



# Evaluation of the Legal Aid Program Final Report

July 2021

Evaluation Branch  
Internal Audit and Evaluation Sector

## ACKNOWLEDGEMENT

The Chief Audit and Evaluation Executive would like to thank the Evaluation Working Group, evaluation team and individuals who contributed insights and input to this evaluation. Evaluation participants included employees from the Department of Justice Canada, provincial and territorial governments, and legal aid plans.

## ACRONYMS

AJA	Access to Justice Services Agreements
ALAP	Association of Legal Aid Plans
CERC	Criminal Early Resolution Contract
DRR	Departmental Results Report
ERCP	Early Case Resolution Program
EWG	Evaluation Working Group
FEG	Financial eligibility guidelines
I&R	Immigration and refugee
IRB	Immigration and Refugee Board of Canada
IT/IM	Information technology/information management
JPBP	Justice of the Peace Bail Program
LAD	Legal Aid Directorate
LICO	Low-Income Cut-Off
MBM	Market Basket Measure
PID	Policy Implementation Directorate
PRRA	Pre-removal risk assessment
PWG	Federal-Provincial-Territorial Permanent Working Group on Legal Aid
RRRP	Rapid Remand Response Program
YLSS	Yukon Legal Services Society

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# EXECUTIVE SUMMARY

## Introduction

The Department of Justice Evaluation Branch conducted the Evaluation of the Legal Aid Program (the Program), which covers fiscal years 2016-17 to 2019-20. The evaluation was completed in accordance with the Treasury Board's *Policy on Results* (2016). It examined the relevance of the Program in terms of whether the Program continues to serve public interest and need, the impact of the Program in terms of achieving its intended outcomes, and the value of the federal investment in legal aid in terms of the Program's efficiency and its contributions to the fairness and efficiency of the justice system.

## Program Description

The overall objective of the Legal Aid Program is to promote access to justice for eligible persons and to promote public confidence in the justice system through federal contribution funding to the provinces and territories and/or legal aid plans for legal aid services. The Program has three funding components that are included in the evaluation: Criminal Legal Aid in the Provinces and Territories (and Civil Legal Aid in the Territories);<sup>1</sup> Immigration and Refugee (I&R) Legal Aid; and State-funded Counsel. The first two components of the Program are cost-shared with the provinces and territories.

## Findings

### Relevance

The federal Legal Aid Program is a federal responsibility that continues to serve a public interest and need. The federal responsibility for legal aid is longstanding with over four decades of federal funding, and is fundamental to Canadian federalism as reflected in foundational documents, such as the *Constitution Act, 1867*. The ongoing need for legal aid is in part reflected in the volume of applications but also in the proportion of Canadians who are economically disadvantaged and may need legal assistance in areas of law covered by the Program. The ongoing need also underpins the public interest served by legal aid. Legal aid serves economically disadvantaged Canadians and provides access to justice to particularly vulnerable populations who are often overrepresented in the criminal justice system. By providing legal services to individuals who would otherwise not be able to afford counsel and would experience significant challenges in representing themselves, legal aid promotes fairness in the justice system and helps prevent miscarriages of justice.

### Effectiveness

The Program provides funding for legal aid but is not directly involved in its delivery. The Program outcomes are, therefore, largely about the impact of the federal contribution to legal aid. In terms of effectiveness of the Program, the evaluation did not assess legal aid plan activities but considered how the federal contribution serves to support and enhance the capacity of provincial and territorial legal aid plans.

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<sup>1</sup> A fourth component, Legal Advice for Complainants of Workplace Sexual Harassment, started in 2019-20 and is being evaluated separately in 2022-23.

## **Federal Contribution to Support Service Provision**

The evaluation found that the federal contribution is critical to maintaining legal aid services. One of the most significant developments to occur during the timeframe covered by the evaluation was the increase to the federal contribution for criminal legal aid in the provinces and territories and civil legal aid in the territories. Announced in Budget 2016, the phased increase of \$88 million over five years (which included \$2 million per year for innovations that ended in 2020-21) was the first increase in the federal legal aid contribution since 2003-04. The federal government has committed to continuing the final year staged increase of \$30 million for an ongoing annual total of \$142.4 million for criminal legal aid in the provinces and criminal and civil legal aid in the territories.

This additional funding was much needed. In addition to contributing to maintaining the current level of legal aid service delivery, it provided some financial support for promising innovative practices to improve services and operations. Legal aid plans reported 126 innovations over the five-year evaluation period. The reported innovations must be placed into context: particular innovations cannot be directly attributed to the federal contribution; in addition, legal aid plans have consistently engaged in innovations and continuous improvement practices as a way to manage increasing workload and cost pressures for years. However, the additional funding enabled legal aid plans to commence service delivery or operational improvements that they may not have been able to undertake otherwise.

During the five-year evaluation period, there was a significant increase in demand for I&R legal aid in some jurisdictions and/or substantial provincial budget cuts in that area. The Program addressed these challenges by providing top-up funding, additional funding in Budgets 2017, 2018 and 2019, and further funding in August 2019. These increases enabled legal aid plans to continue providing I&R legal aid services, which contribute to the efficiency and fairness of the I&R system.

The federal funding for state-funded counsel also ensures the integrity of the Canadian justice system by providing legal representation in federal proceedings where, if counsel were not provided, the public interest would not be served fairly and equitably.

## **Access to Justice for Vulnerable Populations**

The federal contribution provides access to justice for vulnerable populations. The profile of legal aid clients demonstrates that they are among the most vulnerable people in Canada in terms of socio-economic indicators related to financial means, education, and health, which make it difficult for them to navigate the complex justice system. Key informants indicated that there remain unmet needs, despite efforts of legal aid plans to adapt and expand services to reach vulnerable populations. In particular, they mentioned those living in rural and remote areas, Indigenous populations, racialized groups, and those who do not meet the financial eligibility criteria. The unmet needs for these groups go beyond legal aid and include the justice system more broadly with the need for new approaches to better address legal issues more holistically, such as greater use of diversion or therapeutic/specialized courts. For legal aid, financial ineligibility remains a major barrier for individuals who are still unable to afford legal counsel yet have incomes that exceed the guidelines. Some legal aid plans have been able to adjust their financial eligibility guidelines to keep pace with other economic measures, such as inflation, but most have not. To address the unmet needs, legal aid plans require the human and financial resources to enhance and expand their services.

## **Emerging Issues and Legal Aid Service Delivery**

Many of the same issues noted in the previous evaluation are still affecting the provision of legal aid and have continued to result in consequences such as increased costs. These include legislative changes, court decisions, the complexity of the criminal cases, and investments in other areas of the justice system without corresponding investments in legal aid. The territories face particular challenges

related to maintaining staffing levels, high costs related to travel, and particular issues in their jurisdictions, such as the housing situation or the loss of a key employer, which will increase demand for civil legal aid. For I&R legal aid, the main challenge remains the fluctuating demand that includes substantial increases in legal aid applications at particular moments in time, which require infusion of additional funding.

The pandemic tested legal aid plans and the justice system, but both responded with service innovations to manage the crisis. However, its full effects on volumes and finances will not be known until the pandemic is over, and potentially for years to come.

### **Legal Aid Policy and Program Development**

The Program supports communication, information sharing and networking through the Federal-Provincial-Territorial Permanent Working Group on Legal Aid (PWG), which brings together Justice Canada, provincial and territorial governments, and the legal aid plan representatives. While the PWG in previous evaluations had focussed more on funding issues, it is now fulfilling its broader mandate as a forum to share ideas and discuss high level, national issues related to legal aid. The PWG is valued as a forum for freely sharing ideas, learning from each other's experiences, and fostering relationships among legal aid plans and provincial and territorial government representatives.

### **Efficiency**

#### **Management of Contribution Agreements**

The Program is well managed. It has provided funding under the contribution agreements in a timely manner, meeting Justice Canada's service standards for processing claims for over 90% of its payments in most years. In addition, the Program's administrative expenses equalled 0.8% of the total contribution funding, which matches the 2016 evaluation findings.

It is also considered to have effectively handled I&R funding issues. The timing of the receipt of I&R funding could be improved as legal aid plans find it difficult to manage their I&R services given how late in the fiscal year the allocation is determined. The Program is caught between the need for updated data to assess demand as required by the funding formula, and the desire of plans to know their share of the federal I&R funding earlier.

While improved, work remains to be done on reporting and performance measurement. Key informants were divided on whether the reporting requirements were reasonable or onerous. The Legal Aid Directorate is considered to have made improvements in the Statement of Final Claim forms and been supportive of legal aid plans that have more limited data collection capacity, but key informants believe that further improvements could still be made to ensure that the data being captured are relevant. For performance measurement, the Definitions Project is considered to have improved the data being collected and resulted in useful information. The next step is to reduce further the inconsistencies in the data and to determine what additional data would be useful to provide information on the delivery challenges and impacts of legal aid services.

#### **Efficiency of the Legal Aid System**

The legal aid system provides a cost-effective service when compared to private bar rates and continues to innovate to maintain and enhance its services. Many of these innovations and service enhancements not only create efficiencies for legal aid but also the justice system by supporting initiatives such as specialized courts, 24-hour bail court, and diversion programs. Legal aid plans have also shown a willingness to embrace technology and digital transformation initiatives when they have the resources to do so. Overall, legal aid supports the efficient operations of the justice system by



providing legal assistance and advice services to individuals who might otherwise proceed through the system without counsel.

## **Recommendations**

**Recommendation 1:** The Legal Aid Directorate, in collaboration with the Permanent Working Group, explore options for a national immigration and refugee legal aid program that would extend to all jurisdictions and include national standards.

**Recommendation 2:** The Legal Aid Directorate (including the representative from the Policy Implementation Directorate responsible for the Access to Justice Services Agreements) should work in collaboration with the Permanent Working Group to improve performance measurement and reporting. Consideration should be given to improving the consistency of data, including demographic information, and identifying additional data that would be useful for reporting and future program planning.

# 1 INTRODUCTION

## 1.1 Purpose of the Evaluation

This report presents the results of the Evaluation of the Legal Aid Program (the Program). The evaluation was conducted in accordance with the Treasury Board's *Policy on Results* (2016), which requires departments to measure and evaluate performance and use the resulting information to manage and improve programs, policies, and services. The Evaluation Branch of the Department of Justice Canada conducted the evaluation between September 2020 and March 2021, according to the 2019-20 to 2023-24 Integrated Audit and Evaluation Plan.

## 1.2 Evaluation Scope

The Evaluation of the Legal Aid Program covered the fiscal periods from 2016-17 to 2019-20. It examined the relevance of the Program in terms of whether it continues to serve public interest and need, its impact in terms of achieving its intended outcomes, and the value of the federal investment in legal aid in terms of the Program's efficiency and its contributions to the fairness and efficiency of the justice system.

The scope of the evaluation was informed through facilitated sessions with the Evaluation Working Group (EWG), which included members of the Legal Aid Directorate (LAD), the Policy Implementation Directorate (PID), and provincial/territorial government and legal aid plan representatives from the Federal-Provincial-Territorial Permanent Working Group on Legal Aid (PWG).

The following components of the Legal Aid Program are covered in the evaluation: Criminal Legal Aid in the Provinces and Territories (and Civil Legal Aid in the Territories), Immigration and Refugee (I&R) Legal Aid, and State-funded Counsel. The evaluation also examined the policy role of the Program. The evaluation did not include the Legal Advice for Complainants of Workplace Sexual Harassment component, as this is a new component with funding that started in fiscal year 2019-20. An evaluation of this component is planned for completion in fiscal year 2023-24.

## 2 PROGRAM PROFILE

### 2.1 Program Description

The overall objective of the Legal Aid Program is to promote access to justice for eligible persons and to promote public confidence in the justice system through federal contribution funding to provinces and territories and/or legal aid plans for legal aid services. The specific objectives are to provide legal information, advice and representation to vulnerable persons, including economically disadvantaged individuals, in order to ensure that their rights to a fair justice process are protected; to enable the federal government to maintain a policy role in access to justice issues. The last objective is to promote a culture of innovation and performance measurement in legal aid, which is key to supporting the overall efficiency and effectiveness of the justice system.

By meeting the above objectives, the Program contributes to the Department of Justice Canada's core responsibility that individuals in contact with the Canadian justice system have access to appropriate services, thus enabling a fair, timely, and accessible justice system.<sup>2</sup>

#### Overview of Program Components

The Program has four funding components: Criminal Legal Aid in the Provinces and Territories (and Civil Legal Aid in the Territories);<sup>3</sup> Immigration and Refugee (I&R) Legal Aid; State-funded Counsel; and Legal Advice for Complainants of Workplace Sexual Harassment. The Criminal Legal Aid in the Provinces and Territories (and Civil Legal Aid in the Territories) and I&R Legal Aid components of the Program are cost shared with the provinces and territories.<sup>4</sup>

**Criminal Legal Aid**<sup>5</sup> provides ongoing contribution funding to the provinces and territories in support of specific policy objectives related to the delivery of legal aid services to vulnerable persons, including economically disadvantaged people; those who are accused of serious and/or complex criminal offences and facing the likelihood of incarceration; and youths charged under the *Youth Criminal Justice Act*.

**I&R Legal Aid** provides ongoing contribution funding to the six participating provinces (British Columbia, Alberta, Manitoba, Ontario, Quebec, and Newfoundland and Labrador) that deliver I&R legal aid.

**State-funded Counsel** is provided in instances where a court orders the Attorney General of Canada to provide funded counsel in federal proceedings or where there is a high likelihood that the court will do so. State-funded counsel is also provided for economically disadvantaged persons subject to terrorism prosecutions, security certificates issued under the *Immigration and Refugee Protection Act*, proceedings under the *Extradition Act* where the commission of a terrorist act is alleged, and proceedings under any other legislation involving national security issues that Parliament might enact. The Attorney General of Canada will also provide state-funded counsel when Minutes of Settlement involving Canada require it. Unlike the other two components, state-funded counsel is not cost-shared, but rather the Department provides funding to cover 100% of eligible expenses.

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<sup>2</sup> Department of Justice Canada. (2018). *Department of Justice—Overview of the 2018-19 Departmental Results Framework and Program Inventory*. <https://www.justice.gc.ca/eng/rp-pr/cp-pm/paa-aap/drfdpi-cmrrp/2018/index.htm>

<sup>3</sup> Funding is provided to the territories for criminal and civil legal aid through the Access to Justice Services Agreements, which integrate federal funding support for legal aid (criminal [adults and youth] and civil), the Indigenous Courtwork Program, and Public Legal Education and Information (PLEI) services. The Indigenous Courtwork Program and PLEI services are outside the scope of the Program and are evaluated separately.

<sup>4</sup> In 2019-20, I&R was 100% federally funded.

<sup>5</sup> This component includes civil legal aid in the territories.

**Legal Advice for Complainants of Workplace Sexual Harassment** component, which first received funding in 2019-20, supports organizations that provide legal information and advice to persons who have experienced sexual harassment in the workplace, regardless of their economic status. As noted in Section 1.2, this component is not included in this evaluation.

## Program Governance

Overall responsibility for the Program lies with the Department's Programs Branch. Within the Branch, the LAD is responsible for the delivery of the criminal and I&R components to the provinces, and the delivery of the state-funded counsel component to provinces, territories, and/or legal aid plans. The LAD is the federal policy and program lead for legal aid. It is responsible for developing research and analysis on legal aid; preparing briefing materials and Cabinet documents to seek policy authority and funding approval in response to emerging needs; negotiating, allocating, and managing program budgets and agreements; and fostering and maintaining collaborative working relationships with recipients, including provincial and territorial government and legal aid representatives. The Policy Implementation Directorate (PID) is responsible for the Access to Justice Services Agreements (AJAs) with the territories.

The LAD also provides secretariat support for the PWG. The PWG is comprised of representatives of the federal, provincial, and territorial governments and representatives from each provincial and territorial legal aid delivery agency, and it reports directly to the Federal-Provincial-Territorial Deputy Ministers Responsible for Justice and Public Safety. The PWG is a forum for national information sharing, research, joint policy development, and discussions on matters of shared interest respecting legal aid, as well as a forum for the negotiation of the federal contribution for legal aid.

**Error! Reference source not found.** shows the Legal Aid Program planned resources for 2016–17 to 2019–20, which is the period covered by the evaluation. A comparison of planned to actual expenditures is included in Section 0.

**Table 1. Planned Resources for Federal Legal Aid Program (in millions of \$)**

<b>Funding Components (Contributions)</b>	<b>2016-17</b>	<b>2017-18</b>	<b>2018-19</b>	<b>2019-20</b>
Criminal legal aid in provinces, and criminal and civil legal aid in the territories	121.39	124.39	127.39	132.39
I&R	11.50	14.20	14.20	27.65*
State-funded counsel	4.15	4.15	3.65	3.66
<b>Total – Contributions funding**</b>	<b>137.04</b>	<b>142.74</b>	<b>145.24</b>	<b>163.7</b>
<b>Program administration***</b>				
Salary	1.01	1.01	1.01	1.01
Operations and maintenance****	0.63	0.63	0.63	0.63
<b>Total – Administration</b>	<b>1.64</b>	<b>1.64</b>	<b>1.64</b>	<b>1.64</b>
<b>Grand total – Contributions and administration</b>	<b>138.68</b>	<b>144.38</b>	<b>146.88</b>	<b>165.34</b>
Note: Numbers are rounded; as a result, the sum of program administration funding does not match the total. * The FY 2019-20 I&R total includes Budget 2019 funding. **The funding for Legal Advice for Complainants of Workplace Sexual Harassment is not included. ***Accommodation and benefits are not included. ****The costs to the Department of state-funded counsel cases managed by LAD are included in operations and maintenance.				

Source: Department of Justice financial data

## 3 EVALUATION METHODOLOGY

To guide the evaluation, an evaluation matrix (evaluation questions, indicators, and data sources) was developed during the evaluation scoping process and further refined with the EWG. The scope of the evaluation focussed on relevance and performance (effectiveness and efficiency) and included the following nine evaluation questions:

### Issue #1: Relevance

- 1.1. Does the Legal Aid Program continue to serve public interest and need?

### Issue #2: Effectiveness

- 2.1. To what extent have the Legal Aid Program components provided services – directly (state-funded counsel) or indirectly (contribution funding to the provinces and territories for criminal and I&R legal aid) – to eligible vulnerable persons, including those who are economically disadvantaged?
- 2.2. Have emerging issues and the current context impacted legal aid service delivery in the federally funded areas? How have the legal aid systems responded?
- 2.3. What impact has federal funding had on improving access to legal services for vulnerable populations?
- 2.4. To what extent have legal aid systems contributed to a fair and efficient justice system?
- 2.5. In what ways has the Program contributed to collaboration in legal aid policy and program development?

### Issue #3: Efficiency

- 3.1. How efficient is the Legal Aid Program in managing the contribution agreements and state-funded counsel?
- 3.2. To what extent have the LAD and the PWG contributed to effective and efficient delivery of the Legal Aid Program?
- 3.3. Considering the legal aid system as a whole, are there more efficient ways of delivering the components of the Program and of meeting its objectives?

Four lines of evidence were used to address the evaluation questions: a review of program and administrative documents and data; key informant interviews; case studies; and journey mapping. Each of these methods is described briefly in the following sub-sections.

### 3.1 Document and Data Review

The document and data review provided descriptive information on the activities of the Legal Aid Program and legal aid plans, as well as information responding to most evaluation questions. This review was ongoing throughout the life of the project and included the following types of documents:

- administrative and internal program documents and data; and
- publicly available departmental and legal aid plan documents and data

## 3.2 Key Informant Interviews

A total of 31 in-depth interviews were conducted with 48 individuals, representing the following groups:

- legal aid plan representatives (22 individuals)
- provincial and territorial government representatives (11 individuals)
- Justice Canada (LAD and PID) (10 individuals)
- other federal departments (3 individuals)
- lawyers handling state-funded counsel cases (2 individuals)

Most of the provincial and territorial government representatives and legal aid plan representatives were members of the PWG or invited to participate in the interview by one of its members. Three key informants opted to provide written responses.

