equal services in the open market.
>
> This paradox signals some ambivalence about extending legal services; it reveals the opposing pulls of self interest and professional interest. It also reflects the traditional charity base of the organized bar's efforts to extend legal services - what cannot be paid for creates no ethical problems.[34]

Whilst not denying that these plans may have some merit, it is rather disconcerting to see that there are perhaps more reasons behind their implementation than those stated.

The A.B.A., as would the organized Bar in this Province,[35] wants to control any new plan that is introduced. They argue that only the organized bar can speak fairly on behalf of all lawyers without showing favouritism to any. They fear that private insurance companies may, in the future, establish their own independent prepaid plans, and that if they do not enter the field now "they may seriously compound their problems later in their role as enforcers of legal ethics."[36]

They argue that the main concern of a private insurance company must necessarily be to make money on their investment, and the profit motivation may sometimes cause conflict of interest with that of the public or the profession.[37] This therefore, is their stated reason for advocating that a non-profit corporation be the administering entity of any plan. It is interesting to note, however, that the B.C. Branch of the Canadian Bar Association (C.B.A.) does not rule out the possibility of using commercial insurers, particularly in regard to the initial expenses that will be incurred in establishing the plan, as they feel that "it would be very helpful to have significant financial backing in case expenditures outreach income as the plan gets underway".[38]

Although the question of financing, as the B.C. committee has pointed out, may be crucial in the early days of any plan, I would disagree that one should look to commercial insurers for support, the administration of justice comes under the jurisdiction of the Provincial Government and if these plans are intended to achieve equality in the judicial system, then it is the government, not commerce, who should be asked to support such plans.

One is therefore left with the impression that this sudden interest and growth in prepaid legal services, at least in the U.S.A. is not in response to a changing consciousness on the part of the legal profession as to the legal needs of the public, but rather in response to the growth of the more traditional closed panel plans and the interest that the private insurance companies are beginning to show in such plans. A cynical conclusion could be that the growth of these plans is no more than an exercise in self preservation on the part of the organized Bar with the chance to make a profit at the same time.

As has been stated, local Bar Associations across the U.S.A. have been "stampeded" into establishing prepaid plans and it appears that the same phenonemum is taking place here. The B.C. Branch of the C.B.A. has tentatively proposed that a plan be set up in that Province[39] and in Alberta a special committee of the Law Society has been set up to examine the concept.

The question arises as to what kind of plan would be best for Alberta. The fundamental question that will have to be decided upon is what is the more desirable, a closed panel or open panel plan. In the U.S.A. there is a continuing debate as to which is the more preferable; labour unions and the organized bar are both in agreement that for these plans to be successful they should work closely together[40] but they often disagree as to which type of plan is the better.[41] The arguments used by both sides are very similar to those that are used in the debates on the relative merits of Judicare (open panel) as opposed to Neighbourhood Law Offices and vice versa, as to which is the better plan for meeting the legal needs of the poor.[42]

III. Open Panel v. Closed Panel Plans

Some of the arguments in favour of open and in favour of closed panels[43] are listed below, These are the more common arguments that various committees have had to consider before they have endorsed one plan or the other, and with which the committee in Alberta will undoubtedly have to familiarize themselves.

1. In favour of open panel.

(i) The organized bar in the U.S.A. has argued that an independently selected lawyer is in a better position

to serve his client, it also avoids many ethical questions; they feel that freedom of choice preserves a lawyer's independence and avoids lay interference between the lawyer and his client which is contrary to many Codes of Ethics.[44]

(ii) A sponsoring group takes on an unnecessary added responsibility for the quality and efficiency of the lawyer's work when it appoints him and pays him a retainer and requires the member to see that particular lawyer.[45]

(iii) Under an open panel plan members who feel that they are being deprived of their rights as members of the sponsoring group could see advice from an independent lawyer. This would not be available with a closed panel because members would be inhibited from seeking such advice.[46]

(iv) The selection of a lawyer or a panel or a firm of lawyers for the closed panel by someone other than the client is fraught with all sorts of problems and implications. Payments for legal services to a member of a closed panel may also be suspect as to impropriety and reasonableness.[47]

(v) The regulation of lawyers and their ethics is the duty of the Bar Associations and Courts, and other groups are not ready to take on this job. As the A.B.A. has said,

> The provision of legal services no matter in what form will always be under the scrutiny of the bar and its disciplinary procedures. The protection of the public interest is the paramount controlling force in such surveillance.[48]

2. In favour of closed panel.

(i) It has been argued that a free choice of lawyer is too costly, that it serves to perpetuate problems, causing a failure to deliver needed services to large groups,[49] whereas sponsoring groups can hire their own staff lawyers on a salary arrangement, each expert in his specialty, with ample non-professional assistance, and can guarantee services by lawyers who are generally sympathetic with their clients' interests. As one labour union lawyer has said,

> In response to the bar's frequent claim that an individual should be entitled to make his own selection of an attorney, Unions can be expected to reply that the problems surrounding the selection of an attorney are so difficult that the union members generally would prefer to be represented lawyers whose competence and qualifications have been ascertained by their unions.[50]

(ii) Open panels could create doubt as to the funding of the programme. Assuming that the programme is funded by anticipated membership dues and payments made to lawyers for services rendered in the programme are exhausted, what will the effect be on lawyers, knowing that there are no funds with which to pay for their services? Bearing in mind that lawyers will always have the privilege of refusing to accept a client, would the lack of funds in the programme influence lawyers to reject members sent to them by the plan?[51]

(iii) Is the open panel the most economical and efficient method of delivering legal services? A member of a plan may offer a lawyer of his choice a matter in which the lawyer

has had no prior extensive experience. It follows that wh[illegible]ces the lawyer is required to render may not [illegible] effective nor would the time spent by this [illegible] as minimal as it would be had it been rendered by one who specializes in that particular field. As a consequence the legal costs in handling that particular case would obviously exceed that when handled by a [illegible] could be argued that an open panel of lawyers could be classified according to specialty but in doing so, in effect, it could be said that the open panel had been partially closed.

