



The Impact of the Lack of Legal Aid in Family Law Cases

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Executive summary

The purpose of this review is to examine the impact of the lack of legal aid in family law cases in Canada, particularly among populations that experience systemic disadvantage. Lack of access to legal aid for family law cases profoundly affects adult litigants and their children.

The two objectives of this review are:

- to identify challenges that individuals face in accessing justice for family law disputes in the absence of legal aid; and
- to analyze the impacts of a lack of or limited representation on certain population groups (i.e., women, residents of rural and remote communities, people with disabilities, Indigenous peoples, newcomers, LGBTQ2S+ people, official language minorities and visible minority groups), particularly in family law cases.

To meet these two objectives, the following research questions were asked:

- What policies govern how legal aid is granted in family law cases?
- Are cases involving family violence treated differently, and if so, how?
- Are there differences in legal aid eligibility criteria, such as whether the matter is proceeding under the *Divorce Act* or provincial legislation?
- Are there unique challenges to providing legal aid for family law cases? If so, what are they?
- What are the issues, challenges and impacts unique to providing access to justice for certain population groups, and do some groups face greater barriers than others?

The review examines four major topic areas:

- (1) background on family legal aid;
- (2) family legal aid coverage and eligibility guidelines;
- (3) innovative approaches to providing access to family legal aid services to specific communities; and,
- (4) impacts of limited family legal aid funding for family cases.

The first topic considers the difficulties in accessing legal aid for family law cases and the consequences for parents and children, as well as for society as a whole. Legal assistance is often too expensive for many individuals and access to legal aid is very limited. Women suffer serious consequences without access to legal aid services. Children may also be exposed to risk and families may suffer economically.

The second topic examines coverage and eligibility guidelines for family legal aid across Canada. Each jurisdiction has its own unique demographic characteristics (e.g., population size, rural versus urban centres), as well as financial coverage and eligibility guidelines. While the territories receive the most assistance for legal aid on a per capita basis in federal cost-sharing, they also carry a larger burden as a result of geography, isolation, and lack of social services compared to southern Canada. Québec is the province that has the highest financial eligibility threshold, and as a result provides more family law services through legal aid than other provinces on a per capita basis. None of the jurisdictions provide coverage for divorce if there is no corollary relief requested for parenting issues (e.g., custody, access, child support). New Brunswick and Newfoundland and Labrador also exclude property claims for unmarried persons even when they financially qualify for legal aid.

Applicants experience barriers beyond the limitations imposed by the coverage and eligibility guidelines. For example, applicants face practical barriers in the legal aid application process, a lack of legal aid information,

barriers due to the location of services (e.g., geographic inequities), and lack of legal aid coverage for some matters (e.g., divorce, property). There are additional barriers in accessing legal services for certain population groups, including: Francophones in rural and remote areas in predominantly English provinces; immigrants and persons whose first language is neither English nor French; those with limited education and literacy; members of Indigenous and racialized communities; and, individuals living in northern and rural communities where services, particularly family legal aid services, are limited.

Collecting data about demographic characteristics of legal aid applicants and users, services provided by legal aid organizations, and financial eligibility is necessary for understanding cost-effectiveness and efficiency. However, quantitative data alone does not tell the full story of how being unable to access legal aid—that is to say the social, behavioural and emotional, or human story—of how individuals experience legal aid. There is, at present, little research on this larger, more complex story, specifically in relation to family legal aid.

The third topic examines innovative approaches to providing family law services to specific communities. These innovations include, for example, limited scope legal services (e.g., unbundled legal services and coaching), internet-based legal services, community-based information, child legal representation, and family violence initiatives. Service providers in all jurisdictions are aware that more information and assistance is required for those with low-incomes who need legal aid assistance in family law disputes.

The fourth topic examines the effects of limited family legal aid funding. The lack of access to family law services and the increase in self-representation in family proceedings are growing concerns in Canada. Limited family law funding is one of the causes of the increasing number of self-represented family litigants. This makes the family justice system more costly to operate and affects court outcomes for vulnerable family litigants and their children. It is also vitally important to know the human costs (e.g., socio-emotional, health, employment, and housing) for adults and children in addition to the financial costs of not being able to access legal aid in family disputes. While there has been more empirical research on the impact of self-representation as a result of lack of legal aid assistance, there needs to be a comparable examination of the impacts on vulnerable and marginalized communities.