## 3.3 Case Studies

Three case studies were conducted to highlight and provide further depth to the analysis of key areas of legal aid service delivery, including services provided, challenges, costs, and innovative practices. The case studies also considered how legal aid supports and is impacted by other stakeholders in the justice system. The case studies were selected in consultation with the EWG and the jurisdictions listed in **Error! Reference source not found.** agreed to participate. Summaries of the case studies are included in Appendix A.

**Table 2. Case Studies**

Topic	Jurisdiction(s)	Number of Interviewees	Rationale
I&R legal aid	Quebec Ontario	3 5	The case study explored how I&R legal aid is delivered and what the differences are in terms of services and delivery in each selected jurisdiction. The case study considered costs, challenges, and promising practices.
Youth criminal legal aid	Yukon	4	The case study considered service innovations and challenges for providing youth criminal legal aid.
Issues and challenges related to remand	Alberta Saskatchewan	2 2	The case study considered the impact of remand on legal aid, the justice system and the accused, as well as how legal aid plans have approached the issue of remand (e.g., duty counsel services).

## 3.4 Journey Mapping

Sessions were conducted with three jurisdictions to map the journeys of legal aid clients through the justice system. The mapping of hypothetical legal aid clients' journeys through the justice system explored how legal aid supports clients at different steps in the process, what options might be available for clients, what steps might be particularly challenging for an accused person, and what might be the impacts of legal aid representation on court efficiency and client outcomes.

The journey mapping process was informed by a EWG meeting devoted to considering the best approach. As a result, it was determined that, rather than establishing a single hypothetical legal aid client for mapping in each jurisdiction, the participating jurisdictions should be given the opportunity to select the types of journeys that would be explored. As a result, the evaluation mapped eight client journeys with three jurisdictions.

**Table 3. Journey Mapping**

Jurisdictions	Journey Map Scenarios	Number of Participants
Nova Scotia	Adult male African Nova Scotian criminal legal aid client who proceeds through the traditional court process in Halifax or Dartmouth	Seven Nova Scotia Legal Aid staff
	One male youth criminal legal aid client who proceeds through Restorative Justice (diversion) – rural office	Four Nova Scotia Legal Aid staff
	One female Indigenous criminal legal aid client who proceeds through a specialized court – Halifax based	Six Nova Scotia Legal Aid staff
Manitoba	Adult criminal legal aid client in Thompson	Three Legal Aid Manitoba staff
	Youth criminal legal aid client in Winnipeg	Two Legal Aid Manitoba staff
	Adult criminal legal aid client in Winnipeg Mental Health Court	Three Legal Aid Manitoba staff and one Crown counsel
Northwest Territories	Adult criminal legal aid client in a remote community who goes through the traditional court process in a circuit court location	Four Northwest Territories Legal Aid Commission staff
	Adult criminal legal aid client in Yellowknife who attends the Wellness Court	

### 3.5 Limitations, Challenges, and Mitigation Strategies

The evaluation encountered a few methodological limitations or challenges.

**Table 4. Summary of Limitations, Challenges, and Mitigation Strategies**

Line of Evidence	Limitation or Challenge	Mitigation Strategy
Document and data review	In regards to the legal aid statistics, for some indicators, there are three years of data (FYs 2016-17 to 2018-19), so an analysis of trends is premature. The evaluation relied on the <i>Legal Aid in Canada</i> reports prepared by Justice Canada’s Research and Statistics Division and the LAD. Prior to FY 2016-17, annual reports were prepared by Statistics Canada and during the transition period (FY 2015-16), no report was prepared. Additionally, this evaluation occurred before the report for FY 2019-20 was available.	Where possible, information was gathered from 2019-20 claims submitted by the jurisdictions, some of which were still drafts.
Key informant interviews	Challenges included potential response biases from the sampling approach (selective, non-random), the voluntary nature of participation, self-reporting (reporting on own activities).	The evaluation used multiple lines of evidence and triangulation to confirm results.
Case studies	The case studies were each intended to include two jurisdictions in order to support a comparison in approaches. However, for one case study (youth), ultimately only one jurisdiction volunteered.	None needed. While a comparison in approaches was hoped for, the case study was still able to provide examples of youth criminal legal aid services. In addition, the document review included a review of any other

Line of Evidence	Limitation or Challenge	Mitigation Strategy
		noteworthy youth criminal legal aid service delivery methods.
	Each case study was to include interviews with legal aid plan representatives and other provincial and territorial justice stakeholders. Legal aid plan representatives did not participate in one case study (remand) due to lack of time or capacity to participate.	To the extent possible, the evaluation relied on available relevant documentation to provide the legal aid perspective, although the documentation was limited.
	As part of each case study, the evaluation sought to include relevant documents and data. The evaluation was not successful in obtaining data from the provincial and territorial governments or plans for most of the case study jurisdictions. Data was either not available or it was collected but no interviewees were able to provide the data or indicate where the evaluation might be able to obtain the data.	To the extent possible, the evaluation relied on publicly available documentation and data.
Journey mapping	The purpose of the journey mapping sessions was to seek information related to potential system efficiencies (e.g., the number of appearances, time in court, ability to negotiate release on bail), to which monetary amounts could be attributed if reliable information was available to support that analysis. This type of information was not available.	The evaluation used qualitative information to the extent possible.

## FINDINGS

### 4.1 Relevance

#### 4.1.1 Continued Need for Federal Legal Aid Program

The federal Legal Aid Program serves a longstanding federal responsibility in the federally funded areas. Its continued relevance is demonstrated by the ongoing need for legal aid to provide legal representation and advice to economically disadvantaged Canadians, and the public interest served by legal aid supporting a fair and efficient justice system.

#### Federal Responsibility

The federal government has funded legal aid for over four decades, reflecting its recognition of the continued need for the Program.<sup>6</sup> This longstanding commitment reflects not only the continued need for legal aid, but also the public interest that underlies it, which is found in documents that define Canadian federalism.

- ▶ Under the *Constitution Act, 1867*, criminal justice is a shared federal-provincial-territorial responsibility. The federal government has authority for criminal law-making and criminal

<sup>6</sup> The federal funding for I&R legal aid is more recent; it dates back to 2001.



procedure (Section 91) and the provincial and territorial governments are responsible for the administration of justice (Section 92).

- ▶ The *Canadian Charter of Rights and Freedoms* contains provisions that reflect Canada's commitment to principles of fundamental justice before depriving someone of their liberty. The right to a fair trial and the right, upon arrest, to retain counsel have been interpreted by the courts to establish a limited right to counsel in criminal matters. Courts have held that there is a Charter right to counsel if it is necessary for a fair trial. As a result, the court can order federally funded defence counsel in situations where an accused cannot afford counsel, is not eligible for legal aid, and where the proceedings are complex and there is a likelihood of imprisonment.<sup>7</sup>
- ▶ The federal government retains authority for civil law in the territories given the federal responsibility for the territories.
- ▶ Under the *Constitution Act, 1867*, immigration is a shared federal-provincial responsibility. The federal government enacts laws related to I&R matters, sets the volume of immigrants and refugees, and handles enforcement, while the provinces determine access to benefits, such as social assistance and other services for immigrants and refugees.

## Ongoing Need

The ongoing need for legal aid to provide legal representation and advice to economically disadvantaged Canadians is demonstrated by the volume of applications for legal aid services in criminal legal aid in the provinces and territories, civil legal aid in territories, and I&R legal aid (see Table 5).

In the area of criminal legal aid, while applications decreased by 7% between 2016-17 and 2018-19 (the last year for which there is complete data), there are still approximately 300,000 individuals applying for criminal legal aid annually. This decline in applications is due to a variety of factors, including the crime rate in the jurisdiction; its economic circumstances which may contribute to under-employment and unemployment; and the (in)ability of the legal aid plan to adjust its financial eligibility guidelines over time. In contrast to criminal legal aid, applications for civil legal aid in the territories rose by 22%.

Applications for I&R legal aid increased by 44% between 2016-17 and 2019-20. This was due primarily to an increase of applications in Quebec and Ontario (120% and 57% increases, respectively) between 2016-17 and 2017-18. Total I&R applications were relatively stable between 2017-18 and 2019-20, although there were variations at the provincial level.

**Table 5. Legal Aid Applications\* by Type and Year**

Year	Criminal			I&R	Civil (territories)
	Adult	Youth	Total		
2016-17	313,219	27,914	341,133	22,458	1,355
2017-18	300,122	25,844	325,966	31,926	1,383
2018-19	294,588	23,451	318,039	32,542	1,651
2019-20**	276,225	20,626	296,851	32,375	404

\* An application for legal aid refers to a request for legal aid assistance that results in the provision of summary or full service assistance on behalf of the legal aid plan, or the denial of legal aid service. While most amounts were obtained from the *Legal Aid in Canada* annual reports, where no value was provided, some amounts were obtained from the jurisdictional annual claim reports.

<sup>7</sup> R. v. Rowbotham, [1993] 4 S.C.R. 834

\*\* 2019-20 statistics are partial. The data were obtained from provincial and territorial Statement of Final Claims, some of which are still only in draft format; a few claims were not submitted in time to inform the evaluation (Nunavut and Yukon).

Source: Department of Justice Canada, *Legal Aid in Canada*. 2018b, 2019a, 2020a<sup>8</sup>

Due to the pandemic, the courts were not operating at all or at reduced capacity for much of 2020; therefore, the number of criminal and civil (territories) legal aid applications in FY 2020-21 is expected to decline substantially. However, the decline is expected to be temporary, as the pandemic's impact on the economy will likely result in more individuals qualifying for legal aid. A similar trajectory is expected for I&R legal aid applications. At the start of the pandemic, the number of refugees declined precipitously, which impacted application volumes. Once travel restrictions ease, there is concern that there will be an influx of refugees.

It is important to note that legal aid application data underestimate the volume of actual need for legal representation among economically disadvantaged Canadians. This underestimation is partly due to the fact that for the provinces, the statistics on the number of applications do not capture individuals who may be eligible but do not apply. The territories are in a unique situation, as most individuals qualify for legal aid but many clients are not required to make legal aid applications under their guidelines for presumed eligibility.<sup>9</sup>

## Public Interest

Legal aid serves the public interest by providing legal assistance to economically disadvantaged Canadians and thereby, ensuring the fairness of the justice system. Socio-economic indicators indicate continued need for legal aid. While the proportion of Canadians classified as low-income has declined slightly between 2015 and 2018, there remain 7% to 12% of Canadians (depending on the measure) living in poverty.<sup>10</sup> In addition, the proportion of Canadians classified as low-income will likely have increased in 2020-21 due to the coronavirus pandemic and the resulting increase in unemployment.<sup>11</sup> The vulnerable groups that legal aid serves, such as low wage workers and recent immigrants, have been disproportionately affected.<sup>12</sup>

Legal aid also serves the public interest by providing access to justice for particularly vulnerable populations. Vulnerable or marginalized populations also continue to be overrepresented in the criminal justice system.

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<sup>8</sup> Department of Justice Canada. (2018b). *Legal Aid in Canada 2016-17*. <https://www.justice.gc.ca/eng/rp-pr/jr/aid-aide/p1.htm>; (2019a). *Legal Aid in Canada 2017-18*. <https://www.justice.gc.ca/eng/rp-pr/jr/aid-aide/1718/1718.pdf>; (2020a). *Legal Aid in Canada 2018-19*. <https://www.justice.gc.ca/eng/rp-pr/jr/aid-aide/1819/p1.html>

<sup>9</sup> In the Northwest Territories and Nunavut, individuals with criminal charges are presumed eligible for legal aid at court appearances up until the point of entering a not guilty plea. Presumed eligibility does not require any legal aid intake process or assessment of financial eligibility. If a client makes the decision to enter a not guilty plea, they are then required to apply for legal aid to determine their eligibility for ongoing legal representation.

<sup>10</sup> Three poverty measures for which data are available between 2015 and 2018 are considered. The Market Basket Measure (MBM), Canada's official poverty line since 2018, is based on the cost of a specific basket of goods and services that approximate the amount of disposable income necessary to meet basic needs (housing, food, clothes), and it varies by location and city size. Based on the MBM, the percent of people in poverty in Canada in 2018 was 11%. The Low-Income Cut-off (LICO) defines families living in poverty if they spend more than 20% of their income on necessities, compared to the average Canadian family. In 2018, 7.3% of Canadian families were living below the LICO. The Low-Income Measure represents the population in the bottom income quartile, adjusted for family size, and was 12.3% of the population in 2018 (Statistics Canada, 2015b, 2015c).

<sup>11</sup> Statistics Canada. 2021. *The Daily – Labour Force Survey*, January 2021. <https://www150.statcan.gc.ca/n1/daily-quotidien/210205/dq210205a-eng.htm>

<sup>12</sup> Statistics Canada. (2020). *COVID-19 in Canada: A Six-month Update on Social and Economic Impacts*. <https://www150.statcan.gc.ca/n1/pub/11-631-x/11-631-x2020003-eng.htm#b>

- ▶ Indigenous people represent 4.5% of the adult population of Canada but comprise 30% of admissions into correctional facilities in 2018-19.<sup>13</sup> Approximately 15% to 20% of Indigenous people in federal correctional facilities attended residential schools.<sup>14</sup>
- ▶ Of individuals who had contact with the police, those with a mental health or substance use disorder were four times more likely to be arrested.<sup>15</sup>
- ▶ Studies show that most inmates in federal correctional facilities have mental health or substance use disorders.<sup>16</sup>
- ▶ At least half of persons in custody have experienced some form of childhood abuse (sexual, physical, or emotional).<sup>17</sup>

Key informants emphasized the role of legal aid in providing access to justice to low-income individuals who often have other challenges (e.g., mental health, addictions, trauma, or literacy) that make it difficult for them to navigate the justice system and represent themselves in court. By providing legal representation, legal aid helps prevent miscarriages of justice and supports fairness in the justice system, which is a core Canadian value as enshrined in the Charter. As some noted, legal aid helps to “level the playing field” for individuals who are often marginalized and disadvantaged. In this way, legal aid supports equality and inclusion.

Legal aid also contributes to the public interest in an efficient justice system, as, without it, the system would have more unrepresented individuals who are not well equipped to handle their cases, which would create delays. Judges would also be faced with having to ensure that unrepresented individuals understand the process, while not helping the person advocate for themselves.

## 4.2 Effectiveness

### 4.2.1 Federal Contribution to Support Service Provision

The federal contribution is critical to maintaining legal aid services in provinces and territories. In 2016, the Program received its first budget increase since 2003-04. This increase, along with other budgetary and top-up funding increases for I&R legal aid, has offered much needed additional support for legal aid service provision. In addition, federal innovations funding has assisted legal aid plans to further improve their services to clients and the efficiency of their service delivery.

#### Supporting current demand for services

The Department has set two performance targets for the Program in its Departmental Results Report (DRR) that are intended to demonstrate that the Program is providing “Canadians in contact with the justice system have access to appropriate services enabling a fair, timely and accessible justice

<sup>13</sup> Malakieh, J. (2020). *Adult and youth correctional statistics in Canada, 2018/2019*. The Canadian Centre for Justice Statistics. <https://www150.statcan.gc.ca/n1/en/pub/85-002-x/2020001/article/00016-eng.pdf?st=bF5EMZ05>

<sup>14</sup> Kouyoumdjian, F., Schuler, A., Matheson, F. I., & Hwang, S. W. (2016). Health status of prisoners in Canada. *Canadian Family Physician*, 62(3), 215–222

<sup>15</sup> Statistics Canada. (2015a, June 2). *Mental health and contact with police in Canada, 2012*. <https://www150.statcan.gc.ca/n1/pub/85-002-x/2015001/article/14176-eng.htm>

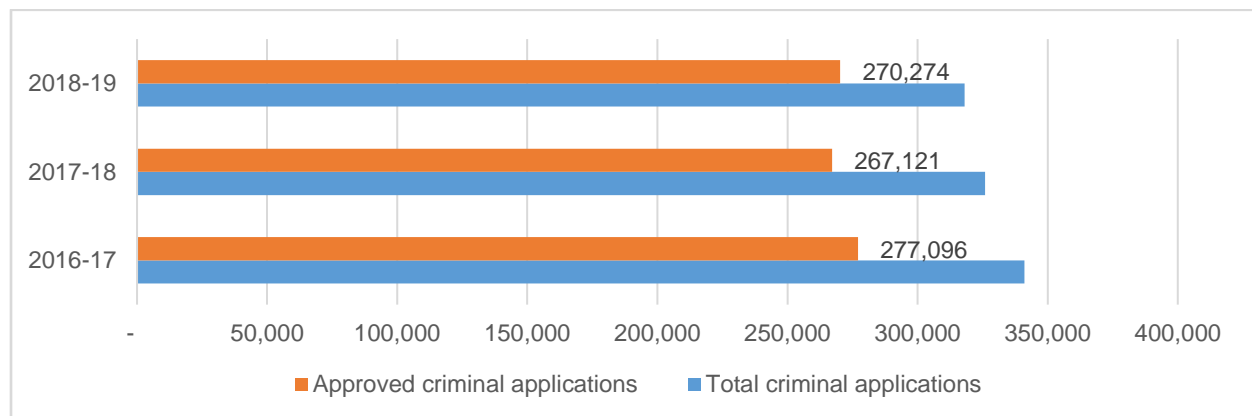
<sup>16</sup> Correctional Service of Canada. (2015). *National Prevalence of Mental Disorders among Incoming Federally-Sentenced Men*. <https://www.csc-scc.gc.ca/research/005008-0357-eng.shtml>; Correctional Service of Canada. (2018). *Prevalence of mental disorder among federal women offenders: Intake and in-custody*. <https://www.csc-scc.gc.ca/research/r-420-en.shtml>

<sup>17</sup> Kouyoumdjian, supra note 12.

system”.<sup>18</sup> Based on the available data from legal aid applications and duty counsel assists from provincial and territorial Statement of Final Claims, the Program is generally meeting these two performance targets.

For two of the three years for which Statement of Final Claims are available for all jurisdictions, the number of approved criminal applications exceeded the DRR target of 270,000 approved full service applications.<sup>19</sup> In 2017-18, the number of criminal applications was slightly below the target, which reflects the declining crime rate mentioned in Section 0. In addition, while the number of applications has decreased over time, the proportion of approved criminal legal aid applications has remained fairly stable (between 81% and 85%), which is also an indication of the legal aid plans’ ability to maintain access to appropriate services. See Figure 1.

**Figure 1. Criminal Legal Aid Applications, 2016-17 to 2018-19<sup>20</sup>**



Source: Department of Justice Canada, *Legal Aid in Canada*. 2018b, 2019a, 2020a<sup>21</sup>

In terms of duty counsel assists in criminal matters, the number is trending upwards (12% over four years). In the most recent two years, the number of assists has exceeded the DRR target of 1,000,000 duty counsel assists. In addition, it is likely that the number of duty counsel assists came substantially closer to the target in the other years, as some legal aid plans keep data by persons assisted rather than the number of assists. The increase in duty counsel assists is for adults, as youth duty counsel assists have declined substantially, reflecting the decline in youth crime.<sup>22</sup>

<sup>18</sup> Department of Justice Canada. 2020. 2018-19 Departmental Results Report. [https://www.justice.gc.ca/eng/rp-pr/cp-pm/dpr-rr/2018\\_2019/index.htm](https://www.justice.gc.ca/eng/rp-pr/cp-pm/dpr-rr/2018_2019/index.htm)

<sup>19</sup> Data for 2019-20 is not reported, as Statement of Final Claims for the territories were not available in time to inform the evaluation.

<sup>20</sup> An application for legal aid refers to a request for legal aid assistance that results in the provision of summary or full service assistance on behalf of the legal aid plan, or the denial of legal aid service. While most amounts were obtained from the *Legal Aid in Canada* annual reports, where no value was provided, amounts were obtained from the jurisdictional annual claim report.