(iv) As to charges for services, it is argued that a closed panel would provide some degree of regulation and result in less costly charges.[52]

Thus, in the main, the arguments in favour of open panel are predominantly based on ethical considerations whereas arguments as to practicalities, e.g. as to cost and efficiency, are used by proponents of closed panel plans. One wonders, however, how the organized bar can ethically argue in favour of a plan which generates needless expenses, which have to be borne by the participating members of that plan, when there is a cheaper and perhaps more efficient alternative available.

## IV. Prepaid Legal Services in Alberta?

It is highly likely that in Alberta the type of plan which the organized Bar in the Province would only be willing to endorse would be an open panel plan. Although this is only conjecture it is well supported by the experiences with legal aid in this Province. As has been said,

the Alberta Legal Aid Plan is a modified judicare type of plan, which though not giving legal aid recipients a free choice of lawyer (except in serious criminal cases)[53] aims at spreading legal aid cases across the whole of the profession.[54] Indeed, this is one of the few Provinces which has not even officially considered the concept of the neighbourhood law office.[55]

Despite this conjecture I would suggest that the approach that is being taken by the B.C. Branch of the C.B.A. would be an intelligent one to emulate in this Province. In their Interim Report on Prepaid Legal Services they have recommended that

> the type of plan, the organizational structure of the carrier and the benefits offered are all matters to be settled by the different groups which will be setting up or joining prepaid legal service plans, e.g. there may well be groups for whom the most desirable feature of a plan is the knowledge that the carrier has selected a panel of competent and fair lawyers; other more sophisticated groups may feel that they would prefer a freer choice of lawyers.[56]

By adopting this kind of approach it is suggested that a comparative analysis of the different types of plans could be made, in a local setting.

But are such plans desirable in Alberta? If they do make legal services more readily available to those who would ordinarily be unable to afford a lawyer then it is submitted that they would be desirable. They could perform a useful preventative function by enabling people to seek advice on their legal problems at an early stage, future litigation, or further difficulties that could arise, could be prevented. However, these plans would not help people identify problems as being legal problems[57] even though one of the reasons for establishing these plans is that people are not utilizing lawyers' services

because of this "identification" problem.[58] Their only real value would therefore be to reduce a person's reticence in consulting a lawyer by reducing their fear of the costs involved.

What are the implications for Alberta if such plans were established? As they slightly detract from the traditional practice of law, closed panel plans in particular, the support of the Law Society would have to be gained. I do not think that it would be desirable for these plans to have to face the spectre of litigation between their administrators and the Law Society, as happened in the U.S.A. The Law Society's Unauthorized Practice Committee would have to make a ruling that any particular plan did not contravene their Code of Ethics and that they did not constitute the unauthorized practice of law.[59]

Certain legal problems have arisen in the U.S.A. vis à vis prepaid legal service plans[60], but because they are problems which have arisen because of law which is peculiar to the U.S.A. they do not appear to be relevant when these plans are looked at in an Albertan context. This would lead one to suppose that there are not that many legal obstacles to establishing such plans in Alberta. One of the major questions that has arisen in the U.S.A., which may be of some relevance to Alberta, has been whether these plans are to be considered a form of insurance, and therefore regulated by a State's insurance regulations under the auspices of the State Insurance Commissioner. The A.B.A. argues that whether it is insurance depends on the type of plan[61], but a survey made of individual State Insurance Commissioners has indicated that there will be differing interpretations of the various State laws in reference to identical plans of service.[62] The

A.B.A. is against labelling these plans as insurance, for they say that it "invites regulation and additional burdens incident thereto".[63] And "in the present infancy of prepaid legal services such additional burdens might well inhibit the development of these untried systems."[64] These insurance regulations are, however, aimed at protecting the public, and I do not see why the proponents of any plan in Alberta should argue against a ruling by the Superintendent of Insurance in this Province that such plans should be governed by the Alberta Insurance Act.[65] It would seem, however, that this is a question that can only be decided after the blueprint of any particular plan has been drawn up.

There may be other legal difficulties peculiar to a particular variety of plan. For example, if, as is happening in the U.S.A. the contributions to the plan are paid by a member's employer, these contributions would form a part of that member's income for income tax purposes by virtue of s.6 of the Income Tax Act.[66] I would suggest that if these plans proliferate, it would save many complications and perhaps bad feelings, if employer's contributions to a prepaid plan on behalf of an employee, be excluded from that employee's taxable income, just as contributions to accident insurance and private health insurance plans are treated.[67] Indeed, the A.B.A. has noted that this inequality has thwarted at least one Bar sponsored plan of prepaid legal services.[68]

Specific legal problems, as has been said, can only be properly investigated when a blueprint of any particular plan has been drawn up. There are, however, wider implications to such plans. There is the possibility that the "floodgates of litigation" may be opened, although.

this has not been the case in Shreveport.[69] Even if this does happen, if the litigation is legitimate, it would only go to show how inadequately the legal profession had been serving the public. To criticize any plan on this basis would be to criticize the fundamental concept of equal justice for all.

These sort of plans should not be looked at in isolation but rather in relation to the whole question of the delivery of legal services. If these plans are established it would mean that there would be a three tier system of providing legal services in this Province: through legal aid, through prepaid plans, and through those who pay for a lawyer's services through their own resources. It could well be that the kind of "service" that a person will receive will be determined by the kind of "system" through which he is obtaining the service. Lawyers would have to guard against and be warned against thus categorizing their clients.