The authors conclude that opportunities for future work could include collaborative work between researchers, governments, legal aid service providers, lawyers, and litigants to conduct quantitative and qualitative research on long-term impacts of limited legal aid assistance in family disputes, as well as to study how to improve the efficiency of legal aid services. Areas that collaborative research could address include: better tracking of parenting orders; comparing outcomes for litigants who are legally represented and those who are self-represented; proceedings that involve overlap between family proceedings and criminal, child welfare and immigration matters; and, longitudinal research in these types of family law cases.

While government policies and programs cannot be expected to meet the needs of all of those affected by family law problems, those who are the most vulnerable and marginalized in society would benefit from better access to family justice. Improved data collection and evaluation research are necessary for the improvement of services for vulnerable and marginalized populations and are a necessary step for effective program and policy discussions.

1.0 Introduction

1.1 Background

The stated goals for legal aid in Canada are: (1) to ensure that the interests of justice are served; (2) to ensure that the legal rights of low-income individuals are protected; and, (3) to provide fair and equal justice (Bertrand, Paetsch, Hornick, & Bala, 2002; Buckley, 2010; Leitch, 2013; UN Office of Drugs and Crime, 2016).¹ The federal government does not deliver legal aid services, but the Department of Justice Canada's Legal Aid Program (LAP) provides funding to the provinces and territories for the delivery of legal aid services.² The federal LAP does not contribute funding to the provinces for civil legal aid (except in immigration and refugee matters). The Department of Justice Canada contributes to civil as well as criminal legal aid in the territories through Access to Justice Service Agreements, which also cover Indigenous courtwork programs and public legal education and information. Civil legal aid is also an eligible expenditure under the Canada Social Transfer (CST), an annual block transfer provided by the Department of Finance to provinces and territories.

Each province and territory has its own legal aid plan, and each is responsible for the delivery of criminal and civil legal aid services, based on its own policies and procedures. While the federal government has jurisdiction over legislation governing divorce and related parenting and support issues, civil legal aid falls within provincial jurisdiction. There is considerable variation in legal aid programs across Canada with respect to the delivery of services, level of financial eligibility, and coverage provisions (Bertrand et al., 2002; Buckley, 2010; Dandurand & Jahn, 2018; Dupuis & Kelly, 2012-2013; Tsoukalas & Roberts, 2002; Wright, 2017; Zemans & Amaral, 2018).

The 2017 Report of the Standing Committee of the House of Commons on Justice and Human Rights (Housefather, Chair, 2017) states, "Canada does not have one legal aid system ... what we have is a series of 13 provincial and territorial legal aid programs, with very little consistency among them" (p. 2).³ This raises questions about equality of access to justice services across Canada.

1.2 Purpose and objective

This report examines the impact of the lack of access to legal aid in family law cases in Canada. The objective is to identify challenges that people face in accessing justice for family law disputes in the absence of legal aid, and to analyze the impacts of the lack of access to family legal aid on certain population groups (i.e.,

¹ See Department of Justice website that reports on the plans and priorities of the federal government in providing funding for legal aid in Canada. For example, see Department of Justice Canada *2016-17 Report on Plans and Priorities*, which can be accessed at: https://www.justice.gc.ca/eng/rp-pr/cp-pm/rpp/2016_2017/index.html (Accessed June 6, 2019).

² See Department of Justice website, which explains the role of the federal government in providing funding for legal aid and the legal aid service agreements with each province and territory. Accessed at: <https://www.justice.gc.ca/eng/fund-fina/gov-gouv/aid-aide.html> (accessed June 6, 2019). Also see *Resource and Caseload Assistance* (2012-2013), which reports the funding across Canada for legal aid to the various provinces and territories. Accessed at: <https://www150.statcan.gc.ca/n1/en/catalogue/85F0015X> (accessed June 6, 2019).

³ JUST, *Evidence*, 1st Session, 42nd Parliament, 2 May 2017 (Mark Benton, Chief Executive Officer, Legal Services Society). Accessed at: http://publications.gc.ca/collections/collection_2017/parl/xc66-1/XC66-1-1-421-16-eng.pdf (accessed June 6, 2019).

women, residents of rural and remote communities, people with disabilities, Indigenous peoples, newcomers, LGBTQ2S+ people, official language minorities and visible minority groups).