<sup>21</sup> Department of Justice Canada, supra note 9

<sup>22</sup> Moreau, G., Jaffray, B., & Armstrong, A. (2020). *Police-reported crime statistics in Canada, 2019*. Canadian Centre for Justice Statistics. <https://www150.statcan.gc.ca/n1/en/pub/85-002-x/2020001/article/00010-eng.pdf?st=3L-nSp>

**Table 6. Criminal Legal Aid Duty Counsel Services\* by Type and Year**

Year	Adult	Youth	Total
2016-17	868,661	56,462	925,123
2017-18	939,622	54,349	993,971
2018-19	980,711	39,920	1,020,631
2019-20**	1,000,266	33,802	1,034,068

\* Criminal duty counsel refers to legal services in criminal matters that are generally provided at a court or place of detention. Some legal aid plans keep data by number of assists and others by number of persons assisted. Duty counsel assists for provincial statute offences are not included.  
\*\*2019-20 statistics are partial. The data were obtained from provincial and territorial Statement of Final Claims, some of which are still only in draft format; a few claims were not submitted in time to inform the evaluation (Nunavut and Yukon).

Source: Department of Justice Canada, *Legal Aid in Canada*. 2018b, 2019a, 2020a<sup>23</sup>

It is important to note that these statistics provide a measure of legal aid plans' provision of and access to appropriate service to economically disadvantaged Canadians. However, it should be noted that the statistics do not include all individuals that do or could receive legal aid services. For example, the number of applications and the proportion of applications accepted do not account for situations where legal aid plans may pre-screen individuals for eligibility and not require an application, or where individuals are presumed eligible. In this way, the number of Canadians receiving appropriate services is undercounted. However, as noted in Section 0, the statistics do not capture individuals who may be eligible but do not apply. As a result, unmet need for legal aid services is not captured in these statistics.

## **Contribution Funding for Criminal Legal Aid in Provinces and Territories and Civil Legal Aid in the Territories**

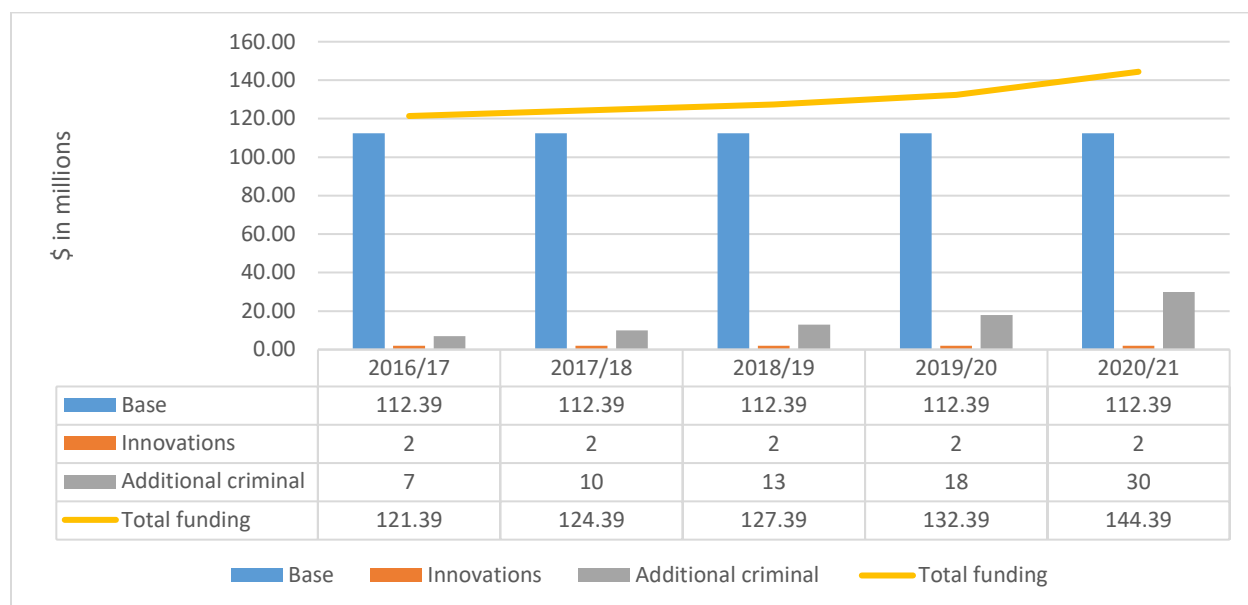
### ***Funding Increase***

One of the most significant changes from the last evaluation of the Program is the increase in the federal contribution. Prior to 2016, the federal contribution had not increased since 2003-04. Through Budget 2016, the federal government announced a funding increase (for criminal legal aid in the provinces, and criminal and civil legal aid in the territories) of \$88 million over five years, starting in 2016–17. This amount included a phased increase to the base funding (see “Additional criminal” in Figure 2) and \$2 million annually to support innovations (\$1.9 million to provinces and \$0.1 million to the territories).<sup>24</sup> Effective 2021–22, the federal government has committed to continuing the \$30 million increase for an ongoing annual total of \$142.4 million for criminal legal aid in the provinces and criminal and civil legal aid in the territories. Overall, legal aid funding increased by 19% from 2016-17 to 2020-21.

<sup>23</sup> Department of Justice Canada, *supra* note 9

<sup>24</sup> The \$2 million innovations funding ended in FY 2020-21.

**Figure 2. Budget 2016 Funding Increase**



Source: Department of Justice financial data.

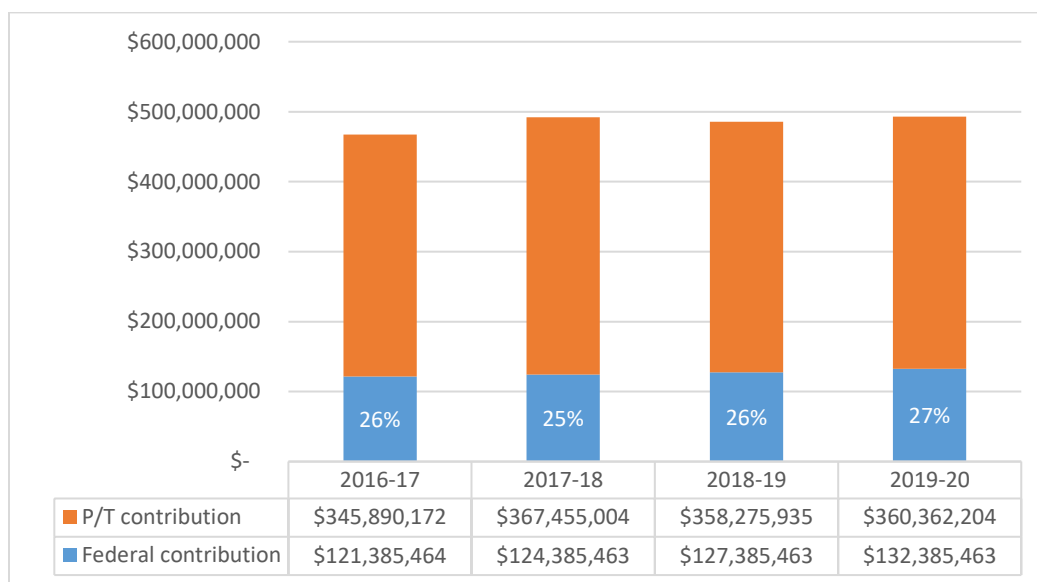
Key informants reported that the increased legal aid funding in Budget 2016 was much needed and helped legal aid plans. The new funding formula, which makes part of the federal funding dependent on demand and population demographics, also received positive comments. However, because federal legal aid funding is provided to the consolidated revenue fund for each province and territory, and is not earmarked for legal aid, legal aid plans did not necessarily receive the full benefit from the funding increase or the new formula. Of the nine jurisdictions that have complete Statement of Final Claims data for FYs 2016-17 to 2019-20, four had increases in their provincial contributions (British Columbia, Saskatchewan, New Brunswick, and Nova Scotia), while others showed decreases in the provincial contributions, ranging from 2% in Manitoba to 23% in Ontario.<sup>25</sup>

While the federal contribution has increased, the level of the contribution as a proportion of total legal aid eligible expenditures remains lower than desired by provincial and territorial governments and legal aid plans. However, the contribution's importance to maintaining the current level of service delivery was acknowledged.

As shown in Figure 3, while the proportion of the federal contribution has increased slightly, it remains below 30%.

<sup>25</sup> This calculation is based on reported total legal aid plan revenues by type of revenue (federal, provincial/territorial, client contributions and cost recoveries, contributions of the legal profession, and other legal aid plan revenues).

**Figure 3. Proportion of the Federal Contribution to Total Shareable Expenditures**



Source: Statement of Final Claims and Department of Justice financial data.<sup>26</sup>

Key informants were unanimous that, if the federal funding were withdrawn or substantially reduced, many legal aid programs would have to drastically cut services, which would go beyond family and civil legal aid and would also impact criminal legal aid. In addition, legal aid plans would likely have to tighten financial eligibility guidelines, causing more people to be ineligible. Some provincial and territorial governments might be more willing and capable than others to address shortfalls; however, this would result in even greater inequalities in access to legal aid across jurisdictions. An increase in unrepresented individuals in the justice system would create delays, cause miscarriages of justice, and erode the Canadian values of having a fair and accessible justice system.

### ***Innovations and Other Service Enhancements***

While federal legal aid funding contributes just over one quarter of the total shareable expenditures, the base funding and the innovations funding are intended to provide some of the financial support for promising innovative practices in legal aid service delivery.

While the innovations funding is new, many key informants noted that the legal aid plans have been, over the years, consistently engaged in the development and implementation of innovative practices. Innovation has been driven in large part by the need to manage an increasing workload and costs at a time when financial resources are not keeping pace. The 2016 evaluation report documented a number of innovations that had been undertaken by legal aid plans between FY 2012-13 and FY 2015-16.<sup>27</sup>

During the period covered by the current evaluation, legal aid plans have continued to innovate and enhance their services. While it is impossible to attribute directly specific innovations or service enhancements to the increase in federal or the innovations funding, the federal contribution does assist legal aid plans in being able to undertake these activities. As some key informants noted, while the additional money for their jurisdiction was not substantial (particularly for innovations), it enabled the

<sup>26</sup> Territorial eligible expenditures data includes eligible expenses related to civil legal aid. Some eligible expenditures are draft and/or unaudited for some jurisdictions and years.

<sup>27</sup> Department of Justice Canada. (2017, May 1). *Evaluation of the Legal Aid Program*. <https://www.justice.gc.ca/eng/rp-pr/cp-pm/eval/rep-rap/2016/lap-paj/index.html>



legal aid plans to improve some aspects of service delivery or their operations that they would not have been able to do without the additional funds.

Some key informants pointed to the benefits of having a specific funding amount attached to innovations. Not only has the innovations funding enabled the Legal Aid Program to provide specific support for innovations, but it has encouraged provincial and territorial governments to leverage the federal funding for additional investments in innovations. While there was limited evidence of leveraging, as noted above, some jurisdictions increased their legal aid funding. In addition, by having a portion of federal funding tied to innovations, the Legal Aid Program was also able to receive reporting on the innovations undertaken by plans, which provided the LAD and PID with a deeper understanding of these types of legal aid innovations.

Under the funding agreements, the jurisdictions were expected to report on “the nature of criminal legal aid innovations implemented that target and/or enhance services for vulnerable populations, modernize processes using technology, enhance business practices, and/or support improved data collection and performance measurement”.<sup>28</sup> As noted above, the innovations reported on by legal aid plans cannot be directly attributed to the federal funding or the innovations funding specifically, but the reports indicate the ongoing commitment of legal aid plans to innovation.

As shown in Table 7, approximately 50 innovations each year were reported between FY 2017-18 and FY 2019-20. When considering unique innovations that did not appear in multiple years, legal aid plans reported a total of 126 innovations.

**Table 7. Number of Innovations Reported**

Jurisdiction	2016-17	2017-18	2018-19	2019-20*	Total
P.E.I.	1	-	1	-	2
N.B.		1	7	3	11
N.S.	5	6	6	3	20
Que.	4	2	1		7
Ont.	7	9	2	1	19
Man.	4	10	7	5	26
Sask.	4	4	3	3	14
Alta.	2	2	2	3	9
B.C.	1	1	1	3	6
N.W.T.	4	-	3	-	7
Yuk.		5	-	-	5
Total unique	32	40	33	21	126
Total overall reported	37	50	55	53	N/A
<p>*2019-20 statistics were obtained from provincial and territorial Statement of Final Claims, some of which are still only in draft format, a few claims had not been submitted in time to inform the evaluation.            Note: Multi-year innovations were recorded in their first year only.            Newfoundland and Labrador and Nunavut did not provide reporting on innovations.</p>					

Source: Department of Justice Canada, Legal Aid in Canada. 2018b, 2019a, 2020a<sup>29</sup>

Based upon a review of the Statement of Final Claims, the types of innovations were classified into three main categories: general service enhancements, services for vulnerable populations, and information technology/information management (IT/IM). An overview of each innovation type is

<sup>28</sup> Department of Justice Canada. (2020a). *Legal Aid in Canada 2018-19*. Department of Justice Canada. <https://www.justice.gc.ca/eng/rp-pr/jr/aid-aide/1819/p1.html>

<sup>29</sup> Department of Justice Canada. Supra note 9



provided below (the number in parentheses is the number of unique innovations reported between 2016-17 and 2019-20). Specific examples, supplemented with information from key informant interviews, case studies, and journey mapping are included in Appendix B.

- **General service enhancements (n=67)** includes improvements in service delivery processes or staff capacity to promote greater access to services, improved quality of service, or greater efficiency. Several jurisdictions expanded services to weekends and new geographic areas, increased financial eligibility limits, expanded duty council services, and introduced efficiency measures to provide more timely access to service and reduce time in the court system.
- **Services for vulnerable populations (n=31)** includes changes in service delivery to improve access to services or the quality of services, and service outcomes for specific vulnerable populations. Jurisdictions implemented a variety of innovations that included providing assistance in specialized courts to individuals with substance abuse or mental health issues, and funding or creating resources to assist with Gladue reports<sup>30</sup> or cultural assessments so that the justice system takes into account a person's relevant background. In addition, these innovations offered cultural-competency training to staff, and collected better information on marginalized clients so that services can be better tailored to meet their needs, among others.
- **IT/IM (n=28)** includes modernization of infrastructure or information management to increase access to information (for the public or for service providers), improve online access to services and/or digital data collection. Several jurisdictions modernized information databases, introduced or updated websites for program information, introduced online application processes, or enhanced the data being collected on applicants and clients. This modernization was particularly valuable for smaller jurisdictions where the needs were great but funding was lacking for IT/IM projects, such as Prince Edward Island, Nova Scotia, New Brunswick, Saskatchewan, Northwest Territories, and Yukon.

### **Contribution Funding for Immigration and Refugee Legal Aid**

Key informants noted that the federal funding for I&R legal aid has been crucial to maintaining services due to an increase in demand and/or substantial provincial budget cuts.

As discussed in Section 0, applications for I&R legal aid have increased, particularly between 2016-17 and 2017-18. PWG key informants attributed the increase to the international situation (i.e., the level of conflict and human rights abuses in various countries) and more irregular border crossers coming from the United States to Canada to seek asylum.<sup>31</sup> Due to the fluctuating demand and limits of available funding,<sup>32</sup> legal aid plans offering I&R legal aid reported nearly having to pause their I&R legal aid services at different points in time over the last four years.

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<sup>30</sup> The Supreme Court of Canada, in *R. v. Gladue*, [1999] 1 S.C.R. 688, found that lower courts must consider an Indigenous offenders' background in sentencing given the effects of residential schools and other features of colonialism. *Gladue* reports are pre-sentencing or bail hearing reports, which outline mitigating factors to be considered in sentencing Indigenous offenders.

<sup>31</sup> When individuals cross the Canada-United States border between ports of entry, this is termed "irregular border crossings."

<sup>32</sup> The I&R federal funding allocation formula is based on past demand, so increases in demand can create funding pressures.

To respond to the I&R legal aid situation, the federal government provided funding top-ups and announced additional funding in Budgets 2017, 2018 and 2019. In Budget 2019, the federal government committed to \$49.6 million over three years for I&R legal aid.<sup>33</sup>

The I&R legal aid situation did not stabilize as, in April 2019, the Ontario government cut Legal Aid Ontario's funding overall by \$133 million and required that only federal funding be used for any new I&R legal aid certificates.<sup>34</sup> The federal government responded in August 2019 with an additional \$26.8 million announced in the Economic and Fiscal Snapshot 2020 for I&R legal aid for FY 2019-20, of which Ontario was to receive \$25.7 million.<sup>35</sup> However, due to the impact that COVID-19 had on legal aid volumes and expenditures, only \$20.3 million was required based on revised provincial forecasted budgets, which totalled \$48.53 million for 2020-21. According to key informants, had the federal government not provided the additional funding, Legal Aid Ontario would have had to stop issuing new I&R legal aid certificates.<sup>36</sup> The service disruption was expected to increase the number of refugee claimants appearing before the Immigration and Refugee Board of Canada (IRB) without legal representation, which would negatively impact the efficiency of the IRB.<sup>37</sup>

Key informants from legal aid plans credited the Legal Aid Program with stepping up to assist them when funding pressures have occurred. Because the Program does not have extra contribution funding, it has to make off-cycle budget requests for additional money (top-ups) and, once the request is approved, make the necessary Treasury Board submissions. This cycle of needing to make yearly requests for additional funding for I&R does not support the long-term sustainability of I&R legal aid. The past four years have demonstrated that the current level of ongoing I&R funding in the contribution agreements (\$11.5 million per year) is not sufficient. Figure 4 reflects the additional infusion of funding that I&R legal aid has required from FY 2016-17 to FY 2019-20.

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<sup>33</sup> Government of Canada. (2019, March 19). *Budget 2019: Chapter 4*. <https://www.budget.gc.ca/2019/docs/plan/chap-04-en.html>; Office of the Prime Minister. (2019, August 12). Increased legal support to help reduce delays for asylum claims. *Prime Minister of Canada*. <https://pm.gc.ca/en/news/news-releases/2019/08/12/increased-legal-support-help-reduce-delays-asylum-claims>

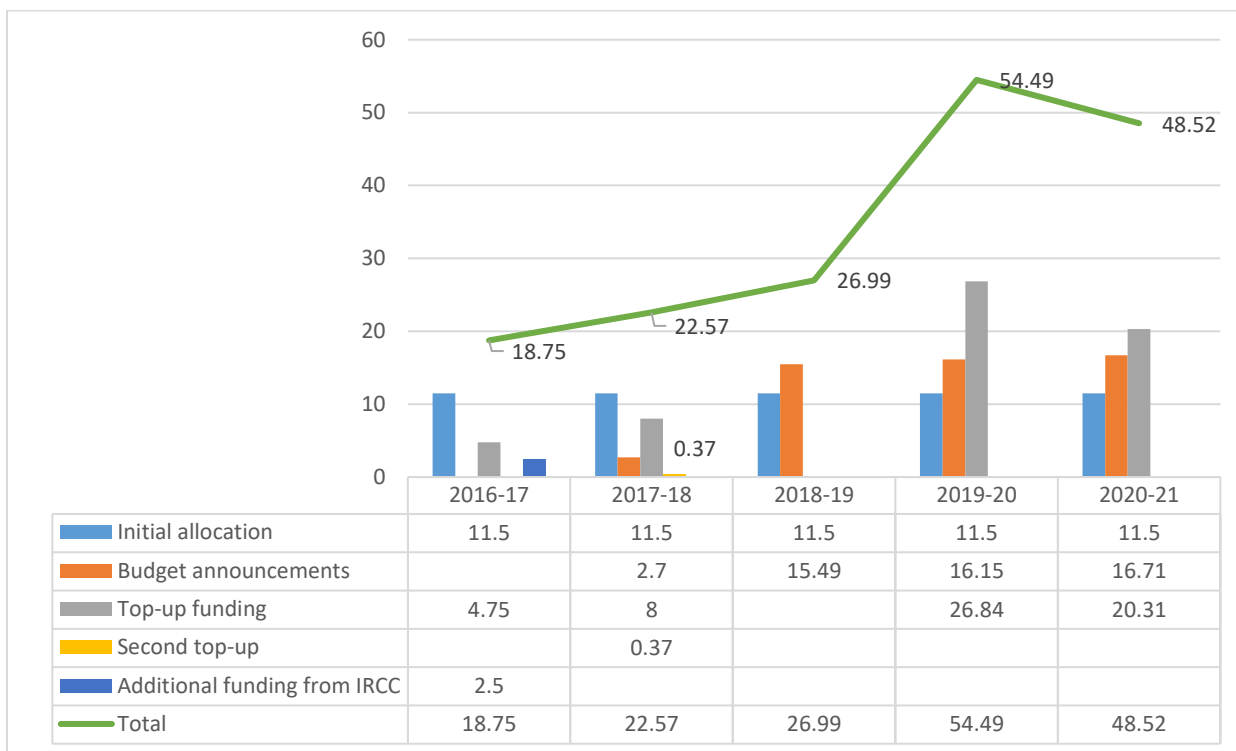
<sup>34</sup> Globe and Mail. (2019a, April 15). *Legal Aid to stop taking on new immigration and refugee cases Tuesday after Ontario budget cut*. <https://www.theglobeandmail.com/canada/article-legal-aid-to-stop-taking-on-new-immigration-and-refugee-cases-tuesday-2/>; Law Times. (2019, August 12). *Feds pledge \$25.7M to Ontario immigration and refugee legal aid*. <https://www.lawtimesnews.com/practice-areas/immigration/feds-pledge-25.7m-to-ontario-immigration-and-refugee-legal-aid/278060>

<sup>35</sup> Office of the Prime Minister, *supra* note 28.