To counter this sort of danger it has been suggested that it might be worthwhile considering the establishing of a prepaid plan that is universal in its coverage, i.e. any legal service to any individual should be covered by one province wide plan similar to the Alberta Health Care Insurance Plan.[70] The contributions of those unable to pay them would be theoretically paid for by the Province. The proponents of such plans have drawn an analogy between health services and legal services[71] and argue that both should be subject to such unified coverage. However, more forceful writers have shown this analogy to be false,[72] and it is doubtful whether the public would be responsive to such a scheme, particularly at this early stage in the development of prepaid

plans. It is therefore probable that any plan in Alberta would have to complement rather than absorb the present legal aid plan and the wealthier clients of the private practitioner.

Thus on the whole it is possible and probably desirable that some kind of prepaid legal services plan be established in Alberta. By bringing more people within reach of legal services they can bring this Province closer to attaining equality before the law. Initially, such a plan should only be on the scale of a pilot project, so that the usefulness of such a plan could be evaluated in relation to the conditions that exist in Alberta. However, the legal profession should be made fully aware that this kind of plan is not intended to be just for their benefit. If the legal profession were to treat such a plan as a full employment programme for lawyers, as could easily happen, public distrust could discredit such a plan and ruin any chance it had of success.

## V. Footnotes to Chapter Seven

1. The extent of this interest is evidenced by the extensive bibliography on the subject that can be found in the American Bar Association's Revised Handbook on Prepaid Legal Services, 331-342 (1972)

2. In Alberta, as in Ontario, the Law Society has established a Committee to examine the subject. In British Columbia he Canadian Bar Association (B.C. Branch) is also studying the feasibility of such plans, and in their Interim Report on Prepaid Legal Services for British Columbia (January, 1973) they have tentatively suggested that such plans be established in that Province.

3. Smethurst, Prepaid Legal Services, (1972) 20 Chitty's L.J. 303.

4. Sydney L. Robins, Treasurer of the Law Society of Upper Canada, Edmonton Journal, November 6, 1972 at 5.

5. hurst, supra, n. 3 at 303.

6. Meserve, Our Forgotten Client: The Average American, (1971) 57 Am. Bar Assoc. J. 1092.

7. Transcripts of Proceedings, National Conference on Prepaid Legal Services, Washington D.C. April, 1972. American Bar Association.

8. Revised Handbook, supra, n. 1 at 1.

9. id.

10. id.

11. id. Schemes similar to the closed panel type of plans have also been operating in England for some years where many English unions offer free legal services to their members for job related matters. For a description of these English plans see Lewis and Lata, Union Legal Services, (1973) 123 New L.J. 386. Canadian unions appear to have been completely lacking in this regard and are only now showing interest in the idea.

12. Brown, Legal Cost Insurance, (1952) Insurance L.J. 475, is generally credited with being the originator of the idea.

13. Stoltz, Insurance for Legal Services: A Preliminary Study of Feasibility, (1968) U. Chicago L. Rev. 417.

14. A comparative analysis of these and other plans can be found in the A.B.A.'s Revised Handbook, supra, n. 1 at 20. A good description of the Shreveport plan can also be found in Marks, The Shreveport Prepaid Legal Services Plan, (1971) 36 Unauthorized Practice News, (March).

37. id.

38. Canadian Bar Association (B.C. Branch), Interim Report on Prepaid Legal Servi[illegible]s for British Columbia, 17 (January, 1973).

39. id.

40. Bernstein, [illegible]l Services: The Bar and the Unions, (1972) 58 Am. Bar Assoc. J. [illegible], and the Revised Handbook, supra, n. 1 at 4.

41. The Pros and Cons of Open and Closed Panels, supra, n. 7, 172-214.

42. See e.g. citations in n.5 of Chapter Six.

43. See supra, n. 41 for an exhaustive discussion of these arguments.

44. Revised Handbook, supra, n. 1 at 4.

45. Ells, The Primrose Path for Lawyers, (1972) 36 Unauthorized Practice News, 1 (June).

46. id.at 4.

47. id.

48. Revised Handbook, supra, n. 1 at 4[illegible].

49. Supra, n. 41 at 180.

50. Supra, n. 40 at 475.

51. Supra, n. 41 at 180.

52. id.

53. Appendix VIII, Clause 5(2).

54. Area Direct[illegible]' Handbook on Legal Aid (Criminal), The Legal Aid Society of [illegible]erta (1972).

55. Alberta, Report and Recommendations of the Joint Committee on Legal Aid, (1970) - makes no mention of N.L.Os. See Chapter Six, n. 42.

56. British Columbia, supra, n. 38 at 13.

57. Stoltz, supra, n. 13 at 422.

58. Revised Handbook, supra, n. 1 at 4.

59. The Rules of the Law Society of Alberta, Rule 35, (March, 1971)

60. See Politz, Prepaid Legal Services - The Shreveport Plan: The

15. Smethurst, supra, n. 3 at 304.

16. Revised Handbook, supra, n. 1 at 20.

17. Vancouver Sun, December 19th, 1972 at 1.

18. Apart from those provinces - supra, n. 2, there has also been a call for such plans in Manitoba - Smethurst, supra, n. 3 at 305.

19. Stoltz, supra, n. 13 at 419.

20. 372 U.S. 335 (1963).

21. e.g. Escobedo v. Illinois, 378 U.S. 478 (1964) and Miranda v. Arizona, 348 U.S. 436 (1966)

22. Cahn and Cahn, The War on Poverty: A Civilian Perspective (1964) 73 Yale L.J. 1317. See generally Chapter Six for a discussion of the N.L.O. concept.

23. See e.g. Lowry, Social Justice Through Law, 8-27 (2ed. 1971).

24. Stoltz, supra, n. 13 at 420.

25. Revised Handbook, supra, n. 1 at 4.

26. id.

27. Stoltz, supra, n. 13 at 420.

28. Christenson, Regulating Group Legal Services: Who is being Protected against What and Why? (1969) 11 Arizona L. Rev. 229.

29. See e.g. N.A.A.C.P. v. Button, 371 U.S. 415(1963), Brotherhood of Railroad Trainmen v. Virginia, 377 U.S. 1 (1964), United Mine Workers of America District 12 v. Illinois State Bar Association, 401 U.S. 576 (1971).