<sup>36</sup> Legal Aid Ontario was prepared to issue new certificates for the limited purpose of assisting refugee claimants with completing the Basis of Claim form, which is a key document for refugees to present their claims before the IRB.

<sup>37</sup> Globe and Mail. (2019b, July 16). *Immigration and Refugee Board says cuts to legal aid funding in Ontario will cause hearing delays*. <https://www.theglobeandmail.com/canada/article-immigration-and-refugee-board-says-cuts-to-legal-aid-funding-in/>

**Figure 4. Federal Immigration and Refugee Legal Aid Funding (in millions of \$)**

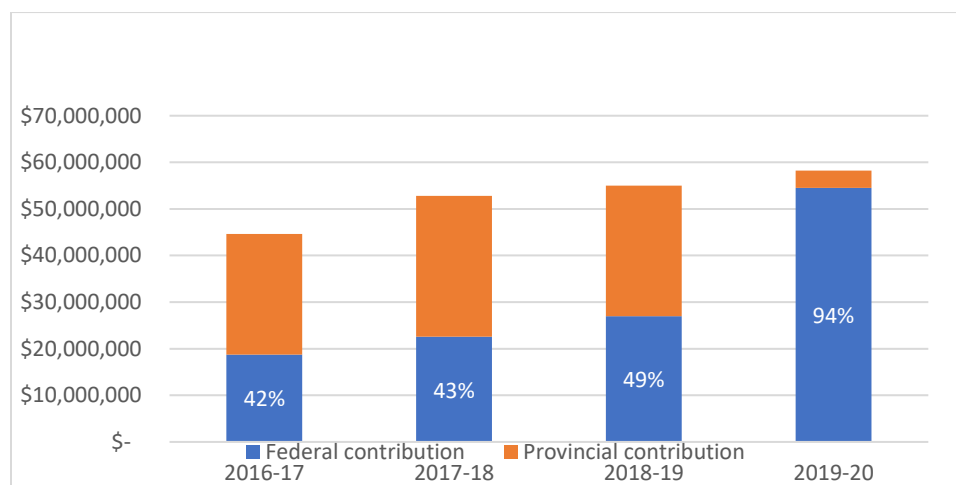


Source: Department of Justice financial data.

The FY 2019-20 situation is also reflected in Figure 5, showing that the federal contribution as a proportion of shareable I&R expenses rose from 42% in FY 2016-17 to 94% in FY 2019-20. Given the current situation, key informants believed that, if federal funding ended for I&R legal aid, I&R legal aid would cease, as it is unlikely that the provinces would step in and provide the necessary funding. In fact, provincial key informants commented that I&R legal aid is considered an area of federal responsibility.

A few provinces that do not receive I&R legal aid funding noted that they require I&R legal aid in their province, but they have not sought funding under the federal I&R legal aid component because the federal contribution that they would receive would not be sufficient to cover their needs.

**Figure 5. Proportion of the Federal Contribution to Total Shareable Immigration and Refugee Expenditures**



Source: Statement of Final Claims and Department of Justice financial data.

Overall, legal aid has a significant impact on the IRB, as well as the Federal Court, as counsel help those processes operate more smoothly. Key informants indicated that having counsel ensures that the merits of an individual's case are not affected negatively by lack of preparation or proper presentation. In fact, a 2011 study highlighted the importance of competent counsel in successful outcomes for refugee claimants.<sup>38</sup> In Budget 2019, the federal government also recognized the importance of competent legal representation for parties before the IRB.<sup>39</sup> In the absence of legal aid, service organizations that assist refugees would likely become overburdened by trying to assist their members who are appearing before the IRB, and would have to divert some of their resources from job training assistance or assistance in finding housing.

### State-Funded Counsel Funding

The federal funding for state-funded counsel ensures the integrity of the Canadian justice system. In state-funded counsel cases, the proceedings involve federal interests and, should counsel not be provided, the public interest would not be served fairly and equitably, consistent with Charter rights, and the criminal justice system would be brought into disrepute. According to key informants, the absence of state-funded counsel would likely impact prosecutorial decisions, and a major backlog of cases in the justice system would likely occur. In cases with unrepresented individuals, the court is likely to order a stay of proceedings to request state-funded counsel for the accused, which creates delays and inefficiencies in the system. Similarly, if trials were to proceed with unrepresented individuals, more time, energy and resources would be required from all justice stakeholders involved, including the Officer of the Peace, the judge, and court administrators. Key informants agreed that, if state-funded counsel were not available, something else would need to be created to fill the gap, as they are critical to the proper functioning of the justice system.

<sup>38</sup> Rehaag, S. (2011). The Role of Counsel in Canada's Refugee Determinations System: An Empirical Assessment. *Osgoode Hall Law Journal*, 49(1), 71–116.

<sup>39</sup> Government of Canada. (2019, March 19). *Budget 2019: Chapter 4*. <https://www.budget.gc.ca/2019/docs/plan/chap-04-en.html>

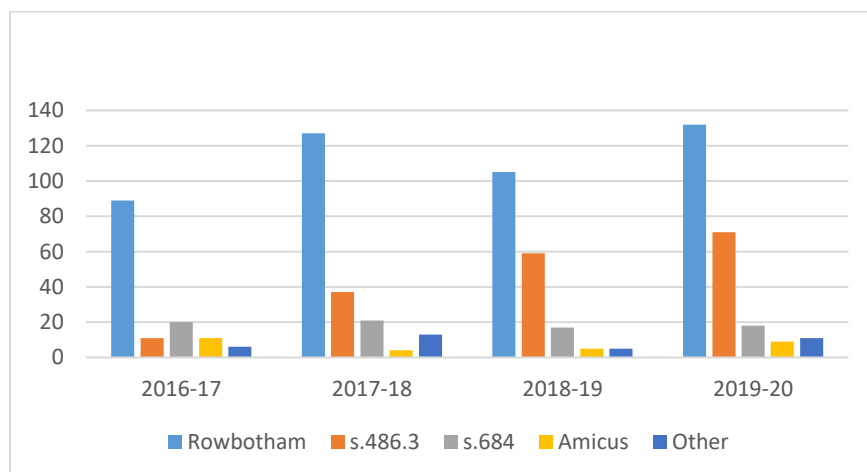
Federal contributions for the state-funded counsel cases cover 100% of the legal service costs (fees and disbursements) of defence counsel, plus a 15% management fee to the provincial or territorial governments or legal aid plans that agree to manage these cases on behalf of the federal government. For some cases, the LAD directly administers state-funded counsel cases.

As shown in Figure 6, the most common state-funded counsel cases relate to instances where a court orders the Attorney General of Canada to provide funded defence counsel in cases where the individual does not qualify for legal aid, lacks the funds to hire a lawyer, and the case is so complex that without counsel, the accused would be denied a fair trial.<sup>40</sup> These cases are generally not only complex, but also the consequences to the accused if found guilty are incredibly serious (e.g., cases related to terrorism or narcotics trafficking).

The other most common state-funded counsel cases involve *Criminal Code* Section 486.3 (appointing counsel so that the accused will not cross-examine certain witnesses, such as witnesses under 18 years of age, or the complainant in cases involving certain violent offences) and Section 684 (appellate judge determines accused should have counsel in the interest of justice). In addition, courts can use their inherent jurisdiction to order the appointment of *amicus curiae*, who are lawyers that assist the court by serving as an independent counsel to provide legal advice. *Amicus curiae* are often appointed in proceedings involving Sections 37 (public interest) and 38 (national security) of the *Canada Evidence Act*, so that appointed counsel can review top-secret documents. They can also provide the court with legal arguments on whether the documents should be disclosed or whether they are of such a sensitive and potentially injurious nature that they should not be disclosed.

The state-funded counsel caseload for cases managed by provincial or territorial governments or legal aid plans increased between 2016-17 and 2019-20 from 137 to 250, with annual expenditures ranging from a low of \$3.65 million in FY 2018-19 to a high of \$4.15 million in FY 2016-17. State-funded counsel cases managed by the LAD constitute a small number each year, ranging from 18 to 31 over the evaluation period, with expenditures well under \$500,000 each year (ranging from \$98,174 to \$428,009).

**Figure 6. State-funded Counsel Cases Managed by Provincial or Territorial Governments or Legal Aid Plans**



Source: Legal Aid Program administrative data.

<sup>40</sup> R. v. Rowbotham, [1988] 41 CCC (3d) 1

## 4.2.2 Access to Justice for Vulnerable Populations

The federal contribution provides access to justice for vulnerable populations as is evident from the profile of legal aid clients. Legal aid plans are adapting and expanding services in a variety of ways to reach vulnerable populations and address unique client needs. Financial ineligibility remains a barrier to accessing legal aid for those who are economically disadvantaged but whose income exceeds the financial eligibility guidelines.

### Profile of Legal Aid Clients

Legal aid clients are among some of the most vulnerable Canadians, as they have few to no economic resources; are usually less educated; and typically have experienced mental illnesses, substance abuse, trauma, or other personal situations that impact their ability to respond to their legal situations. They are also disproportionately Indigenous. Most key informants reported that the profile of legal aid clients has not substantially changed, with the exception of a few areas. In particular, there has been a decline in the number of youth criminal legal aid clients (related to the decline in the youth crime rate) and more criminal legal aid clients with substance use issues related to the opiate addiction epidemic.

The LAD has attempted to collect data on the profiles of legal aid clients by requesting demographic information in the annual Statement of Final Claim forms that each jurisdiction provides. There are limitations with this data, and it is hampered both by a lack of resources/capacity among certain legal aid plans as well as by relying on individuals to self-identify.<sup>41</sup> For this reason, other sources were used for the statistical profile, where available.

### Indigenous Clients

The overrepresentation of Indigenous people in the criminal justice system, as well as systemic racism and the legacy of colonialism, impact the social and economic outcomes for Indigenous people.<sup>42</sup> As a result, the proportion of legal aid clients who are Indigenous continues to be larger than their proportion of the population generally. Recent statistics for the legal aid plans in jurisdictions that together constitute the majority of the First Nations and Métis population<sup>43</sup> demonstrate the high numbers of legal aid clients who self-identify as Indigenous:<sup>44</sup>

- 31% of Legal Aid BC clients (criminal legal aid only) – 5.9% of the population are Indigenous
- 42% of Legal Aid Saskatchewan clients (all clients) – 16.3% of the population are Indigenous
- 66% of Legal Aid Manitoba clients (all clients) – 18% of the population are Indigenous
- 20% of Legal Aid Ontario clients (criminal legal aid only) – 2.8% of the population are Indigenous.

<sup>41</sup> Currently, for some legal aid plans, clients who receive multiple services are counted more than once, which means that the proportion of clients in a particular demographic category cannot be determined. In addition, completeness of the data is an issue: for most of the years covered by the evaluation, not all jurisdictions provided the demographic data. While most jurisdictions capture information on whether legal aid clients self-report as Indigenous, few jurisdictions are currently collecting data on whether clients are from racialized groups or have mental health issues.

<sup>42</sup> Department of Justice Canada. (2019b). *Understanding the Overrepresentation of Indigenous People in the Criminal Justice System*. <https://www.justice.gc.ca/socjjs-esjp/en/ind-aut/uo-cs>

<sup>43</sup> Four fifths of First Nations and Métis people live in Ontario (24.2%), British Columbia (17.7%), Alberta (14.0%), Manitoba (13.4%), and Saskatchewan (11.7%) (Statistics Canada, 2017b). Of these jurisdictions, only Legal Aid Alberta does not provide reporting on the number of its clients who self-identify as Indigenous.

<sup>44</sup> Legal aid plan data are from the most recent annual reports or other publications (Legal Aid Alberta, 2020; Legal Aid Manitoba, 2019; Legal Aid Ontario, 2020b; Legal Aid Saskatchewan, 2018; Legal Services Society of BC, 2019). The Indigenous population for the provinces is from the 2016 Census (Statistics Canada, 2017a).

## **Racialized Groups**

Few jurisdictions report on the number of clients who are racialized groups. Legal Aid Ontario reports that Black Ontarians comprise 14.3% of its criminal legal aid clients while constituting 4.7% of the provincial population.<sup>45</sup> For jurisdictions that provide I&R legal aid, these clients are often racialized groups. In addition, because I&R legal aid clients are primarily refugee claimants, they are by definition a highly vulnerable group who have experienced trauma.<sup>46</sup> As key informants pointed out, immigrants and refugees may struggle to understand not only the Canadian judicial process, but also Canadian laws that may differ substantially from their home country's system. They are also navigating a complex legal system in a language they may not speak.

## **Legal Aid Plan Services for Vulnerable Populations**

The evaluation found that legal aid plans are adapting and expanding services in a variety of ways to reach vulnerable populations and address unique client needs. Some of these service enhancements and innovations are described above in Section 0.

Some jurisdictions have clinics which specialize in certain areas of the law (e.g., immigration and refugee law, youth law, civil law, criminal law, family law). Other clinics deal primarily with particular population sub-groups (e.g., clients in rural areas, who are elderly, students, parents whose children have been removed, disabled persons, those living with HIV/AIDS or FASD, those who have mental health issues, and those whose mother tongue may not be English or French). Key informants in these regions viewed these dedicated clinics positively for several reasons, including that they allow for the specialization and concentration of counsel, build client confidence in the expertise and competence of counsel, and support the development of effective networking and referrals between offices. Dedicated offices also allow for more specialized and targeted support to marginalized and vulnerable groups. As is evident from the types of clinics listed, not all are in areas that receive federal funding.

Most jurisdictions in Canada (with Nunavut being the sole exception) have some type of specialized, therapeutic court. These courts provide a multi-disciplinary criminal justice and therapeutic response that includes court-supervised treatment as an alternative to the traditional criminal justice system. The intention is also to address issues such as substance abuse, mental health, or trauma that underlie the criminal behavior. Currently, legal aid plans support the following specialized courts in their jurisdiction by offering full legal representation and/or duty counsel services: Mental Health/Wellness Courts, Drug Treatment Courts, First Nations/Gladue Courts, and Domestic Violence Courts. In addition to the therapeutic courts, many jurisdictions offer a separate Youth Court for young offenders and/or diversion programs, which the legal aid plans also support through full legal representation and/or duty counsel services. For both specialized courts and diversion programs, the involvement of legal aid improves access to justice as, without legal aid assistance, individuals may not be aware or understand these options. Examples from the journey mapping sessions and the youth justice case study are provided below.

- All three legal aid plans that participated in the journey mapping sessions supported Wellness Courts in their jurisdictions. There were some service differences, such as using a dedicated staff Mental Health Court lawyer (Nova Scotia Legal Aid), staff counsel but not dedicated solely to work in the Wellness Court (Northwest Territories Legal Aid Commission), and staff duty

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<sup>45</sup> Legal Aid Ontario. (2020b). *Legal Aid Ontario: Race-based data for legal aid certificates 2019-20*.

<https://www.legalaid.on.ca/news/legal-aid-ontario-race-based-data-for-legal-aid-certificates-2019-20/>

<sup>46</sup> Kronick, R. (2018). Mental Health of Refugees and Asylum Seekers: Assessment and Intervention. *Canadian Journal of Psychiatry. Revue Canadienne de Psychiatrie*, 63(5), 290–296.

<https://doi.org/10.1177/0706743717746665>

counsel services with private bar full representation services (Legal Aid Manitoba). In addition, while Nova Scotia Legal Aid and Legal Aid Manitoba require individuals to apply for legal aid, individuals are presumed eligible for legal aid in the Northwest Territories. In Nova Scotia, the Mental Health Court lawyer can directly refer individuals to Wellness Court while the Crown or other stakeholders are more directly involved with referrals in the other jurisdictions. However, the main services provided are similar: serving as a resource, liaising with other justice stakeholders, assisting with any legal issues that arise (e.g., breaches or the need to change conditions), and attending check-up meetings on client progress.

- Three legal aid plans described their support of youth diversion programs — Nova Scotia Legal Aid, Legal Aid Manitoba, and Yukon Legal Services Society — and for all three, the legal aid plan is much less involved than in the traditional court process or specialized courts. When the diversion occurs before the individual is charged, the legal aid plan is not involved at all. However, if the decision to divert the matter occurs post-charge or post-plea, the legal aid plan's role consists in identifying appropriate individuals and liaising with the Crown. Once in a diversion program, the legal aid plan typically plays a minimal role, but there may be opportunities to provide youth with additional guidance and support as they navigate the diversion process (Yukon). In addition, the legal aid plan may seek a status update and use that information when liaising with the Court. It will ask for adjournments as necessary to allow more time to complete the plan (Nova Scotia).

Individuals living in remote and rural regions face a number of interconnected barriers to which legal aid plans have attempted to respond.

- A client's ability to access physically legal aid offices or the court varies across the country and can present a significant barrier. This is particularly true in regions where there are few legal aid offices, where the territory covered is quite large, and where there is a lack of transportation infrastructure. For example, in fly-in communities where court might be held once a month, it can be challenging to make sure that the client has a good understanding of the process and the case in one day. To mitigate this barrier, some regions have increased the number of service areas (e.g., New Brunswick) while others have sought to make the application process more accessible by phone or online (e.g., Nova Scotia) and tried to conduct a significant amount of casework by telephone (Northwest Territories). This latter mitigation strategy has become all the more prevalent in response to the COVID-19 pandemic, which has seen many legal aid offices and courts close down temporarily. However, as detailed further in the following point, phone and internet connectivity can themselves present barriers.
- As noted by most key informants, reliable access to technology, broadband, and internet can create significant challenges for both clients and legal aid. For example, it can be difficult to reach people (and this in a timely manner) or to send documents electronically for a client to sign. Further, an individual may not be eligible for electronic monitoring if there is a lack of landlines in their community. Various legal aid plans have sought to mitigate this challenge by trying to meet people in person, by visiting communities on a regular schedule, or by working with community organizations that serve the same clientele to try to better track individuals.

Quite a few legal aid plans have specific services or processes in place to support Indigenous clients, who can have a significant lack of trust in a judicial system that is seen as a colonial structure. Many have allocated funding for the writing of Gladue reports and have provided Indigenous cultural awareness training to their staff. Several also have recruited Indigenous or Inuit counsel and staff. Eight plans provide either full legal representation, duty counsel services, or expanded duty counsel services for First Nations/Gladue Courts in their jurisdictions. Two of the more unique examples of enhanced services provided to support Indigenous clients are below.



- Legal Aid BC has worked with the BC Provincial Court on the development of alternative sentencing models whereby Indigenous Elders are actively involved in the decision-making process. In addition to making the judicial process more rehabilitative than punitive, it has allowed the Indigenous community to be more engaged in the process and thus have more confidence in the justice system.
- Legal Aid Alberta has dedicated phone lines and reserved call-in days for Indigenous communities, and has provided cultural awareness training to staff who handle these calls.

The lack of trust in the justice system extends to other racialized groups as well. An example of how a legal aid plan has responded is Nova Scotia Legal Aid's creation of an African Nova Scotian Social Worker position who ensures that African Nova Scotian clients receive culturally specific supports and services. This Social Worker is involved at various points in the court process to assist clients, particularly to help finding services and programming to use at the show cause (bail) hearing to support a client's release, providing support to clients who are having a cultural assessment, and connecting clients to services as part of the Wellness Court or post-conviction restorative justice.

### **Potential Unmet Needs**

Client sub-groups who are underserved across the country include those living in rural and remote areas, Indigenous populations, racialized groups, and those who do not meet legal aid's financial criteria. Other underserved sub-groups include youth, those with physical and mental disabilities (i.e., who may face accessibility-related challenges), those with FASD, those who are illiterate, and immigrant populations. In addition, access to criminal legal aid services is more widespread and consistent than is access to civil legal aid services because of their relative funding amounts. Consequently, most individuals who appear in family court are self-represented and, as many of them are women, this would be another potentially underserved group.

Legal aid plans are paying attention to ensuring that services are adequate for clients with different backgrounds. However, available human and financial resources have impacted the ability of legal aid plans to improve service to these clients. With increased resources, legal aid plans could do such things as commission more Gladue reports, operate more community clinics in rural areas and on reserves, and provide increased translation services. They could also increase their financial eligibility guidelines (FEGs), which establish the financial levels for assessing whether an individual is eligible for legal aid, so that more individuals are eligible for legal aid.

As with the last evaluation report, financial ineligibility remains the most common reason that criminal legal aid applicants are refused legal aid. The evaluation found that the ability of legal aid plans to adjust their FEGs varies across jurisdictions. Those who cannot adjust their guidelines are restricting the access to legal aid, although this is also a means to manage demand for services and, therefore, expenditures. Those who can adjust their guidelines are increasing access to justice. Key informants indicated that for most plans, the FEGs are now set so low that many low-income individuals facing the likelihood of imprisonment can neither afford lawyers nor qualify for legal aid.

Comparing the FEGs to other economic measures demonstrates whether the financial eligibility requirements are responding to the economic environment. The evaluation updated the analysis undertaken in the last evaluation for the jurisdictions where the required information was available. Three jurisdictions (Ontario, Quebec, and Yukon) have increased their FEGs well above any of the economic measures used (consumer price index [CPI], average hourly earnings, and minimum wage), which means that a higher proportion of lower income individuals are eligible for legal aid. Similarly, British Columbia is the only jurisdiction where the FEG is above Low-Income Cut-Offs for most family

sizes, which means that more families living below the Low-Income Cut-off are eligible for legal aid. The results are provided in Appendix C.

### 4.2.3 Emerging Issues and Legal Aid Service Delivery

Many of the issues noted in the previous evaluation are still affecting the provision of legal aid and have continued to result in consequences such as increased costs. The pandemic tested legal aid plans and the justice system, but both responded with service innovations to manage the crisis, although its full effects on volumes and finances will be unknown until at least the end of FY 2021-22, and perhaps for several years to come.

#### Criminal Legal Aid

A number of issues were identified as having had an impact on the provision of criminal legal aid, including legislative changes. The removal of pre-emptory challenges when empanelling juries has added costs to legal aid cases. Additional costs are also associated with mandatory minimum penalties, as individuals are more likely to take the matter to trial. In addition, these legal provisions have added to the cost of legal aid, in part due to lawsuits related to the loss of pre-emptory challenges and mandatory minimum sentences. *Criminal Code* changes related to additional protections to victims, while positive for the criminal justice system, can add to the complexity and lawyer time required for these cases.

Recent court decisions have also had an impact on legal aid, most notably the Jordan decision.<sup>47</sup> In this decision, the Supreme Court of Canada established rules for the length of time from a person being charged to trial, and held that for most cases, the trials should occur within 18 to 30 months from the time the person was charged. This decision creates more pressures on legal aid in order to find the resources (staff or private bar) to ensure that legal aid can support these timelines.

The increasing complexity of criminal cases due to the length of criminal investigations, and the number of wiretaps and other surveillance methods, are all contributing to an increased volume of disclosure as well as the need for disclosure applications. In addition, there are more Charter applications which also add expenses to legal aid, as Charter legal issues add to the complexity and length of files. It is a continually evolving area of the law, which requires time for legal aid staff lawyers to maintain expertise, which is an expense for legal aid plans. While these complex criminal cases and Charter applications constitute a relatively small number of legal aid cases, they are substantially higher cost.

Finally, investments in other areas of the justice system, such as in policing or Crown prosecutors that may result in more individuals being charged, add to the expense of legal aid and often occur without a corresponding increase in legal aid funding.

#### Legal Aid in the Territories

In the territories, there are the ongoing challenges in maintaining staffing levels and retaining staff (especially senior staff), which in turn affects the functioning of the legal aid plans. Unique situations in the territories has also created issues, such as the housing crisis in Nunavut that has created demand for legal aid services related to housing issues; and the fluctuations in the mining industry have impacted the demand for legal aid, particularly for employment law, in other territories.

Other challenges mirrored those of the provincial legal aid plans, including the increasing complexity of criminal cases because of changes to the law, and increased costs of transcripts and travel. The

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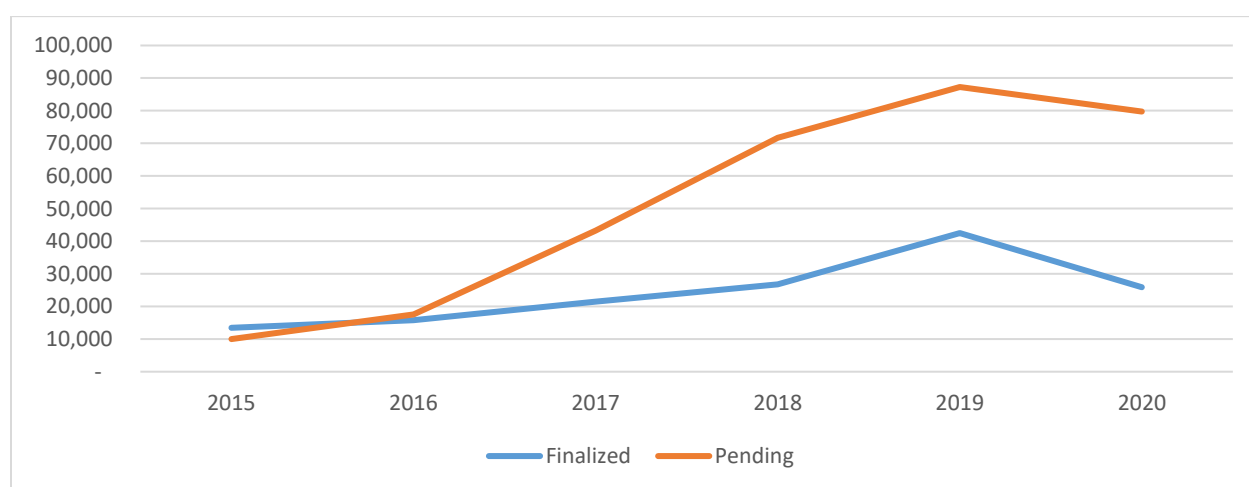
<sup>47</sup> R. v. Jordan, [2016] 1 S.C.R. 63

changes to the law mentioned were *Criminal Code* changes to impaired driving and sexual assault, as well as the *Cannabis Act*. The changes add volume to the legal aid caseload and/or increase legal aid costs because additional time is required to handle these cases.

### Immigration and Refugee Legal Aid

For I&R legal aid, the increasing volume of applicants, as well as the potential influx of refugee claimants who may come to Canada when travel restrictions ease post-pandemic, were cited as the major issues that will emerge over the course of the coming months/years (see Figure 7). According to key informants, the IRB has continued to have a backlog of refugee claims, and the trend towards faster processing of refugee claims is reversing, with longer delays in scheduling hearings in the Refugee Protection Division of the Board. These trends are projected to continue, particularly given the expected increased demand.

**Figure 7. Immigration and Refugee Board of Canada Refugee Protection Claims**

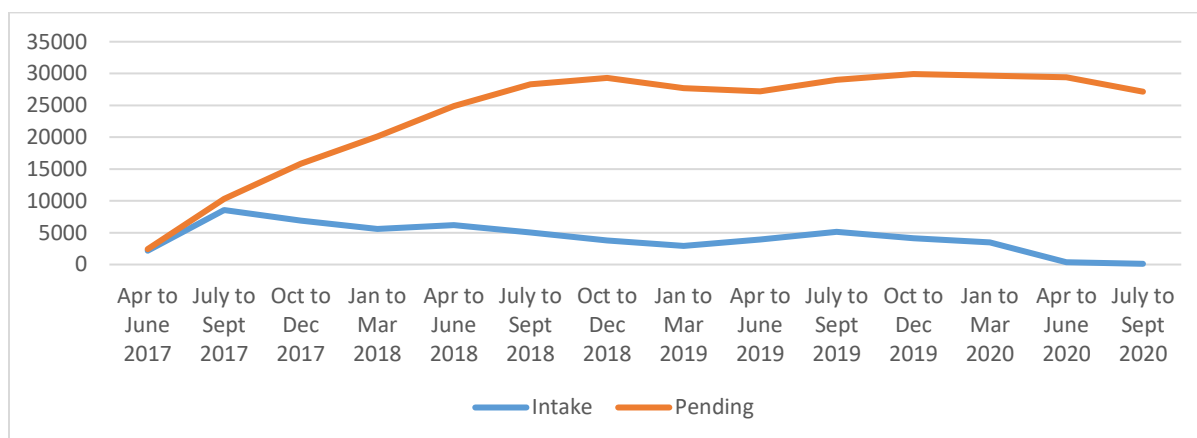


Source: Immigration and Refugee Board of Canada, *Refugee claims statistics*.<sup>48</sup>

Part of the increased demand is due to the number of irregular border crossers and the increasing backlog of pending claims (see Figure 8). Key informants noted that a new procedure to address the demand involves an enhanced pre-removal risk assessment (PRRA) and an interview with a representative of Immigration, Refugees and Citizenship Canada, rather than providing irregular border crossers access to the IRB. This approach is intended to manage the demand while ensuring that individuals are not returned to dangerous situations. However, it should be noted that some legal aid plans that provide I&R legal aid (e.g., Legal Aid Alberta) do not cover PRRA and for those that do (e.g., Legal Aid Ontario), the increased use of PRRAs could add costs to I&R legal aid delivery.

<sup>48</sup> Immigration and Refugee Board of Canada. (n.d.). *Refugee claims statistics*. Immigration and Refugee Board of Canada. <https://irb-cisr.gc.ca/en/statistics/protection/Pages/RPDStat.aspx>

**Figure 8. Refugee Claims Made by Irregular Border Crossers**



Source: Immigration and Refugee Board of Canada, Irregular border crosser statistics<sup>49</sup>

## Impact and Response to the Coronavirus Pandemic

### Service Delivery

COVID has had an impact on the overall justice system more generally, which has affected legal aid and its delivery. The evaluation explored these changes to determine whether any innovations may remain or would be beneficial to retain post-COVID.

Due to COVID, the courts shut down for a period of time, which led to a decrease in applications and new legal aid clients. When the courts began operations remotely using technology for video or teleconference hearings, legal aid plans had to adapt quickly to these new processes. Remote court sessions did make connecting with clients challenging for legal aid plans, as their initial contact is usually through duty counsel at the courthouse. Key informants (both legal aid plan and provincial representatives) commented that legal aid plans had adapted well to the situation by taking steps to connect counsel to clients as efficiently as possible. In particular, some plans did the following:

- assigned duty counsel dates in advance to streamline court appearances and decrease the number of adjournments
- used a phone-in or website service for quick applications for duty counsel assistance
- worked to ensure that counsel could appear via teleconference or video-conference for court (all plans where possible) — this move to video-conference hearings has proved challenging for some plans who are having to upgrade their information technology capabilities to enable staff counsel to appear remotely
- designated a lawyer to appear as agents for the private bar and staff counsel to adjourn matters, conduct bail hearings, and enter guilty pleas in adult and youth criminal court to reduce the need for attendance of multiple counsel
- put in place a system so lawyers can consult with clients who are in correctional institutions by teleconference
- developed systems to provide immediate assistance to detained accused, such as evening and overnight bail services, where lawyers provide after-hours assistance by teleconference with the goal to reduce the time that accused stay in remand when a consent order and/or bail plan can be put in place

<sup>49</sup> Immigration and Refugee Board of Canada. (2021). *Irregular border crosser statistics*. <https://irb-cisr.gc.ca/en/statistics/Pages/Irregular-border-crosser-statistics.aspx>

Legal aid plan representatives also mentioned a number of administrative changes that occurred during the pandemic:

- reduced contact by having applications completed over the phone or online exclusively or primarily
- introduction of new tariff items to support court changes (for example, providing an extra hour for criminal duty counsel to engage with the Crown to respond to the court holding pre-trial conferences on all criminal matters)
- removal of some requirements for applications to make virtual applications simpler (e.g., signature requirements or proof of cash income)
- elimination of financial eligibility determinations for certain clients, including all incarcerated individuals, which was done so those in remand could receive counsel right away since jails were potential COVID hotbeds
- creation of measures to pay lawyers expeditiously in recognition of cash flow issues that the pandemic would cause (e.g., simplified procedure for verifying private practice fees accounts [QC], allowing lawyers to interim bill on block fee certificates, reduced time period for payment from 30 to 14 days)

In terms of whether any of the changes might become permanent, most key informants stated it was too early to tell. Some expressed the hope that with the success of remote working, legal aid plans could reduce their office space. Similarly, it would be beneficial to continue to expand legal aid intake by telephone and online as this reduces barriers for some to apply. However, it was noted that intake cannot be moved entirely to these methods due to technology (Wi-Fi and cell coverage) issues in remote and rural areas. These issues of accessibility were well known already, but came into sharper focus with the pandemic.<sup>50</sup>

It was also noted that retaining some of the system changes that were introduced would also be beneficial. In particular, the use of audio or video-conferences for bail hearings and other court appearances has been beneficial as it saves time and resources in transporting the accused to court. Similarly, the ability of legal aid staff counsel and private bar to meet with clients using video-conferencing also saves time and resources.

Unintended consequences of some of the changes need to be assessed further. For example, whether, and the extent to which, bail hearings via video-conference has an effect on whether the accused is released from pre-trial detention. The concern is that seeing the individual in custody, which is the case when the bail hearing is conducted via video-conference, would unduly influence the judge. Other unintended consequences include the additional time required to track down clients and communicate with them, as criminal legal aid clients (in particular) often meet counsel in court, which is not occurring during the pandemic. For the territories and provinces with northern circuits, the pandemic has highlighted the system's unique vulnerabilities, such as fly-in court locations and, for the territories, the reliance on lawyers from the south who would need to fly in and self-isolate.

Several legal aid plan representatives noted that they have committees or working groups looking at the changes to service delivery that are due to COVID to determine lessons learned and best practices that should be maintained post pandemic.

### **Funding**

One of the legal aid plans' revenue streams are the contributions from the legal profession (e.g., law foundation funding and levies which may include interests from lawyers' trust accounts, revenues from

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<sup>50</sup> The Arctic Institute. (2020). *COVID-19's Impact on the Administration of Justice in Canada's Arctic*. <https://www.thearcticinstitute.org/covid-19-impact-administration-justice-canadas-arctic/>.

investments, etc.). While not expected to have a lasting impact, Ontario, Manitoba, and British Columbia will experience sharp declines in these revenues in 2020 and 2021 due to the pandemic. In FY 2019-20, Legal Aid Ontario received 22% of their revenues from legal profession contributions, followed by Legal Aid Manitoba (9%) and Legal Aid BC (6%). This will also affect other legal aid plans that receive a small percentage of their revenue from this source (e.g., the remaining plans reporting this information received between 0% and 3% of their revenues from the law foundation.)

#### 4.2.4 Legal Aid Policy and Program Development

The Program supports information-sharing and networking through the PWG. While the PWG was previously found to be focussed more on funding issues, it is now fulfilling its broader mandate as a forum to share ideas and discuss high level, national issues related to Legal Aid.

The PWG brings together representatives of Justice Canada, provincial and territorial governments, and legal aid plans for information-sharing and policy development. The PWG typically has one annual in-person meeting that occurs in the fall. In addition, the PWG meets via teleconference on an as-needed basis throughout the year. While some sub-committees are permanent (e.g., I&R Sub-committee), the PWG also creates sub-committees as needed. During the evaluation period, sub-committees that were in operation included the I&R and Policy and Research sub-committees. The Policy and Research Sub-committee was formed in early 2016 to examine the development of a new distribution formula for the five-year contribution agreement with Justice Canada for the 2017-18 to 2021-22 period. Based on the documents provided, the Policy and Research Sub-committee did not continue beyond 2016. Most recently, a sub-committee, the Contributions Sub-committee, was established in 2020 to discuss the distribution formula and the other terms in the contributions agreement in preparation for the next round of funding agreements. In 2021, the Information Technology Sub-committee was formed to discuss technological issues, including capacity gaps and strategies to address them.

The LAD serves as the PWG's secretariat and its handling of its secretariat role was uniformly praised by PWG members. Key informants noted that the LAD works with a Planning Sub-committee of the PWG before each annual meeting to identify which topics are of interest to PWG members. This collaborative approach to setting the PWG agenda was appreciated by members.

#### Information sharing

Almost all PWG key informants commented that the PWG serves an important role as a channel of communication and information-sharing about promising practices, emerging issues, and challenges affecting legal aid in Canada. Previously, the PWG was thought to focus more on funding issues, and the shift to broader discussions was attributed, in part, to the Budget 2016 increases. These key informants placed a high value on the PWG as a forum where they can freely share ideas and learn from each other's experiences, including how they have each responded to shared or similar pressures. Conversations about high level, national issues were noted as particularly useful, such as:

- service delivery issues (e.g., the use of technology, the pros and cons of the different legal aid models [staff, judicare, mixed] in different settings);
- the federal objectives for legal aid as they relate to access to justice;
- justice issues and trends (e.g., specialized courts, Indigenous justice issues, explanations of changes to the *Criminal Code*);
- the federal funding allocation formula; and
- most recently, the challenges of and responses to the pandemic related to service delivery and its impact on non-government funding (i.e., from law foundations).

In terms of information sharing, PWG key informants consider the working group to be more useful for smaller legal aid plans that do not have the capacity to conduct research or engage in policy or program development (e.g., develop pilot projects). The smaller plans benefit by having access to that national expertise on issues that impact legal aid; learning from the experience of larger legal aid plans helps them innovate. The smaller plans noted that although the PWG has established a network with legal aid plans which allows them to reach out and ask questions of larger plans, they also share information with the larger plans that may assist them as well, such as information on Indigenous and northern issues. In addition, the LAD has brought in guest speakers on topics of interest at PWG meetings that particularly benefited smaller plans that would not otherwise have had access to such presentations.

Some PWG key informants desired more information sharing between provincial and territorial governments and the federal government, or thought that the generalized nature of the information and research being shared did not lend itself well to the unique local realities of each jurisdiction. The discussion of outcomes and other over-arching policy issues were noted as being challenging given legal aid plans' different contexts, structures, and level of independence from the provincial and territorial governments.

## **Networking**

The PWG is considered a useful forum for fostering relationships among legal aid plans and provincial and territorial government representatives. As these representatives often have a much broader mandate than legal aid, the PWG provides them with the opportunity to learn from other jurisdictions' experiences as well as hear more from their own legal aid plans. According to provincial and territorial government key informants, these discussions at the PWG meetings help jurisdictions anticipate issues, and the PWG provides a network that they can reach out to for advice.

Some PWG key informants addressed the potential overlap or duplication of the Association of Legal Aid Plans (ALAP) and the PWG. Those informants who commented were evenly divided between those who considered the two forums to be somewhat duplicative and those who considered them to be complementary. Those who considered them complementary noted that while the legal aid plans have ALAP as a network, the PWG's value added is connecting the plans and provincial and territorial government representatives with their federal, provincial and territorial government counterparts.

With respect to ALAP, a few key informants appreciated LAD's participation in the ALAP's Finance Sub-committee. This has increased LAD's understanding of the operational context and administrative and financial terminology used.