30. Revised Handbook, supra, n.1 at 5.

31. id at 2.

32. id. at 5.

33. Marks et al, The Lawyer, the Public and Professional Responsibility, 186 (1972)

34. id.

35. c.f. The Law Society's Control of the A.L.A.P., see infra Chapter Three.

36. Revised Handbook, supra, n. 1 at 4.

Long Sought Answer? (1971) Trial Magazine, March-April, for a catalogue of these legal problems.

61. Revised Handbook, supra, n. 1 at 44.

62. Van Pelt, Prepaid Legal Services: Regulation by State Insurance Departments, supra, n. 7 at 143.

63. Revised Handbook, supra, n. 1 at 44.

64. id.

65. R.S.A. 1955, c. 159.

66. R.S.C. 1971, c.63.

67. id. at s.6(1)(a).

68. Revised Handbook, supra, n. 1 at 46.

69. Smethurst, supra, n. 3 at 304.

70. Pincus, Alternative Approaches: General Remarks, supra, n. 7 at 291.

71. id. at 292.

72. See e.g., Stoltz, supra, n. 13 at 423, and Abel-Smith and Stevens, In Search of Justice, 258-262 (1968).

# CONCLUSION

In the introduction of this thesis it was stated that because of the very nature of the judicial system, legal aid was an essential facet of the concept of equality before the law. Furthermore, it was suggested that for a legal aid plan to be fully effective in working towards achieving equality before the law it would have to provide the full range of services that lawyers presently provide to paying clients and should carry no charitable overtones.

It has been shown that the A.L.A.P., by its restrictive coverage and quasi-charitable nature, can only partially achieve this end. It has been suggested that a restructuring of the A.L.A.P., a widening of its coverage, the use of duty counsel, and the implementation of N.L.Os. and a prepaid legal services plan, would bring this Province much closer to achieving equality before the law. If such ideas were implemented there would, of necessity, be an increased use of lawyers, and it is assumed that there is, or will be, enough legal manpower to accommodate this increased use.

There has, however, been an amount of pessimistic conjecture on the likely effects of the extended use of legal aid and the increased use of lawyers, which is worthy of consideration. One Canadian author, Professor Mewett,[1] has expressed the fear that there will be more adjournments, more jury trials, more not guilty pleas and more appeals in criminal cases, which could disrupt the already overworked and inadequate courts. There is little evidence that this fear will be realized. Duty counsel may well be able to expedite cases by giving advice to defendants with little chance of acquittal who otherwise

might have had cases adjourned unnecessarily. There may be some slow down in the Provincial Courts, as the Bench and the Bar would be taking greater care in the disposition of cases, but this would be a salutary effect and one which would be in the spirit of legal aid. Even if Mewett's fears were realized it is doubtful whether it would be as apocalyptic as he would have us believe. It would only show that the court structure, which is a Nineteenth Century structure, is in need of expansion to make it a truly Twentieth Century structure.

On a philosophical level Mewett is even more pessimistic. He observes that our criminal law and procedure with its protective and exclusionary rules of evidence, have been "geared to the concept of the criminal as a lone individual, not very intelligent, a member of a sub-group, pitted against the forces of the State"[2] He argues that if we have a system whereby everyone is legally aided and properly defended there may be a change in attitude towards the defenceless man on trial, and that we may have to take "a long, close look" at the whole adversary system and its applicability to criminal cases.[3] He presents the spectre of civil liberties running wild, with many persons being found not guilty in spite of their having committed a criminal act. He concludes that the wider use of legal counsel will demonstrate "very shortly hitherto unappreciated defects in our substantive law, procedural rules and law of evidence"[3] I fail to see, however, why this should be any cause for concern; if there are defects which will be highlighted by legal aid, then legal aid will be performing a useful service in pointing the way to reform.

An American author who already questions the efficacy of the

adversary system, Professor Blumberg,[4] is equally pessimistic about the effects of legal aid, but for different reasons. He argues that the present preoccupation with "due process" of law sometimes leads to only ional increases in protection and that the effects are formalistic rather than substantive. He suggests that the wider use of legal counsel makes the adversary system more pervasive, but that the adversary system itself is not conducive to greater protection, as it simply perpetuates a system which is "compromised and modified and (is) inappropriate in terms of values of maximum protection and efficiency that are being sought".[5] He believes that

> ... more libertarian rules will tend to produce the rather ironic end result of augmenting the existing organizational arrangements, enriching court organizations with more personnel and elaborate structure, which in turn will serve to maximize organizational goals of efficiency and production. Thus, many defendants will possess an even more sophisticated apparatus for processing them toward a guilty plea." 6

His thesis is that defence lawyers are playing out a char that he believes the criminal process to be, and that instead of extending the use of counsel, which he believes will not mean that the protecti n of "due process" will have any more meaning than before, we should aim to develop a more just system for administrating criminal justice.[8]

Other authors have also suggested that an increased use of lawyers is not the panacea for curing the ills that they believe plague the machinery of justice.[9] Of significance are the radical ideas of Wexler.[10] Wexler forcefully argues against increasing the population's dependency on lawyers. He believes that, for poor people at least, the legal system is useless and does not have the capability to assist them. He argues that the laws are either inadequate in assisting poor people or

are slanted against them,[11] and that no more is done by lawyers than poor people could be taught to do for themselves[12]. He feels that the "proper job of a poor people's lawyer is helping poor people organize themselves to change things so that no one is poor, or (less radically) so that poverty does not entail misery".[13] However, he is pessimistic about the legal profession's willingness to accept such ideas as it has "so much ego invested" in its skills, and believes that reform will have to come from outside the profession.[14]

The ideas of Wexler, Mewett and Blumberg could be considered extreme or even fanciful but they at least show how legal aid is acting, and will continue to act, as a catalyst, prompting a re-examination of the present judicial system and its attendant institutions. It means that increasing credence will be given to such views. Such authors have shown the judicial system to be far from perfect, but as it is presently constituted, it is essential that legal aid be a part of that system. Improving the judicial system will be an evolutionary process and legal aid is the first step in that process, giving the system some semblance of equality before the law.