## **Research**

The LAD develops a research plan in consultation with the PWG members, although it was noted that few provide specific comments or suggest directions for the research agenda. The research plan incorporates federal objectives, but there is also a desire for meaningful research for the provincial and territorial governments and plans.

PWG key informants valued the LAD's research products. It was noted that if the federal government did not provide statistics related to legal aid, none would be available, as the provincial and territorial governments do not have a dedicated policy unit for legal aid and access to an equivalent of Statistics Canada or the Research and Statistics Division of Justice Canada.

The research that was mentioned the most often by PWG key informants was the Definitions Project. This research was intended to standardize the definitions used in the annual *Legal Aid in Canada*

report so the data are more comparable and reliable. As this is related to performance measurement, it is discussed in more detail in Section 0.

Other research provided by the LAD on national trends or emerging issues assists legal aid plans with their funders, according to key informants. They reported that the LAD is very responsive to requests for this kind of information. In addition, key informants appreciated PWG's research on issues related to service delivery. Examples given were research on the availability of cell phones to low-income individuals and a project on prevalence of guilty pleas among Indigenous people.

Some of the research projects that have been conducted are complex and will require substantial time and resources should follow-up studies be undertaken. Two examples included firstly the 2018 feasibility study for measuring the impact of legal aid and expanding the 2017 legal aid microdata linkage feasibility study. The second study assessed the feasibility of linking legal aid client registry information to the data housed in Statistics Canada as a means to gain socio-demographic information on legal aid clients, as well as information on legal aid in the criminal justice system.

A few key informants suggested that future research could focus on practical solutions to emerging issues and challenges. For example, research on a pilot project that has succeeded or failed would help other plans know whether to undertake a similar pilot project or how to improve potentially upon the one that was undertaken by another plan. Another example would be research that provides a rationale or business case for legal aid, such as legal aid's social return on investment.

## **Policy Role**

The most significant policy work in the last five years has been related to the development of a national I&R legal aid program that would extend to all jurisdictions. This work is intended to address the current situation where I&R top-up funding is required annually.

## **Potential Improvements**

A few PWG key informants provided suggestions for improvements.

- The PWG discussions are too often about legal aid plan operations and should place greater emphasis on policy development work. For example, the PWG could focus more attention on determining the Federal-Provincial-Territorial objectives for legal aid and developing national standards. Among some PWG key informants, there was the desire for at least some separate meetings with the LAD and the provincial and territorial government representatives that would focus on the policy objectives for legal aid.
- These discussions are not always relevant to all participants as larger legal aid plans have very different issues than smaller plans, for example. The sub-committees are considered useful forums for discussing particular topics that may not be relevant to all legal aid plans. There was a desire for the PWG to consider more sub-committees, such as Indigenous or rural sub-committees.



## 4.3 Efficiency

### 4.3.1 Management of Contribution Agreements and State-Funded Counsel

The Program is well managed and has effectively handled I&R funding issues. While improved, there remains work to be done on reporting and performance measurement.

One of the Program's key management goals is to provide funding to provincial and territorial governments according to the terms of the contribution agreements in a timely fashion. A comparison of planned to actual contribution expenditures shows that the Program has experienced some issues with meeting that goal (see Appendix D). This is primarily related to I&R legal aid and the federal government responding to the need for additional funding. This was described in more detail in Section 0 (see Figure 4).

The other area where there are variances is in state-funded counsel cases (managed by provincial and territorial governments or plans or directly by the LAD), which is expected. It is difficult to estimate in advance what costs may be incurred for these cases, given the complex nature of these cases and the uncertainty about the number of new cases that will arise each fiscal year. In the context of these cases, lapsed funds or the reverse (expenditures that exceed budgets) do not reflect on the management of the Program, but are indicative of the unpredictable and high-cost nature of these cases.

The Program lapsed administration (salaries and operations and maintenance) funds in some years due to staff turnover. From 2016-17 to 2019-20, administrative expenses equalled 0.8% of the total contributions funding. In other words, for every \$1 in federal funding distributed to the jurisdictions, less than one (1) cent was spent on administering the Program. This result matches the 2016 evaluation of the Program.

#### Meeting Service Standards

Of the PWG key informants who responded, most reported that the Program is efficiently administered by the LAD. Overall, the process for submitting claims — the timelines, reminders, payment processing — has gone well. As shown in Table 8, the Program is meeting the service standard for over 90% of its payments.<sup>51</sup> This compares favourably to the percentage of payments meeting the service standard across the Department's grants and contributions programs in 2019-20 (which was 84%).<sup>52</sup>

<sup>51</sup> The service standard is to process payment within 28 calendar days after completion of the requirements in the contribution agreement (Department of Justice Canada, 2020c).

<sup>52</sup> Department of Justice Canada. (2020c). *Service Standards*. <https://www.justice.gc.ca/eng/fund-fina/service.html>

**Table 8. Performance against Departmental Service Standards**

Fiscal Year	Contribution Agreements Meeting Standard		Access to Justice Services Agreements Meeting Standard	
	Number of payments	Percentage of time	Number of payments	Percentage of time
2016-17	5 (of 8)	63%	3 (of 3)	100%
2017-18	11 (of 11)	100%	3 (of 3)	100%
2018-19	29 (of 31)	94%	11 (of 12)	92%
2019-20	26 (of 28)	93%	7 (of 10)	70%

Source: Legal Aid Program administrative data.

## Reporting

In terms of the reporting requirements, the Statement of Final Claim form is reviewed annually to ensure that it captures only data that are needed and that supports the *Legal Aid in Canada* report (see also the performance measurement section below). The LAD/PID work on the Statement of Final Claim form is reported to have resulted in data that are more accurate and comparable, as was also discussed in Section 0.

However, key informants were divided on the reporting requirements between those finding them onerous and those considering them reasonable. About half commented that they found the reporting requirements of the Statement of Final Claim to be reasonable, and that the LAD was flexible in terms of reporting, demonstrating a willingness to work with legal aid plans that have more limited data collection capacity (due to staffing and technological issues). They appreciated the LAD's efforts to make the form more user-friendly. However, some of these key informants thought that the new template could still be streamlined so that it is easier to complete. The other half of the key informants consider the claims to have become more onerous to complete with the new forms being more complex and cumbersome. In these jurisdictions, some of the information requested is not available. As a result, some sections require manual data gathering and entry. For this reason, the reporting requirements can be particularly burdensome for the smaller plans. In addition, it was questioned whether the amount of information requested was needed and whether it was of value as the data do not capture the practical challenges of delivering legal aid.

## Access to Justice Services Agreements

Key informants noted that the consolidation of the AJAs' three components and the flexibility it provides has been very beneficial for several reasons. These include the fact that it makes it easier to do the negotiating, planning, and budgeting for the programs all at once, and the fact that legal aid plans are able to organize and deliver their services in such a way that is most efficient for them.

Some key informants mentioned the unique reporting challenges in the North. The territorial plans are small and have technological challenges in terms of inadequate databases and lack of resources for upgrading. In addition, with multiple, geographically distant sites where legal aid is delivered in remote circuit court locations, the territorial legal aid plans face many challenges that impact their ability to track data.

## **Immigration and Refugee Legal Aid**

The current I&R funding formula is generally considered reasonable to properly allocate the funding among the jurisdictions.<sup>53</sup> A few key informants noted difficulties created by the formula being based on past demand, which creates issues when demand fluctuates during a fiscal year. As discussed in Section 0, the Program has effectively handled funding shortfalls. However, there are issues with the timing of funding. The formula requires data from the first quarter of the fiscal year so the allocation cannot be determined until the second quarter, which does not provide some plans with enough lead time to manage their caseloads against available funding.

Federal funding for I&R, as for criminal legal aid, is provided to the provinces to distribute to their legal aid plans. While provinces can submit interim claims to receive a portion of their funding, some legal aid plans noted that they do not receive funding until the Statement of Final Claims are processed. When provincial funding is not available to make up any shortfall, there is the need for the federal top-up funding. Given the current situation, there is some support for the federal government to directly fund I&R legal aid. A national I&R legal aid program would be more efficient in delivering funding than the current contribution agreements. This would provide adequate and timely funding, and could set national standards.

### **State-Funded Counsel**

The state-funded counsel component is working efficiently and effectively. The LAD was commended for its responsiveness to queries and the support provided to those involved at the provincial and territorial government and plan level in managing the Program, as well as counsel who are funded directly by the federal Legal Aid Program. It was suggested that a form could be used to ensure that when a state-funded counsel case comes to a legal aid plan, they have the information that they need to assist them in making cost estimates (e.g., next court date, name of the lawyer, how long the case is expected to take).

The umbrella agreements are considered to have increased the efficiency of the federal Legal Aid Program, as it does not have to deal with numerous amendments on individual cases. There is some benefit to the provinces, territories and legal aid plans, who are managing state-funded counsel cases. However, it was thought that the main benefit of the umbrella agreements in terms of improving the efficiency of this component is for the Legal Aid Program.

The administrative fees provided to plans were considered sufficient.

### **Performance measurement**

The LAD commissioned reports related to performance measurement, including a feasibility study on how to measure the impact of legal aid, and a follow-up study to assist with identifying common indicators to measure performance outcomes for both criminal and I&R legal aid and to document the availability of relevant data. This performance measurement work is a complex task that requires agreeing to measures across jurisdictions and identifying or collecting data to support them. Examples of work that has continued are piloting a national legal aid client survey and a pilot project in one province to link court data to legal aid data. As a result, this performance measurement data was not available for this evaluation.

The main performance measurement progress identified in interviews is the Definitions Project, whereby the LAD is working with legal aid plans to develop clear definitions (and standardized ones,

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<sup>53</sup> Key informants from some of the jurisdictions that receive I&R legal aid funding did not offer opinions on the funding formula.

where possible) for the data collected in the Statement of Final Claim and reported in the *Legal Aid in Canada* report. Previously, Statistics Canada handled this reporting, which meant that Justice Canada had less direct contact with the legal aid plans regarding the data and had not received civil and family legal aid data in the Statement of Final Claims (excluding I&R matters). With the LAD taking over this performance reporting, the Definitions Project has increased the understanding by all parties of the operational context and administrative and financial terminology used by legal aid plans. The Definitions Project was also considered to have improved the standardization and consistency of the legal aid plan data that is being measured, although it was noted that there are still some inconsistencies and comparisons across plans that must be contextualized, which the *Legal Aid in Canada* report has done with careful footnotes. The consensus was that this project was worthwhile and PWG members who commented generally reported that they found the data to be helpful.

Some key informants noted that the next step would be to build on the Definitions Project to determine what other data might be helpful. The current data includes volume (numbers of applications, certificates, duty counsel assists), and limited client demographic information. More detailed client profile data and data that might indicate how the federal investment is improving the lives of clients or contributing to a more efficient and effective justice system are not being collected. Difficulties in collecting this data are, in part, due to the challenges in collecting relevant court data. Legal representation data has numerous issues, including that it is not captured systematically, is often overridden so it just reflects the representation at the last court appearance, and does not indicate whether the individual is receiving legal aid assistance. It was also suggested that more detailed data on hours of service provided by type of service would be useful to show the impact of legal aid and how its resources are being used to assist clients.

Some key informants suggested that national standards, which legal aid plans could be measured against, could be developed as a next step. It was acknowledged that collecting additional types of data would be challenging, particularly for smaller legal aid plans that have less capacity in terms of technology and other resources for collecting data. For all legal aid plans, the contexts in which they operate present different challenges that would need to be accounted for in any data collection efforts on impacts and outcomes.

### 4.3.2 Efficiency of the Legal Aid System

The legal aid system provides a cost-effective service and continues to innovate to maintain and further enhance its services.

Legal aid remains a cost-effective service when compared to private bar rates charged to clients who are not receiving services on a legal aid certificate (non-legal aid clients).<sup>54</sup> For example, Legal Aid Ontario's average cost per criminal certificate was \$1,750.<sup>55</sup> This average would include not only the types of activities listed in Table 9, but also more expensive activities such as appeals. To provide another example, the Legal Aid BC tariff for bail hearings is \$265 per half day for major crimes in Provincial Court and ranging from \$371 to \$795 for Supreme Court bail applications. Trial rates for the

<sup>54</sup> National comparisons of legal aid tariffs and private bar counsel rates are difficult because the legal aid tariff structures vary substantially across jurisdictions, and national information on private bar counsel rates is not extensively available. *Canadian Lawyer* is the only publicly available resource and has its limitations, as its survey is based on those lawyers who subscribe to the magazine and responded to the survey. The sample sizes are small, so results should be interpreted with caution.

<sup>55</sup> Legal Aid Ontario. (2020a). *Legal Aid Ontario 2019-2020 Annual Report*. Legal Aid Ontario. <https://www.legalaid.on.ca/wp-content/uploads/LAO-annual-report-2019-20-EN.pdf>

first two half days range from \$636 to \$1,855 per half day.<sup>56</sup> All are substantially below the amounts indicated in Table 9.

Legal Aid Ontario's average cost for a typical I&R certificate refugee protection claim (which includes submission of the Basis of Claim and the hearing) was \$2,280, which is 43% less than the \$4,000 charged by a private bar lawyer for a refugee protection claim, as indicated in Table 9.<sup>57</sup>

**Table 9. National Average Fees Charged by Private Bar Counsel to Non-legal Aid Clients**

Types of Matters	2020 (Average)
Summary criminal offence (one-day trial)	\$5,400
Bail hearing	\$2,111
Criminal offence (one-day trial)	\$5,291
Refugee protection claim	\$4,000

Source: Canadian Lawyer, Fees rising before downturn: 2020 Legal Fees Survey<sup>58</sup>

Legal aid plans have continued to innovate and enhance their services, as described in Sections 0, 0, and 0. The following examples demonstrate how legal aid plan processes contribute to efficiencies for legal aid as well as for the justice system overall.

- Providing services as early in the process as possible benefits the client, legal aid, and the justice system. For example, expanded duty counsel services, such as evening or weekend duty counsel, enable the defence and Crown to engage in early discussions related to remand and can shorten the period of time that accused spend in remand. Gathering information at this early stage also ensures that counsel involved at later stages can be fully prepared and move the matter forward more expeditiously. This benefits clients but also reduces costs to the justice system. According to a study done by Statistics Canada in 2010-11, the cost of one day in pre-trial custody is approximately \$170 versus, according to a study completed by the Ontario Ministry of Finance in 2012, around \$5 per day to supervise a person in the community.<sup>59</sup>
- Embracing technology and the digital transformation initiatives occurring across the public service sector have great potential to create efficiencies. Conducting hearings or meeting with clients virtually reduces transportation and other costs associated with travel. Legal aid plans have responded during the pandemic to this need to work virtually. However, this also highlights the need for funding to enable legal aid and the justice system more generally to be able to invest in technology. As noted earlier, justice system stakeholders need to be mindful of the impact of these trends on accessibility for legal aid clients, which would have to be monitored closely given the potential barriers created by the cost and/or coverage of internet and phone services.
- Diversion and specialized courts that remove individuals from the traditional court process can reduce legal aid and system costs. For diversion, legal aid is less involved, particularly pre-

<sup>56</sup> Legal Aid BC. (2020). *Legal Aid BC Criminal Tariffs*. Legal Aid BC. [https://lss.bc.ca/sites/default/files/2020-05/criminalMay2020\\_0.pdf](https://lss.bc.ca/sites/default/files/2020-05/criminalMay2020_0.pdf).

<sup>57</sup> The cost estimate was provided by Legal Aid Ontario and is based on its most commonly issued refugee protection claims. The average is based on the total amount paid for certificates closed in fiscal years 2016-17 to 2019-20, regardless of when costs were incurred.

<sup>58</sup> Canadian Lawyer. (2020, June). Fees rising before downturn: 2020 Legal Fees Survey. *Canadian Lawyer*. [https://cdn-res.keymedia.com/cms/files/ca/120/0299\\_637245655342367595.pdf](https://cdn-res.keymedia.com/cms/files/ca/120/0299_637245655342367595.pdf)

<sup>59</sup> Canadian Civil Liberties Association. (2014) *At a Glance: The Human and Financial Cost of Pre-trial Detention*. <https://ccla.org/cclanewsites/wp-content/uploads/2015/02/2014-07-23-Cost-of-Pre-Trial-Detention1.pdf>

charge, and this reduces legal aid case volumes and expenditures. This is demonstrated currently by the decline in the number of applications for youth criminal legal aid as it is thought that the decreased crime rate and the increased use of diversion are both contributing factors.

- For specialized courts, there is evidence of potential cost savings to the justice system due to less incarceration and reduced recidivism.<sup>60</sup> Anecdotally, it is believed that supporting these courts can create additional costs for legal aid as counsel assigned to these courts may have smaller caseloads than other legal aid counsel. Therefore, in supporting these processes, legal aid may incur some efficiency benefits but it may also incur additional costs, which should be viewed in the context of supporting system-wide efficiencies.

The efficiency of the legal aid system must be considered in the larger context of its contributions to justice system efficiencies. Key informants believe that defendants proceed through the system with fewer delays and court appearances and overall less usage of system resources.

## CONCLUSIONS AND RECOMMENDATIONS

### 5.1 Conclusions

#### 5.1.1 Relevance

The Legal Aid Program is a federal responsibility that continues to serve a public interest and need. The federal responsibility for legal aid is longstanding with over four decades of federal funding and is fundamental to Canadian federalism as reflected in foundational documents, such as the *Constitution Act, 1867*. The ongoing need for legal aid is in part reflected in the volume of applications but also in the proportion of Canadians who are economically disadvantaged and may need legal assistance in areas of law covered by the Program. This ongoing need also underpins the public interest served by legal aid providing access to justice to particularly vulnerable populations who are often overrepresented in the criminal justice system. By providing legal services to individuals who would otherwise not be able to afford counsel and would experience significant challenges in representing themselves, legal aid supports the fairness of the justice system and helps prevent miscarriages of justice.

#### 5.1.2 Effectiveness

The evaluation found that the federal contribution is critical to maintaining legal aid services. The \$88 million over five years increase to the federal contribution for criminal legal aid in the provinces and territories and civil legal aid in the territories announced in 2016 was one of the most significant developments to occur during the timeframe covered by the evaluation. This was the first increase since 2003-04, resulting in an ongoing annual federal contribution total of \$142.4 million for criminal legal aid in the provinces and criminal and civil legal aid in the territories. The increase also included financial support for innovative practices to improve services and operations. While the legal aid plans have consistently engaged in innovations and continuous improvement practices as a way to manage increasing workload and cost pressures, the additional funding enabled them to undertake improvements that may have proven impossible otherwise. In some jurisdictions, there was a substantial increase in demand for I&R legal aid and/or substantial provincial budget cuts over the five-year evaluation period. These challenges were addressed by the Program through time-limited funding increases that enabled the legal aid plans to continue providing I&R legal aid services.

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<sup>60</sup> Department of Justice Canada. (2016). *Drug Treatment Court Funding Program evaluation: Final report*. <https://www.deslibris.ca/ID/248695>

The profile of legal aid clients demonstrates that they are among the most vulnerable people in Canada in terms of socio-economic indicators related to financial means, education, and health, which make it difficult for them to navigate the complex justice system. The federal contribution provides access to justice for these vulnerable populations. Despite efforts of legal aid plans to adapt and expand services to reach these populations, there are some unmet needs for those living in rural and remote areas, Indigenous populations, racialized groups, and those who do not meet the financial eligibility criteria. The unmet needs for these groups go beyond legal aid and include the justice system more broadly with the need for new approaches to better address legal issues more holistically.

Many of the same issues noted in the previous evaluation are still affecting the provision of legal aid including legislative changes, court decisions, the complexity of the criminal cases, and investments in other areas of the justice system without corresponding investments in legal aid.

The pandemic tested legal aid plans and the justice system, but both responded with service innovations to manage the crisis, although the pandemic's full effects on volumes and finances will not be known until the pandemic is over and potentially for years to come.

### 5.1.3 Efficiency

The Program is well managed and its administrative expenses equalled 0.8% of the total contribution funding, which matches the 2016 evaluation findings. The Program is also considered to have effectively handled the I&R funding issues. Given the need to seek additional funding, there were issues with the timing of the confirmation of increased funding, which did not provide some legal aid plans with enough lead time to manage their caseloads against available funding.