The next step is a substantive revision of the law to reduce the public need for legal services. This is now considered to be equally as important as seeing to it that lawyers are provided for those who need them.[15] This is the direction in which the legal profession and the rest of society should now be heading.

## Footnotes to Conclusion

1. Mewett, Legal Aid, (1967) 15 Chitty's L.J. 153.
2. id. at 154.
3. id.
4. Blumberg, Covert Contingencies in the Right to the Assistance of Counsel, (1967) 20 Vanderbilt L.Rev. 581.
5. id. at 605.
6. id.
7. id. at 589.
8. id. at 605.
9. For a sceptical assessment of legal aid from the point of view of a classical economist see Hazard, Rationing Justice (1965) 8 Journal of Law and Economics, October at 1.
10. Wexler, Practicing Law for Poor People, (1970) 79 Yale L.J. 1049.
11. id at 1054.
12. id. at 1055.
13. id. at 1053.
14. id. at 1062.
15. Stoltz, Transcripts of Proceedings, American Bar Association National Conference on Prepaid Legal Services, Washington, D.C. 138 (April, 1972).

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APPENDIX I

# *The Legal Aid Society of Alberta*

## APPLICATION

**INSTRUCTIONS to APPLICANT:**

1. Fill out this form, sign it and give it to the Secretary of the local Legal Aid Committee. Make sure you also fill out part 2 "STATEMENT OF ASSETS AND INCOME" attached. If in custody, give completed forms to the police or interviewing lawyer.
2. If you are found eligible, a lawyer will be assigned to you promptly, but on your next court appearance, advise the Judge that you have applied for Legal Aid and ask for a remand or adjournment.

FULL NAME _____ DATE OF BIRTH _____ AGE _____
PRESENT ADDRESS _____ TELEPHONE _____
PERMANENT OR USUAL ADDRESS _____ TELEPHONE _____

1. I hereby apply for Legal Aid for the following purpose:
(if criminal, state nature of offence or section of Criminal Code or Statute under which charged)
_____
_____
_____
_____
_____
_____
_____
_____

2. A. I am in custody at _____
(or)
B. I may be contacted at _____ Tel. No. _____

3. I require Legal Aid as I am financially unable to pay for the services of a Lawyer.

4. If you have consulted a lawyer about this matter recently, give his name.

5. Have you previously had Legal Aid? Yes ☐ No ☐ If so when? _____ where? _____

6. A. Date of Next Appearance _____ B. Place _____
C. Time _____ D. Purpose: Election ☐ Plea ☐ Preliminary Hearing ☐ Trial ☐ Other _____

7. Waiver – In the event that a solicitor is assigned to me under the provisions of the Alberta Legal Aid Plan, I hereby waive any legal professional privilege which I have arising out of any communications passing between the said solicitor and myself, or between the said solicitor and any other person or persons, or between myself and any other person or persons for the sole purpose of permitting the Alberta Legal Aid Plan and those persons participating in its operation to assess the merits of this application or any subsequent application which I may make for legal assistance under the Alberta Legal Aid Plan.

8. I understand that I may be required to contribute to the cost of Legal Aid or to repay the Alberta Legal Aid Plan for any money expended on my behalf.

I HEREBY CERTIFY THAT THE ABOVE ANSWERS AND STATEMENTS ARE TRUE AND ACCURATE.

_____ Date

_____ Signature of Applicant

FOR OFFICE USE ONLY

APPLICATION GRANTED ☐ COUNSEL ASSIGNED _____

APPLICATION REFERRED ☐ TO _____

APPLICATION REFUSED ☐ _____

_____ DATE

_____ INTERVIEWER'S SIGNATURE

APPENDIX II

*The Legal Aid Society of Alberta*

## STATEMENT OF ASSETS AND INCOME

FULL NAME _____ DATE OF BIRTH _____ AGE ____
PRESENT ADDRESS _____ TELEPHONE _____
PERMANENT OR USUAL ADDRESS _____ TELEPHONE _____

1. MARITAL STATUS: ☐ Single ☐ Divorced ☐ Common Law
   ☐ Married ☐ Separated ☐ Widow(er)

2. DEPENDANTS: ☐ No Dependants ☐ Wife or husband (a) Number of Children
   (b) Ages of Children _____ (c) Are you actually supporting children? _____ Wife? _____

3. DETAILS OF EMPLOYMENT:
   (a) Occupation _____ (b) Name of Employer _____
   (c) Rate of Pay $ _____ ☐ Monthly ☐ Weekly ☐ Hourly
   (d) Approximate net (take-home) monthly income $ _____
   (e) If not working, give date you last worked _____ Rate of Pay $ _____
   Previous Employer _____
   (f) Total earnings in past 12 months $ _____
   (g) If you are the subject of a criminal charge, and in custody, is your job still available to you if released on bail?
   ☐ Yes ☐ No ☐ Not Applicable
   (h) Other Income (specify) _____ $ _____
   (Unemployment Insurance, Family Allowance, etc.)
   (i) If on Welfare, give name of Social Worker _____ Telephone No. _____

4. ASSETS AND DEBTS:
   (a) Cash on hand $ _____ (b) Account in bank or elsewhere $ _____
   (b) Car _____ Value $ _____ (d) Furniture ☐ Yes ☐ No Value $ _____
   (description, year & make)
   (e) Other assets (motorbike, musical instruments, etc.) _____
   Value $ _____
   (f) Real Estate (land, house, etc.) $ _____ Encumbrances (mortgage etc.) $ _____
   (market value)
   (g) Monthly Rent $ _____ OR: If buying monthly payment $ _____
   (h) Debts (name of creditors & amount owing) _____ $ _____
   _____ $ _____ _____ $ _____
   _____ $ _____ _____ $ _____

(OVER)

5. FINANCIAL CIRCUMSTANCES OF FAMILY AND FRIENDS:

(a) Name of Parent(s) _____ (b) Occupation _____

(c) Employer _____ (d) Income _____

(e) Assets (Specify) _____

(f) Name & Address of Husband (Wife) - Specify _____

(g) Occupation of Husband (Wife) _____ (h) Income _____

(i) Husband's (Wife's) Employer _____ ☐ Not Working

(j) Assets of Husband (Wife) - Specify _____

(k) Do you have any other friends or relatives who have the financial means to assist you? ☐ Yes ☐ No

If 'yes' give name and address and relationship _____

(l) Do you live with parents? ☐ Yes ☐ No

6. DETAILS OF BAIL: (Where applicable) ☐ Not Applicable

(a) Are you free on bail or own recognizance? ☐ Yes ☐ No

(b) Type of Bail: ☐ Own recognizance ☐ Cash ☐ Property

(c) Amount of bail $ _____ (d) If cash bail, where is the bail receipt? _____

(e) Where did you obtain the money? _____

(f) If property bail, give name and address of person who posted bail _____

7. I do not have sufficient means to retain a lawyer by myself or with the assistance of my friends and family.

8. I do not have any income or assets other than those mentioned in this statement.

9. I understand that I may be required to pay all or part of the legal fees incurred on my behalf, or to re-pay the Alberta Legal Aid Plan from my future earnings.

DECLARATION:

I declare that the foregoing information is true and correct, and I make this statement with intent that the information should be relied upon with respect to my financial condition or means or ability to pay for legal services and to induce the Alberta Legal Aid Plan to appoint a lawyer for me and to pay his fee.

Date _____ Signature _____

# APPENDIX III

Form 4

## Alberta Legal Aid Plan

## LEGAL AID CERTIFICATE

To be completed by (1) Interviewer in Criminal Matters) and forwarded to
(2) Committee in Civil Matters) assigned lawyer

INSTRUCTIONS TO ASSIGNED LAWYER AND CASE SHEET

NAME: ..... AGE: CASE NO.:

CIVIL PROBLEM:

CRIMINAL CHARGE:

In Custody at: ..... or

On Bail, contact at: ..... Telephone .....

Appearing next on the ..... day of ....., 19 .....

at ..... o'clock M.

before: ..... (Justice or Judge) in ..... (Court and Location)

Dear Mr.

The above named has been found eligible for Legal Aid and you are assigned as his Counsel. After final disposition of the case, please complete the lower part of this form and return the entire form to the Secretary, Legal Aid Committee, Court House, together with your account, in duplicate as per the approved tariff.

Yours truly,

Date ..... Member, Legal Aid Committee .....

REPORT OF ASSIGNED LAWYER

The above named was represented by myself, (or by Mr. )

| CRIMINAL CASE | CIVIL CASE |
|---|---|
| Date of Appearance(s)<br>Plea ..... Acquitted<br>Charge(s) Withdrawn<br>Convicted of Original Charge(s)<br>Convicted of Other Charge(s)<br>State Particulars<br><br>SENTENCE:<br>APPEAL: If Applicant wishes to appeal, do you recommend? Yes No<br>REMARKS: | Please give brief report on conclusion of proceedings as to disposition: (If insufficient space send covering letter). |

Date ..... Signature of Assigned Lawyer .....

APPENDIX IV

Form 5

# Alberta Legal Aid Plan

## REFERRAL LETTER

Legal Aid Office
Court House
, Alberta

TO:

(name, address, telephone of lawyer)

RE:

(Name of Applicant)

The applicant has been given your name, address, and telephone number, and has been instructed to arrange an appointment with you to discuss his legal problem.

The apparent nature of the problem is:

The Applicant is apparently eligible for legal aid and has been advised that you may charge an interview fee of $5.00. Upon completion of the interview, you should complete and return the enclosed Form 6 or 6a, REPORT TO THE LEGAL AID COMMITTEE.

THIS IS NOT A LEGAL AID CERTIFICATE. The Legal Aid Committee must still decide, based on your report and other considerations, whether a Certificate will be issued. Legal services performed by you will be paid for by the Legal Aid Plan only if legal aid is approved, and a Legal Aid Certificate issued.

Your name has been chosen either because of some previous contact with the applicant on the matter in question, or because your turn has come around on the roster of lawyers on the active practising list maintained by the Law Society of Alberta.

Yours truly,

DATE

SECRETARY, LEGAL AID COMMITTEE

APPENDIX V

Form 6a

# Alberta Legal Aid Plan

## REPORT TO LEGAL AID COMMITTEE

INSTRUCTIONS: To be completed by the Interviewing Solicitor and sent to The Legal Aid Committee, Court House.

1. Name of Applicant .....

   Age Address .....

2. The nature of the problem is as follows: (State briefly and attach copies of any relevant documents). If space insufficient, use reverse side.

3. The appointment of a Solicitor is (a) recommended ..... (b) not recommended ..... (Briefly state reasons).

4. If legal proceedings are taken, is the proposed defendant in a position to pay costs?

5. If any legal proceedings have been commenced, give a brief summary and indicate the present standing of the matter.

6. From your own assessment of the applicant, do you think that he can afford to contribute, either now or in the foreseeable future, to the costs of the proposed legal aid?

7. Was the applicant able to pay the $5.00 interview fee?

8. (a) I, or ..... of my office, will act in this matter.
   (b) We decline to act for the following reasons:

.....
DATE

.....
SIGNATURE OF INTERVIEWING SOLICITOR

.....
NAME OF INTERVIEWING SOLICITOR
(please print)

APPENDIX VI

Form 7

# Alberta Legal Aid Plan

## APPLICATION FOR APPEAL

To be completed only by persons seeking Legal Aid for Appeal.