While improved, work remains to be done on reporting and performance measurement. The Definitions Project is considered to have improved the data being collected and resulted in useful information. In addition, the LAD has made improvements in the Statement of Final Claim forms and been supportive of legal aid plans that have more limited data collection capacity. That being said, further improvements could still be made to ensure the data being captured are relevant and further reduce inconsistencies. There are also areas where additional data would be useful to provide information on the delivery challenges and impacts of legal aid services.

### Efficiency of the Legal Aid System

The legal aid system provides a cost-effective service when compared to private bar rates and continues to innovate to maintain and enhance its services. Many of these innovations and service enhancements not only create efficiencies for legal aid but also the justice system by supporting initiatives such as specialized courts, 24-hour bail court, and diversion programs. Overall, legal aid supports the efficient operations of the justice system by providing legal assistance and advice to individuals who might otherwise proceed through the system without counsel.

## 5.2 Recommendations

Based on the findings described in this report, the evaluation offers the following two recommendations:

**Recommendation 1:** The Legal Aid Directorate, in collaboration with the Permanent Working Group, explore options for a national immigration and refugee legal aid program that would extend to all jurisdictions and include national standards.

**Recommendation 2:** The Legal Aid Directorate (including the representative from the Policy Implementation Directorate responsible for the Access to Justice Services Agreements) should work in collaboration with the Permanent Working Group to improve performance measurement and

reporting. Consideration should be given to improving the consistency of data, including demographic information, and identifying additional data that would be useful for reporting and future program planning.



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## APPENDIX A: CASE STUDY SUMMARIES

### CASE STUDY - YOUTH CRIMINAL LEGAL AID

#### Introduction

Youth criminal legal aid was selected as a case study, in part due to interest in the use of diversion for young offenders, but also as it is an area of legal aid for which there is not substantial literature on its delivery or effectiveness. Yukon was selected as a jurisdiction with a higher proportion of youth receiving custodial sentences. The evaluation had hoped to compare Yukon's experience with a jurisdiction that has a lower proportion of youth receiving a custodial sentence but was unable to obtain the participation of another jurisdiction for the case study.

#### Overview and context

Youth criminal legal aid is generally understood to include cases that fall under the *Youth Criminal Justice Act* (YCJA), which governs the treatment of youth aged 12 to 17 years old charged with a crime, including the provision of a separate youth justice system, and an emphasis on exploring alternatives to custodial sentences.<sup>61</sup>

Youth criminal justice cases that appear before the courts are handled by the Youth Criminal Justice Court, while others are handled through alternative methods, including extrajudicial measures.<sup>62</sup>

During the period covered by the evaluation, the number of youth criminal cases before the courts in Yukon has decreased with a corresponding decline in youth criminal legal aid matters. Part of that decline is attributed to the use of diversion.

#### Findings

**Services provided:** In Yukon, all youth going through a formal criminal law proceeding under the YCJA are eligible to receive legal aid and approximately 95% use legal aid counsel. In order to reach eligible youth, the Yukon Legal Services Society (YLSS) duty counsel attend every youth court session to provide information on legal aid to youth who are appearing for a matter for the first time or who don't have a lawyer yet, and to answer any questions that the youth might have. Duty counsel provide the youth with the telephone number for legal aid and counsel will then be assigned to the youth, which is typically a YLSS lawyer assigned to youth matters.

Because of the size of YLSS, their team does not include social workers or client coordinators to help support their clients. In the case of youth legal aid, this is a particularly important limitation, as a large portion of the clients are vulnerable youth who can be difficult to keep track of and thus difficult to support and ensure that they meet all of their obligations. There are additional services available for youth through other service providers in Yukon, such as mental health services and services from a youth or social worker. Many of these services are accessible through the diversion process.

**Accessibility:** There is an established and fairly effective process in place for legal aid to reach youth who are formally charged in Whitehorse through the duty counsel. There is room for improvement in accessing legal aid services for youth who are not formally charged, or are outside of Whitehorse. Outside of Whitehorse, there is less continuity with clients as legal aid counsel only visit the

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<sup>61</sup> Malakieh, J. (2019). *Adult and youth correctional statistics in Canada, 2017/2018*. The Canadian Centre for Justice Statistics. [https://www150.statcan.gc.ca/n1/en/pub/85-002-x/2019001/article/00010-eng.pdf?st=s6Uc\\_iq1](https://www150.statcan.gc.ca/n1/en/pub/85-002-x/2019001/article/00010-eng.pdf?st=s6Uc_iq1)

<sup>62</sup> Yukon Courts. (2020). *Youth Justice Court of Yukon*. <https://www.yukoncourts.ca/en/courts/youth-justice-court-yukon>

communities every other month. Youth in the communities also often face the additional challenge that their cases can take longer to proceed through the legal process, since the circuit court does not come to the communities as often as court sessions occur in Whitehorse. The length of time that it can take in the communities can lead to the process being less meaningful for youth. The timing of the court dates could potentially be improved through continuing to use services like Zoom beyond the COVID-19 pandemic, since it would help to hold court in the communities more often. YLSS is also planning on doing more outreach in the communities outside of Whitehorse, and having clinics for specific legal areas (including youth) in these communities.

**Promising practices – diversion:** In Yukon, youth criminal justice has seen a substantial increase in the use of diversion options that exist in the territory. There are multiple paths for diversion that are possible for youth in Yukon. However, there can be some challenges in accessing diversion options outside of Whitehorse.

Youth can be diverted from the court system by the RCMP, who have options available to them that are alternatives to charging a youth with a crime. This pre-charge diversion is used more frequently with first-time offenders who commit a minor crime. Rather than charge the youth, the RCMP can give a verbal or written warning, and/or provide referrals to connect the youth to social services for counselling.<sup>63</sup>

Once youth are charged, Crown and defence will meet to discuss whether diversion will provide an appropriate resolution. If so, they will refer the youth to the local organization that is tasked with diversion in the local area. In Whitehorse, this is the Youth Justice Panel (YJP), which handles approximately 80 to 90% of youth justice cases in Yukon. In general, the group leading the diversion (which includes a youth probation officer) will try to ensure the youth receives services or supports tailored to their needs; these diversion groups may include Crown and/or defence, police, and other organizations that work with youth.

While many areas covered by the YCJA are now being resolved through diversion approaches, there is a limited involvement for legal aid in these processes. In the last decade, legal aid has become more involved in this panel with a lawyer attending YJP meetings, though they take a relatively minor role since the focus is on the youth and their families, as well as the relevant support providers. However, there may be opportunities for YLSS to provide youth with additional guidance and support as they navigate the diversion process.

Diversion offers many benefits for the youth by connecting them with appropriate services or supports and, if the youth successfully completes all of the conditions, they will not end up with a criminal record. In addition, there can be benefits for victims involved in cases proceeding through diversion, as there are often restorative aspects to the process. Diversion benefits the justice system by holding offenders accountable largely outside of the more expensive court process, and because of the lower likelihood of recidivism. Similarly, diversion reduces the costs for youth criminal legal aid, which benefits the legal aid plan.

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<sup>63</sup> Yukon. (2021). *Extrajudicial measures, or out-of-court procedures*. <https://yukon.ca/en/legal-and-social-supports/supports-youth/helping-your-child-after-theyve-been-charged-crime#extrajudicial-measures-or-out-of-court-procedures>

## CASE STUDY – REMAND

### Introduction

Since 2004-05, in Canada, the average number of adults in remand (i.e., when individuals being held while awaiting trial or sentencing) has been greater than the provincial/territorial adult sentenced custody population. The case study considered the impact of remand on legal aid, the justice system and the accused, and how legal aid plans have approached the issue of remand (e.g., duty counsel services). Two jurisdictions were selected for the case study: Alberta (as a jurisdiction that recently started funding duty counsel in remand court) and Saskatchewan (as a jurisdiction that has also undertaken work to reduce the number of people in remand and the length of time they spend in remand).

### Overview and context

The number of individuals in remand was increasing in Canada until 2016-17, but has been decreasing gradually since then, which in part reflects the decreasing crime rate. However, the most recent available data comparing remand to sentenced custody (2018-19) found that per day approximately 70% more adults were in remand (14,778) than in provincial/territorial sentenced custody (8,708). In 2018-19, ten provinces/territories had a higher proportion of remanded adults versus those in sentenced custody. Alberta was among the highest (71% more adults in remand, which tied Nova Scotia and was 1% less than Ontario). Saskatchewan's remand population constituted 51% of adult in custody.<sup>64</sup>

Key informants from Alberta and Saskatchewan highlighted the effect of COVID-19 on remand in their provinces. They noted that, during the pandemic, the length of time that individuals remain in remand is decreasing. Individuals who have less severe offenses and/or criminal history are being released to decrease the number of individuals in remand to try to reduce the spread of COVID-19.

### Findings

**Alberta:** In April of 2018, funding for the Justice of the Peace Bail Program (JPBP) was announced and launched in three phases, such that the Program was fully implemented across the province by the end of September of that year.<sup>65</sup> The Program ensures that “all people arrested in Alberta making first-appearance bail applications will have access to defence counsel” in the form of Legal Aid duty counsel,<sup>66</sup> regardless of their financial situation.<sup>67</sup> This is referred to as Bail Hearing Duty Counsel, which is a form of duty counsel that provides representation at first-appearance bail hearings to those who are detained by police. According to the Irving Report, that examined Alberta's bail procedures, only 7 to 10% of people had lawyers during their bail hearings.<sup>68</sup> Given the introduction of the JPBP, financial eligibility requirements are not considered for people making first-appearance bail applications.

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<sup>64</sup> Malakieh, J. (2020). *Adult and youth correctional statistics in Canada, 2018/2019*. The Canadian Centre for Justice Statistics. <https://www150.statcan.gc.ca/n1/en/pub/85-002-x/2020001/article/00016-eng.pdf?st=bF5EMZ05>

<sup>65</sup> Legal Aid Alberta. (2019). *Legal Aid Alberta—Value for All Albertans—Annual Report 2018-19*

<sup>66</sup> “Duty counsel refers to the provision of lawyers at courts or hearings to provide legal representation to individuals who do not have a lawyer present” (Government of Alberta, 2019).

<sup>67</sup> Parsons, P. (2018). *Legal Aid to expand counsel at bail hearings province-wide*. Edmonton Journal. <https://edmontonjournal.com/news/local-news/legal-aid-counsel-at-bail-hearings-to-expand-province-wide>

<sup>68</sup> Irving, N. L. (2016). *Alberta Bail Review: Endorsing a Call for Change* (p. 128)

The service is offered 16 hours a day (8:00 a.m. to midnight), seven days a week, by duty counsel lawyers based in Calgary and Edmonton.<sup>69</sup> These lawyers have access to “high-tech video and audio technology” to talk to clients via a secure electronic system, and can “video conference into the courtroom with their clients”.<sup>70</sup> The duty counsel lawyers generally adjourn matters and advise clients “how to apply for Legal Aid and to obtain their own representation”.<sup>71</sup> They also ensure clients are aware of their fundamental rights, including their right to a release hearing within 24 hours of being remanded. In 2018-19, there were 26,710 JPBP hearings and in 2019-20, there were 37,715.<sup>72</sup>

While key informants noted that the Program has resulted in some delays to the system, the Program is generally viewed as positive in ensuring a fair process for all individuals.

**Saskatchewan:** Two initiatives targeting remand have been introduced in the last five years: the Early Case Resolution Program (ECRP) and the Rapid Remand Response Program (RRRP). The ECRP was introduced by the Saskatchewan government in 2017. The Program has admissions cases for those remanded over the weekend reviewed by a Crown Prosecutor and Legal Aid weekend duty counsel on Sunday. The Program aims “to improve the number of meaningful first court appearances on Mondays”.<sup>73</sup> The RRRP is the same as the ECRP, but on weekdays, where Legal Aid lawyers and Crown prosecutors choose cases that can be quickly (“more easily”) resolved ahead of bail proceedings to get them done on the same day instead of adjourning the case for two days, as was often done previously.

ECRP and RRRP were introduced to try to resolve a number of files earlier, and therefore get individuals released from remand sooner. A review of the ECRP in Saskatoon in 2017 showed that the ECRP has having a positive effect in reducing the number of individuals in remand. The key informants from Saskatchewan indicated that the ECRP and RRRP have had a positive impact on remand, as those cases are resolved faster and result in less remand time for people.

Both provinces see the value in reducing the use of remand due to its associated costs and potential negative impacts on the accused, but key informants noted the need for and value of remand in certain instances.

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<sup>69</sup> Legal Aid Alberta. (2019). *Legal Aid Alberta—Value for All Albertans—Annual Report 2018-19*; Legal Aid Alberta. (2020). *Legal Aid Alberta 2019-20 Annual Report*

<sup>70</sup> Ibid (Legal Aid Alberta. (2019).

<sup>71</sup> Legal Aid Alberta. (2020). *supra* note 66.

<sup>72</sup> Ibid.

<sup>73</sup> Wilson, S. (2020). Weekend remand admissions and case review in Saskatoon. *Journal of Community Safety & Well-Being*. <https://doi.org/10.35502/jcswb.127>



## **CASE STUDY – IMMIGRATION AND REFUGEE LEGAL AID**

### **Introduction**

The case study on I&R legal aid was chosen to provide a description of how I&R legal aid is delivered and what the jurisdictional differences are in terms of services and delivery in the case study jurisdictions. The case study considered the costs, challenges, promising practices and, where possible, the impacts of the availability of I&R legal aid on the justice system and for clients. Two provinces were selected – Ontario and Quebec – to highlight the different approaches to how I&R legal aid services are provided.

### **Overview and context**

Most of the I&R legal aid expenditures go toward refugee protection claims, and there has been an increase in the volume of these claims with a corresponding increase in I&R legal aid applications. The data on Immigration and Refugee Board of Canada (IRB) refugee protection claims shows the increasing volume of claims between 2015 and 2019 and the growing backlog of pending claims from the previous calendar years. The impact of the coronavirus pandemic is reflected in the sharp decline in claims, particularly for finalized claims in 2020.<sup>74</sup> In addition, there was a spike in late 2016 in irregular border crossers (individuals who cross the Canada-United States border between ports of entry). The increasing volume of I&R refugee claims and its fluctuating nature create issues for legal aid plans in managing demand.

### **Findings**

Ontario and Quebec both have mixed models of I&R service delivery that are primarily *judicare* based (i.e. private bar counsel on a legal aid certificate). However, they differ in terms of the remaining I&R service delivery. Quebec relies exclusively on staff lawyers for I&R services handled outside of the *judicare* model (the Immigration Law Legal Aid Office in Montreal and staff lawyers in other legal aid offices). In comparison, Ontario has a much smaller staff complement in its three Refugee Law Offices and has a substantial reliance on community legal clinics, which are funded by Legal Aid Ontario but independent from it. Key informants from both jurisdictions believe that their model for delivery is working well.

The nature of the matters covered by legal aid is different between the two jurisdictions. Quebec offers a full-service experience from start to finish on a file. Ontario offers more limited coverage, although the key informants thought that the coverage was appropriate with the exception of detention reviews, which was seen as a service gap. Ontario currently has a pilot project to address this gap and offer services closer to the duty counsel services provided by the legal aid regime in Quebec.

The tariff structure is also quite different between the two jurisdictions, which also influences the expenditures on I&R legal aid. In Quebec, the tariff is a flat fee for each I&R service, while in Ontario, the tariff sets a maximum number of hours for each service and a tiered hourly rate based on years of experience. Based on the available information, Quebec fees appear to be less for the same or similar services than Ontario, although a direct comparison is difficult given the nature of the tariff structures. However, the difference appears to be lessening when comparing the average expenditure per issued certificate for each fiscal year. This could be due to cost containment measures taken by Ontario as well as a recent tariff fee increase by Quebec.

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<sup>74</sup> Immigration and Refugee Board of Canada. (n.d.). *Refugee claims statistics*. Immigration and Refugee Board of Canada. <https://irb-cisr.gc.ca/en/statistics/protection/Pages/RPDStat.aspx>

For both jurisdictions, the main challenge is handling the fluctuating demand for I&R legal aid and the increasing complexity and pressures from changes to the I&R determination system and the IRB's increasing backlog.

The two jurisdictions have different recent experiences with their provincial governments. In Quebec, if the legal aid budget has been fully used, legal aid offices will continue to represent clients and Justice Quebec covers the cost of the difference. In contrast, in 2019 the Ontario government prohibited Legal Aid Ontario from using provincial funding to cover new I&R certificates. Without the federal government providing additional funding, I&R coverage in Ontario would have been greatly restricted.

Both Quebec and Ontario had promising practices in relation to key desired outcomes:

- Access to justice: Ontario has instituted a pilot project to provide services to unrepresented persons at 48-hour detention review hearings. This was done in response to an identified service gap. For Quebec, the promising practice was offering its full-service I&R coverage so eligible individuals are assisted throughout the process.
- Quality of services: Ontario uses its panel standards to ensure counsel have the necessary experience to handle I&R matters and ensure service quality. For Quebec, key informants pointed to the Immigration Law Legal Aid Office as a promising practice.
- Accessibility: Ontario has instituted an online application to streamline this process and reduce wait times for the call centre. For Quebec, the funding model where Justice Québec covers the cost if it is exceeded for I&R legal aid was cited as a promising practice.
- Efficiency: Both jurisdictions' legal aid systems have undertaken various steps to improve administrative efficiencies.

## APPENDIX B: EXAMPLES OF INNOVATIONS

**General service enhancements (n=67)** include improvements in service delivery processes or staff capacity to promote greater access to services, improved quality of service, or greater efficiency. Several examples are provided below.

- Legal Aid BC noted that the Criminal Early Resolution Contract (CERC) was the innovation that was most attributable to the innovations funding. The CERC provides individuals who are within \$1,000 of the financial eligibility guidelines the opportunity to have their case reviewed early in the process by a lawyer to determine if a resolution with the Crown might be reached. Early indications show that the CERC has supported earlier resolution of cases, increased access to legal aid services by expanding eligibility, and reduced the number of court appearances.<sup>75</sup>
- Several legal aid plans enhanced their duty counsel services particularly related to bail hearings. In general, these programs are intended to reduce the number of remand hearings and obtain earlier client releases from detention in appropriate cases.
  - In Saskatchewan, the funding has helped Legal Aid Saskatchewan provide the extra duty counsel support needed to support the province’s Early Case Resolution Program and the Rapid Remand Response Program. The Early Case Resolution Program has admissions cases for those remanded over the weekend reviewed by a Crown prosecutor and legal aid weekend duty counsel on Sunday so that agreements can be reached, if possible, ahead of the bail hearing. The Rapid Remand Response Program is the same as the Early Case Resolution Program, but on weekdays, where legal aid lawyers and Crown prosecutors choose cases that can be quickly (“more easily”) resolved ahead of bail proceedings to get them done on the same day instead of adjourning the case for two days, as was often done previously.
  - Legal Aid Manitoba offers duty counsel support for the Manitoba’s 24-hour and weekend bail hearing program. Staffed by both private bar and staff lawyers, duty counsel services include providing legal advice, developing a bail plan (as required), and assisting in filling out a legal aid application if it has not already been done. Counsel will also provide assistance to anyone who is unrepresented at the hearing. While these programs began during the coronavirus pandemic, they are expected to continue. According to Legal Aid Manitoba, early results demonstrate that the programs have contributed to reducing delay and lowering the volume of bail hearings province-wide, particularly in Winnipeg.
  - Legal Aid BC also reported enhancing its duty counsel services for after-hours and weekend bail hearings.
- Legal Aid Saskatchewan created a new legal aid call centre which has extended hours to facilitate applying for legal aid.
- The Northwest Territories Legal Aid Commission established an outreach legal aid clinic, which is primarily for family and civil matters and serves the communities outside of Yellowknife. It is staffed with a family law lawyer (or someone with sufficient background in family law) who provides legal advice for family law questions. For other areas of the law, the lawyer provides legal information. There is also a dedicated courtworker. The Legal Aid

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<sup>75</sup> PRA Inc. (2020). *Evaluation of the Criminal Early Resolution Contract: Year One Final Report*. [https://legalaid.bc.ca/sites/default/files/2020-08/CERCevaluation\\_YearOne.pdf](https://legalaid.bc.ca/sites/default/files/2020-08/CERCevaluation_YearOne.pdf)

Commission partners with the communities as the outreach clinic is community driven and the purpose is to provide legal advice but also to make community connections.