INSTRUCTIONS TO APPLICANT

1. Fill out this form.
2. Hand it to Gaoler.
3. Await interview by Committee. If you are found to be eligible, a lawyer will be assigned to you at once.

NAME: _____

AGE: _____

PRESENT ADDRESS: _____

_____

OCCUPATION: _____

I was convicted by Mr. Justice/Judge/Magistrate _____

_____, at _____

on _____, on the following charge(s):

I was sentenced to _____

My lawyer at trial was Mr. _____

He (was) (was not) appointed under Legal Aid.

- OR -

I did not have a lawyer at my trial.
I require Legal Aid in connection with an Appeal from (conviction) or (sentence only) or (conviction and sentence).
I attach Statutory Declaration.

_____ _____

Date Signature

A.G. 997
V. 1207

PLEASE PRINT NAME CLEARLY BELOW

APPENDIX VII

THE LEGAL PROFESSION ACT , R.S.A. 1970 c.65, s.4.

4.(1) Subject to the approval of the Lieutenant Governor in Council, the Attorney General and the Society may enter into an agreement respecting the operation by the Society of a plan to provide legal aid to persons in need thereof in civil matters or criminal matters or both.

(2) An agreement under this section may provide for the following:

(a) the rules respecting the operation of the plan to be made by the Benchers pursuant to section 7, subsection (2), clause (h);

(b) the establishment of a board, committee or other body to administer the plan consisting of persons nominated by the Attorney General and by the Benchers;

(c) the payment by the Government to the Society of moneys for the purpose of the plan to be paid from funds appropriated by the legislature for that purpose;

(d) the appointment by the Benchers of a director or chief executive officer for the plan;

(e) any other matters pertaining to the establishment or operation of the plan.

# APPENDIX VIII

## FEDERAL-PROVINCIAL AGREEMENT ON CRIMINAL LEGAL AID

MEMORANDUM OF AGREEMENT RESPECTING LEGAL AID IN MATTERS RELATED TO THE CRIMINAL LAW MADE THIS FIRST DAY OF JANUARY, A.D. 1973.

BETWEEN:

THE GOVERNMENT OF CANADA,

Of the First Part

- and -

THE GOVERNMENT OF THE PROVINCE OF ALBERTA

Of the Second Part

WHEREAS the Government of Canada and the Government of the Province of Alberta are desirous of entering into an agreement respecting the provision of legal aid in matters related to the criminal law to eligible persons in need of such aid, and for the allocation of the costs thereof;

NOW THEREFORE, this agreement witnesseth that in consideration of the premises and of the mutual covenants and agreements herein contained, the parties hereto covenant and agree each with the other as follows:

1. In this agreement,

(a) "eligible person" means any person in the province who seeks legal aid and who is approved as a recipient thereof as provided in subsection 4(1) of this agreement;

(b) "fees and disbursements" means payments made or authorized to be made by the provincial agency to a member of the Bar of the province for legal aid rendered by him;

(c) "legal aid" means legal advice and representation by a member of the Bar of the province in a matter related to the criminal law;

(d) "matter related to the criminal law" means any of those matters enumerated in subsection 3(1) of this agreement;

(e) "province" means the province of Alberta; and

(f) "provincial agency" means the agency or agencies designated by the Attorney General of the province for the purposes of this agreement.

2. The Attorney General of Canada shall be entitled to designate a member of the Bar of the province to represent him on the provincial agency.

3.(1) The provincial agency shall authorize the provision of legal aid to eligible persons in relation to:

(a) Offences contrary to an Act of Parliament punishable by way of indictment;

(b) Proceedings under the Juvenile Delinquents Act and all summary conviction offences for a violation of

(i) an Act of Parliament, or
(ii) a Regulation made pursuant to an Act of Parliament

where, in the opinion of the provincial agency, there is a likelihood that upon conviction there will be a sentence of imprisonment or the loss of means of earning a livelihood, or where, in the opinion of the provincial agency, special circumstances exist that warrant the provision of legal aid;

(c) Proceedings pursuant to the Extradition Act and the Fugitive Offenders Act;

(d) Appeals by the Crown in any of the matters referred to in paragraphs 3(1)(a), 3(1)(b) or 3(1)(c) of this section; and

(e) Appeals by an accused in any of the matters referred to in paragraphs 3(1)(a), 3(1)(b) or 3(1)(c) of this section where, in the opinion of the provincial agency, the appeal has merit or where the court appealed to requests the appointment of counsel on behalf of the appellant.

(2) The provincial agency shall take all reasonable measures to ensure that an eligible person who has been arrested or detained is given the opportunity to retain and instruct counsel without delay.

4.(1) The provincial agency shall determine the financial circumstances under which an applicant for legal aid may be approved as a recipient thereof, but in so doing it shall apply flexible rules which take into account whether the applicant can retain counsel at his own expense without him or his dependents (if any) suffering undue financial hardship such as incurring heavy indebtedness or being required to dispose of modest necessary assets, and a person shall not be disqualified from receiving legal aid on the ground that he is not ordinarily resident in the province.

(2) The provincial agency shall require a recipient of legal aid to contribute toward the cost thereof to the extent that in its opinion the recipient can do so without him or his dependents (if any) suffering undue financial hardship such as incurring heavy indebtedness or being required to dispose of modest necessary assets and to the extent that

the provincial agency is of the opinion that it is administratively economic to seek such recovery.

(3) The provincial agency shall require a recipient of legal aid who recovers costs in proceedings for which the legal aid was provided to pay such costs to it in an amount not exceeding the sum spent by the provincial agency on behalf of the recipient.

5.(1) Subject to subsection (2) of this section the provincial agency shall determine the method or methods by which legal aid shall be made available to an eligible person.

(2) Where legal aid has been approved for an applicant who has been charged with an offence the penalty for which is either life imprisonment or capital punishment, he shall be entitled to retain and instruct any member of the Bar of the province who is prepared to act for him as a recipient of legal aid.

6.(1) The Attorney General of the province shall submit to the Attorney General of Canada no later than the 31st day of May in each year a statement in such form as the latter may require signed by the provincial auditor certifying to the amount expended by the provincial agency for fees and disbursements for legal aid during the 12 month period ending the 31st day of March immediately preceding the said 31st day of May, and the Attorney General of Canada, upon being satisfied that the fees and disbursements have been expended for legal aid in accordance with the terms of this agreement shall approve payment to the province of an amount which is the lesser of

(a) 50 cents per capita of the population of the province as estimated on the 1st day of June by the Chief Statistician of Statistics Canada during said 12 months period, or

(b) 90% of the actual amount expended by the provincial agency for fees and disbursements for legal aid during said 12 month period.

(2) The Attorney General of the province shall from time to time provide the Attorney General of Canada with such further information relating to legal aid under this agreement as the latter may request.

7. The Attorney General of the province shall take all reasonable steps to give publicity to the availability of legal aid throughout the province as is necessary to ensure that the public will be adequately informed in this regard.

8. The financial terms of this agreement shall be reviewed by the Parties at the termination of each three year period and may be renegotiated at that time.

9. In the event of any controversy arising between the Parties to this agreement in respect thereof, either Party may submit the controversy to the Federal Court of Canada for determination.

10. This agreement shall come into force and shall bind the Parties

from the 1st day of January, 1973, and shall continue in force thereafter until terminated by either Party giving to the other Party at least one year's notice in writing.

IN WITNESS WHEREOF, the Honourable Otto E. Lang, Attorney General of Canada, has hereunto set his hand on behalf of the Government of Canada, and the Honourable C. Mervin Leitch, Attorney General of Alberta, has hereunto set his hand on behalf of the Government of the Province of Alberta.

Otto E. Lang,
Attorney General of Canada.

C. Mervin Leitch,
Attorney General of Alberta.

# NOTICE

# DO YOU NEED A LAWYER ??

## ALBERTA LEGAL AID PLAN (Criminal)

If you want a lawyer to represent you but feel that you are unable to afford one, The Alberta Legal Aid Society may be able to provide you with one if you can show that you are eligible for Legal Aid.

Who is Eligible

If you have been charged in Alberta with a criminal offence you are eligible for Legal Aid if:

(i) The offence is one which is covered by The Alberta Legal Aid Plan, and
(ii) You have insufficient means to pay for the services of a lawyer.

Offences and Proceedings Which May Be Covered by The Alberta Legal Aid Plan

1. Any offence contrary to a federal statute where the Crown is proceeding by way of indictment.
2. An offence contrary to The Juvenile Delinquents Act.
3. A summary conviction offence if in the opinion of The Alberta Legal Aid Society there is a likelihood that upon conviction there will be a sentence of imprisonment or a loss of means of earning a livelihood, or if in the opinion of The Alberta Legal Aid Society there are special circumstances that warrant the provision of Legal Aid.
4. Proceedings pursuant to The Extradition Act and The Fugitive Offenders Act.
5. An application by the Crown for a sentence of preventative detention as a Habitual Criminal or as a Dangerous Sexual Offender.
6. Appeals by the Crown or by a convicted person in relation to any of the matters contained in 1-5 above.

CHOICE OF COUNSEL

If you have been charged with an offence the penalty for which is either life imprisonment or capital punishment, (e.g. murder, rape, robbery, breaking and entering a dwelling house, etc.) as a recipient of Legal Aid you may choose any qualified lawyer in Alberta to represent you if he is prepared to act for you under a Legal Aid Certificate.

In all other cases counsel will be assigned.

Financial Qualifications for Legal Aid

As an applicant you must prove to the satisfaction of the Alberta Legal Aid Society that you do not have sufficient assets or income to hire your own lawyer or that the cost of hiring a lawyer would cause you or your dependants (if any) undue financial hardship (e.g. incurring heavy indebtedness or being required to dispose of necessary assets). As an applicant you are expected to use all usual or ordinary means of raising funds for your own defence before applying for Legal Aid. Your family and friends are expected to assist you in this matter, if they are able to do so.

As an applicant for Legal Aid you must be willing to undertake to repay the Alberta Legal Aid Society when (and as your circumstances permit) (and if you are able to do so), you may also be granted Legal Aid on the condition that you pay some of the expected cost in advance or by regular monthly payments.

How to Apply

(If you are in any doubt as to whether you are eligible for Legal Aid it is suggested that you should apply).

1. Edmonton and Calgary

(a) If you are in custody:

A representative of the Alberta Legal Aid Society will visit the City Jail each weekday except for statutory holidays to take applications from any person who wishes to apply. If you are detained in a Correctional Institution (Fort Saskatchewan or Spy Hill) you may request and complete an application form and ask that it be forwarded to the Legal Aid Office, or you may ask the prison authorities to contact the Legal Aid Society and request that an interviewing lawyer visit you.

(b) If you are not in custody:

If you have been summonsed or are free on your own recognizance you may visit the Legal Aid Society Office in person to apply. In Edmonton the Legal Aid Society Office is located at 308 McLeod Building. In Calgary it is located in the Court House (Supreme Court Building).

2. Locations Other Than Edmonton and Calgary

(a) If you are in custody:

Ask for and complete an application form and deliver it to the authority in whose custody you are held or to the Secretary, Legal Aid Committee, Court House, in the nearest Judicial Centre.

(b) If you are not in custody:

You may apply at the Court House in the Judicial Centre nearest the place where you are scheduled to appear in Court.

[If you are found eligible a lawyer will be assigned to you promptly. However, if he has not been assigned to you by the time of your next court appearance, you should advise the Judge that you have applied for Legal Aid and ask for a remand or adjournment].

PLEASE NOTE:

If you have applied for Legal Aid but have been refused, or have not been notified about the result of your application within a reasonable time, you should contact the Alberta Legal Aid Society, 308 McLeod Building, Edmonton. Telephone 423-3311.