**Services for vulnerable populations (n=31)** include changes in service delivery to improve access to services or the quality of services, and service outcomes for specific vulnerable populations.

- In Quebec, the *Protocole d'intervention lavallois en santé mentale* was implemented in Laval to reduce mental health stigma and encourage a quicker service response by legal system stakeholders to assist people with mental health issues. Also, a full-time lawyer is provided at the City of Montréal municipal court to assist those with mental health issues who are charged with summary offences.
- In Ontario, Legal Aid Ontario undertook a project to review its programming from the perspective of vulnerable client groups (Indigenous, racialized groups, mental health issues, etc.). *Project Rosemary* collected and analyzed information about the race of applicants and clients of legal aid to support evidence-based service planning.
- Legal Aid Manitoba implemented several projects to improve services for Indigenous people, including: providing Indigenous, Inuit, and Métis cultural-competency training to staff; directly engaging with Indigenous Nations to organize educational retreats and events respecting issues of reconciliation, Indigenous legal systems, and calls for justice for murdered and missing Indigenous women and girls. Legal Aid Manitoba also implemented the Journey to Reconciliation, in accordance with the Truth and Reconciliation Commission recommendations 27 and 28, to provide staff education and participation in Indigenous-led justice innovations.
- Legal Aid Saskatchewan collaborated with the Law Foundation of Saskatchewan and the University of Saskatchewan History Department to create a Gladue database that is open to all legal aid and defence lawyers in the province to assist with writing Gladue reports. The database includes the history of any First Nation in Saskatchewan from the time of first contact up to the 1980s that is based on research conducted by university students and professors. According to the key informants, this has substantially reduced the time and expense of producing quality Gladue reports.
- Nova Scotia Legal Aid enhanced their ability to capture data on clients related to whether they are Indigenous or African Nova Scotian, provided cultural-competency training to their staff, and provided funding for cultural impact assessments in criminal and youth matters and dedicated lawyers to the First Nations Court.

**IT/IM (n=28)** includes modernization of infrastructure or information management to increase access to information (for the public or for service providers), online access to services, or to improve digital data collection.

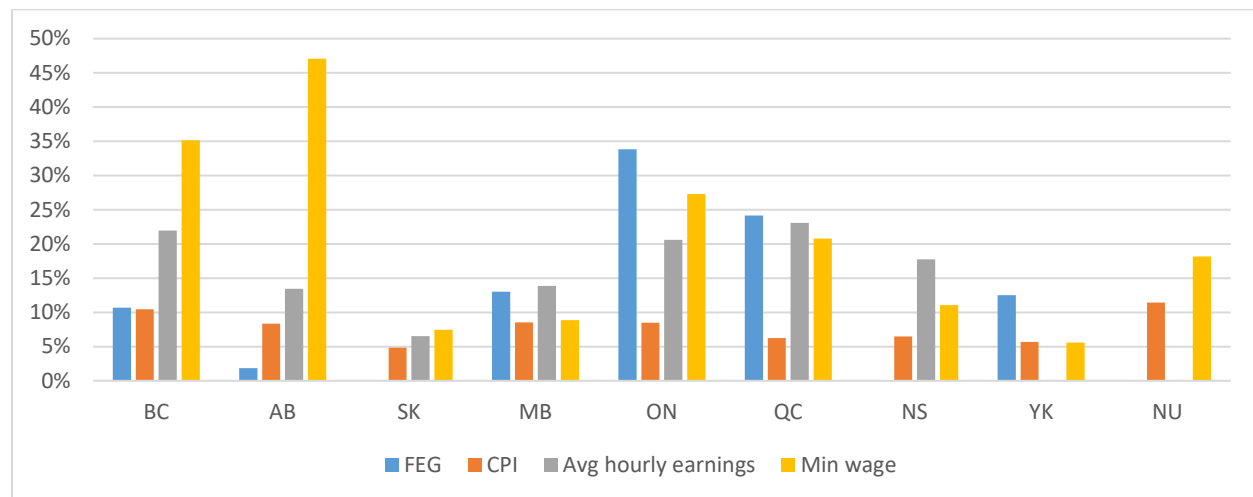
- Yukon Legal Services Society used the innovation funding, along with other territorial funding, to upgrade its database and update its website. The new database should improve the administration of the program (including gathering demographic data on clients) and create efficiencies in operations.
- Saskatchewan Legal Aid reported that it upgraded its database, which has led to operational efficiencies and the ability to track additional types of information (e.g., hours spent on files) in order to better allocate resources to types of cases.

- New Brunswick Legal Aid Services Commission implemented new processes to modernize the application process and streamline it. Instead of having a means test, they moved to a grid system based on income and number of dependents, which is more in line with the approach of other legal aid plans. This new system has made it easier for clients to know if they qualify for legal aid as well as for duty counsel to assess if they should apply.
- Nova Scotia Legal Aid improved their technology in several ways. They now have an online application form, which improves accessibility of its services and enables them to direct more quickly the application to the appropriate legal aid office. In addition, they have introduced text notifications of appointments and court dates and have provided laptops/tablets to lawyers, which allows them to work more efficiently at the courthouse, which they believe has reduced the number of adjournments, thereby saving court time.

## APPENDIX C: COMPARING FINANCIAL ELIGIBILITY GUIDELINES

Comparing the Financial Eligibility Guidelines (FEGs) to other economic measures places them in perspective. Figures 9 and 10 below compare the FEGs for family sizes of between one and four to other economic measures (CPI, average hourly earnings and minimum wage), between 2015 and 2020, for eight provinces: British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, Quebec, New Brunswick, and Nova Scotia; and two territories: Yukon and Nunavut.<sup>76</sup> The two figures are presented to show whether the differences are affected by family size, as legal aid FEGs are scaled based on family size.

**Figure 9. Comparison of Financial Eligibility Guidelines to Other Economic Measures – Single Person 2015 to 2020 Percentage Increase<sup>77</sup>**



Source: Statistics Canada, n.d.-b, n.d.-c<sup>78</sup>

The only notable difference in the comparison of FEGs to other economic measures based on family size is that Manitoba's FEG for a single person kept up with the other economic measures, while the FEG did not for a family of four.

<sup>76</sup> The remaining three maritime provinces (New Brunswick, Prince Edward Island, and Newfoundland and Labrador) and the Northwest Territories were not included in the comparison, because specific FEGs amounts for their legal aid plans could not be determined for 2015 and/or 2020. They either do not use strict financial dollar amounts to determine legal aid eligibility, or the information could not be found online or in annual reports.

<sup>77</sup> Note: The reference period for the CPI is from October 2020 to February 2021. The reference period for average weekly earnings is from 2015 to 2018. Average weekly earnings were taken as an average of both full and part time, for employees who are not union members nor covered by a collective agreement.

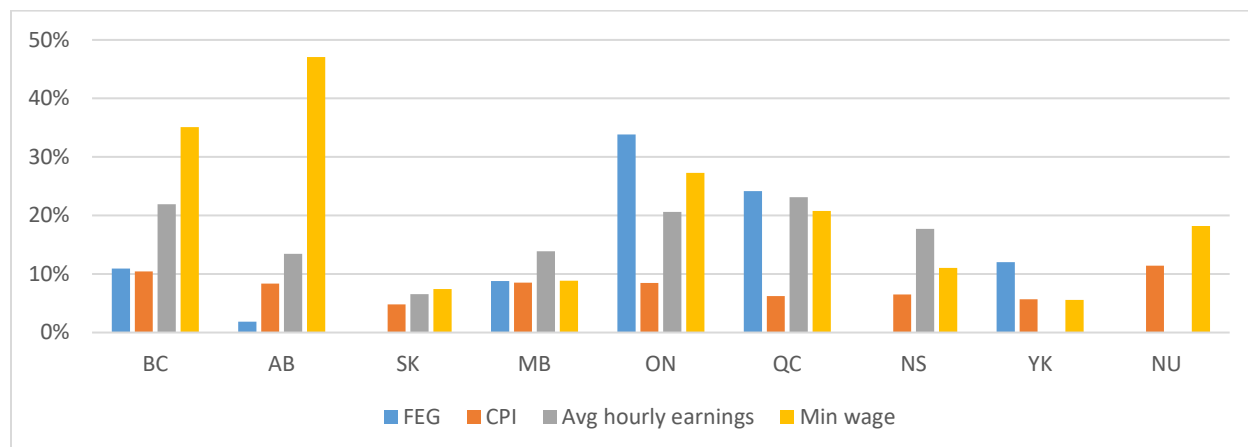
<sup>78</sup> Statistics Canada. (n.d.-b). *Table 14-10-0134-01 Average weekly earnings, average hourly wage rate and average usual weekly hours by union status, annual.*

[https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=1410013401&pickMembers%5B0%5D=1.7&pickMembers%5B1%5D=4.1&cubeTimeFrame.startYear=2015&cubeTimeFrame.endYear=2018&referencePeriods=20150101%2C20180101](https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=1410013401&pickMembers%5B0%5D=1.7&pickMembers%5B1%5D=4.1&cubeTimeFrame.startYear=2015&cubeTimeFrame.endYear=2018&referencePeriods=20150101%2C20180101;);

Statistics Canada. (n.d.-c). *Table 18-10-0004-01 Consumer Price Index, monthly, not seasonally adjusted.*

Statistics Canada. Retrieved April 9, 2021, from <https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=1810000401>

**Figure 10. Comparison of FEGs to Other Economic Measures – Family of Four  
2015 to 2020 Percentage Increase<sup>79</sup>**



Source: Statistics Canada, n.d.-b, n.d.-c<sup>80</sup>

As shown in Figures 9 and 10, three jurisdictions (Ontario, Quebec, and Yukon) have increased their FEGs well above any of the economic measures used. In Ontario, the financial eligibility criteria for legal aid has increased by 6% each year from 2016-17 to 2019-20. As of January 1, 2016, Quebec increased its FEGs for non-contributory (free) legal aid by 17.75%. Then, when the minimum wage increased in May of 2016 and in subsequent years, both contributory and non-contributory legal aid increased to match the increase in the minimum wage. In addition, in May 2018, the financial eligibility guideline increased by 20% for residents of the Magdalen Islands due to their remoteness.

Two provinces, British Columbia and Manitoba, have been able to increase FEGs to keep pace with inflation (as measured by the provincial CPIs), but the increase is less than the increase in wages.

Some jurisdictions expanded accessibility even if they could not increase their FEGs at all or by much.

- In Saskatchewan, duty counsel for bail hearings no longer has a financial eligibility requirement.
- In Alberta, individuals who qualify for the Assured Income for the Severely Handicapped disability benefit are automatically qualified for legal aid representation.
- Nova Scotia has not changed its financial guidelines in some time but noted that they provide a generous interpretation of likelihood of incarceration for particularly vulnerable clients (e.g., mental health challenges, literacy or language issues, potential immigration consequences if convicted).
- Nunavut has a flexible approach for individuals who exceed financial eligibility requirements whereby they can contribute to their legal aid services. This recognizes the fact that legal aid is really the only option for individuals who live in remote communities, as there are no other lawyers available.

Another measure of the responsiveness of legal aid plans' FEGs to the economic situations of lower-income people is a comparison to the Low-Income Cut-Offs (LICOs). Statistics Canada has developed a method of estimating income levels (LICOs) at which families spend 20 percentage points more than

<sup>79</sup> Note: The reference period for the CPI is from October 2020 to February 2021. The reference period for average weekly earnings is from 2015 to 2018. Average weekly earnings were taken as an average of both full and part time for employees who are not union members nor covered by a collective agreement.

<sup>80</sup> Statistics Canada, supra note 78.

the average family on necessities like food, shelter, and clothing. This level is considered to indicate families that are in “straitened circumstances”.<sup>81</sup> To provide some examples of the income levels at issue, the legal aid plans in Ontario and Manitoba base their FEGs on before-tax income, which for a single person is \$20,225 and \$23,000, respectively; the before-tax LICO in 2015 for a single person living in a city with a population of 500,000 or more (e.g., Toronto or Winnipeg) was \$24,593. In Saskatchewan, where the FEGs are based on after-tax incomes, the after-tax LICO for a single person living in Saskatoon or Regina was \$17,236 in 2015 and the FEG was \$11,820.

Table 10 compares the FEGs to the before- and after-tax LICOs for 2015 and 2020 to show changes in FEGs to LICO over time. LICO measures are calculated based on year, family size, and population. The percentages in Table 10 represent the difference between the FEGs and the LICOs. A negative percentage means that the FEGs are below the LICO by that percentage, which means that some individuals whose income is below the LICO do not qualify for legal aid (i.e., they are low-income, but not low-income enough). Conversely, a positive percentage means that the FEGs are above the LICO by that percentage. The change in FEGs to the LICO between 2015 and 2020 is based on comparing the percentage figures in Table 10. If the percentage difference becomes smaller between 2015 and 2020, the FEGs are closer to the LICO, and if the difference becomes larger, the FEGs are further from the LICO. If the percentage difference shifts between 2015 and 2020 from negative to positive, the FEGs have changed from being below the LICO to above the LICO.

In comparing FEGs to LICOs:

- ▶ Alberta, Saskatchewan, Nova Scotia, and Nunavut had minimal or no change in their FEG rates between 2015 and 2020 while the LICO for all jurisdictions and family sizes has increased (meaning more low-income families are potentially ineligible for legal aid).<sup>82</sup>
- ▶ Manitoba increased its FEG rates but not by a sufficient amount to reduce the gap between the FEG and the LICO.
- ▶ British Columbia, the only jurisdiction where the FEG is above LICO for most family sizes, raised their FEGs by about 11% between 2015 and 2020 — a change greater than the change in LICO measures — so the percentage difference increased.
- ▶ Quebec and Ontario raised their FEGs (by about 24% and 34% respectively), so although the difference is still negative, the gap has become smaller.

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<sup>81</sup> Statistics Canada. (2015d, November 27). *Low income cut-offs*. Statistics Canada. <https://www150.statcan.gc.ca/n1/pub/75f0002m/2009002/s2-eng.htm#n1>

<sup>82</sup> Saskatchewan FEGs are tied to the Ministry of Social Services’ social assistance guidelines. As a result, its FEGs for legal aid only increase when the Ministry increases social assistance eligibility.



**Table 10. Percentage Difference between Provincial Financial Eligibility Guidelines and Low-Income Cut-Offs for Years 2015 and 2020\***

Year		2015								
Population		500,000+				100,000-499,999		<30,000		
Jurisdiction		BC	AB	MB	ON	QC	SK	NS	YK	NU
Family size	1	-13.3%	-25.2%	-7.0%	-75.2%	-28.1%	-45.9%	-34.6%	-0.3%	61.8%
	2	1.5%	-25.9%	-13.4%	-21.1%	-30.4%	-52.0%	-22.8%	0.1%	61.6%
	3	4.6%	-8.7%	-21.5%	-27.8%	-25.9%	-41.4%	-27.5%	-6.8%	66.8%
	4	2.4%	-22.1%	-34.4%	-35.1%	-45.2%	-60.7%	-40.6%	-14.7%	62.7%
	5	6.0%	-28.8%	-40.1%	-35.9%		-73.3%	-43.5%	-16.7%	60.7%
	6	9.7%	-35.8%	-46.2%			-80.5%	-44.1%		58.5%
	7	12.5%		-51.4%			-77.3%			56.6%
Year		2020(1)								
Population		500,000+				100,000-499,999		<30,000		
Jurisdiction		BC	AB	MB	ON	QC	SK	NS	YK	NU
Family size	1	-6.9%	-39.9%	-2.7%	-42.6%	-8.0%	-57.6%	-46.8%	8.4%	59.9%
	2	6.9%	-40.6%	-10.8%	-3.8%	3.4%	-64.3%	-33.8%	6.7%	59.7%
	3	10.0%	-21.5%	-20.2%	-4.2%	-6.1%	-52.8%	-39.0%	-0.9%	65.2%
	4	8.0%	-36.4%	-34.1%	-9.9%	-22.4%	-73.7%	-53.3%	-9.4%	60.9%
	5	11.3%	-43.9%	-40.7%	-11.2%		-87.2%	-56.4%	-12.1%	58.8%
	6	14.9%	-51.8%	-47.6%			-95.1%	-57.1%		56.5%
	7	17.5%		-53.6%			-91.6%			54.6%

\* BC, SK, and NS were compared to after-tax LICOs; AB, MB, ON, QC, YK, and NU were compared to before-tax LICOs.  
(1) LICOs for 2020 were not available and were therefore calculated as  $LICO(2020) = LICO(2002) \times CPI(2020)/100$ .

Sources: Statistics Canada, n.d.-a<sup>83</sup>

<sup>83</sup> Statistics Canada. (n.d.-a). Table 11-10-0241-01 Low income cut-offs (LICOs) before and after tax by community size and family size, in current dollars.  
<https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=1110024101&pickMembers%5B0%5D=2.1&cubeTimeFrame.startYear=2015&cubeTimeFrame.endYear=2018&referencePeriods=20150101%2C20180101>

## APPENDIX D: LEGAL AID PROGRAM: BUDGET AND ACTUAL EXPENDITURES (in millions of \$, rounded)

Funding components (contributions)	2016-17			2017-18			2018-19			2019-20		
	Budget	Actual	Variance	Budget	Actual	Variance	Budget	Actual	Variance	Budget	Actual	Variance
• Criminal Legal Aid in Provinces and Territories (and Civil Legal Aid in the Territories) (including \$2M innovations per FY)	121.39	121.39	0	124.39	124.39	0	127.39	127.39	0	132.39	132.39	0
• Immigration and Refugee Legal Aid	11.50	18.75	-7.25	14.20	22.57	-8.37	14.20	26.99	-12.79	27.65 *	54.49	-26.84
• State-Funded Counsel	4.15	2.01	2.14	4.15	1.10	3.05	3.65	1.03	2.62	3.66	0.91	2.75
<b>Total – Contributions Funding</b>	<b>137.04</b>	<b>142.15</b>	<b>-5.11</b>	<b>142.74</b>	<b>148.06</b>	<b>-5.32</b>	<b>145.24</b>	<b>155.41</b>	<b>-10.17</b>	<b>163.7</b>	<b>187.79</b>	<b>-24.09</b>
<b>Program Administration**</b>												
• Salary	1.01	0.96	0.05	1.01	0.88	0.13	1.01	0.83	0.18	1.01	0.71	0.30
• Operations and Maintenance***	0.63	0.38	0.25	0.63	0.44	0.19	0.63	0.46	0.17	0.63	0.32	0.31
<b>Total – Program Administration</b>	<b>1.64</b>	<b>1.34</b>	<b>0.3</b>	<b>1.64</b>	<b>1.32</b>	<b>0.32</b>	<b>1.64</b>	<b>1.29</b>	<b>0.35</b>	<b>1.64</b>	<b>1.03</b>	<b>0.61</b>
<b>Grand Total</b>	<b>138.68</b>	<b>143.49</b>	<b>-4.81</b>	<b>144.38</b>	<b>149.38</b>	<b>-5.00</b>	<b>146.88</b>	<b>156.7</b>	<b>-9.82</b>	<b>165.34</b>	<b>188.82</b>	<b>-23.48</b>
State-funded Counsel Cases Managed by LAD****	0.13	0.1	0.03	0.18	0.32	-0.14	0.18	0.43	-0.25	0.31	0.27	0.04

\* The FY 2019-20 Immigration and Refugee Legal Aid total includes Budget 2019 funding.

\*\*Accommodation and benefits are not included.

\*\*\*The Program uses its operations and maintenance funding to cover state-funded counsel expenditures that are in excess of the budget for state-funded counsel cases managed by LAD.

\*\*\*\* For state-funded counsel cases managed by LAD, the actual expenditures shown are the net amounts paid by the Department after it has recovered costs from other government departments. These amounts are also included in Operations and Maintenance listed above.

Sources: Statement of Final Claims and Department of Justice financial data.