The following research questions were asked:

- What policies govern how legal aid is granted in family law cases?
- Are cases involving family violence treated differently, and if so, how?
- Are there differences in legal aid eligibility criteria, such as whether the case is proceeding under the *Divorce Act* or provincial legislation?
- Are there unique challenges to providing legal aid for family law cases? If so, what are they?
- What are the issues, challenges and impacts unique to providing access to justice for certain population groups, and do some groups face greater barriers than others?

1.3 Methodology

Three different methods were used in this research.

(1) Literature review:

- Existing social science and legal literature, as well as grey literature, was reviewed using the Rapid Evidence Assessment (REA) approach (Barends, Rousseau, & Briner, 2017; Davies, 2003). REA identifies relevant published studies and grey literature through a systematic and transparent approach to understanding the current state of knowledge. This involved identifying and refining inclusion and exclusion criteria for searching for relevant social science research on legal aid practices and policies, family law legal aid policies, legal aid eligibility guidelines, and impacts on certain population groups (i.e., residents of remote and rural communities, persons with disabilities, Indigenous peoples, LGBTQ2S+ people, visible minority groups and language minority communities). Databases that were used included: Academic Search Premier, ERIC, Google Scholar, HeinOnline, Index to Legal Periodicals, LexisNexis Academic, PUBMED, Scopus, JSTOR, and Academic OneFile among university databases. Searches for media reports, and grey and fugitive articles/information such as unpublished manuscripts, conference proceedings, topical bibliographies, and curriculum vitae lists, training materials, were also completed using the Internet search engines: Google.com, Google Scholar, Yahoo.ca, and, Altavista.

(2) Document review:

- The authors reviewed provincial, territorial and federal annual reports on legal aid as well as their legal aid plans, and reports and documents provided by key stakeholder interviews, as well as federal government documents provided by the Advisory Group).

(3) Key informant interviews:

- Interviews with seven key legal aid directors by telephone (see Appendix 1).

1.4 Limitations

This study had a number of limitations. First, there is very little literature on the impact of limited or no legal aid on people with disabilities, Indigenous peoples, LGBTQ2S+ groups and immigrant populations in Canada. The existing literature provides little information on the underlying complexities and challenges in seeking and obtaining family legal aid, as well as the consequences and impacts of not obtaining legal aid, especially among populations. Rather, the information presented in public reports, media and scholarly literature provides generalized and aspirational statements, some raising concerns about the effects of reduced funding in legal aid for family cases. As a result of the gaps in the literature, much of this review is based on an extrapolation from legal aid challenges in general, and applied to family legal aid, in an attempt to gain some understanding of the complexities and challenges for different population groups.

Second, although there is research from countries such as Australia, and England and Wales exploring the effects of limited legal aid in the context of family law (Troup, 1997; Flynn & Hodgson 2017; Richardson & Speed, 2019; Wong & Cain, 2019), these were not included in this study. Many of the challenges experienced in other countries do not easily translate to a Canadian context. Specifically, because of differences in laws and court structures, the federal/provincial/territorial cost sharing schemes in Canada, cost-of-living, and perhaps most importantly, the national variability in Canada of family legal aid coverage and policy.

Third, the information presented by Canadian legal aid organizations in their annual reports, government documents, and online websites does not allow for a clear understanding of the specific challenges of providing legal aid to vulnerable and marginalized communities, or of the effects of the lack of access to legal aid for these populations. The publicly available documents present some quantitative data on users of family legal aid and those denied coverage, in some cases broken down by gender. Yet, there is little research that sheds light on the human stories behind the numbers, and in particular the impact that lack of access to legal services for vulnerable and marginalized parents has on children (e.g., socio-behavioral and emotional outcomes).

Finally, the interview data in this report from the key informants was helpful, but intentionally limited as conducting interviews was not part of the original scope of the review. Interviewees were purposively selected from Yukon, Northwest Territories, Manitoba, Québec, Nunavut, and Newfoundland and Labrador, to better understand the northern realities, as well as the needs of Francophones both within and outside of Québec, with respect to legal aid services provided, including an appreciation of the impact of geography, transportation issues and technology. Another focus in selecting interviewees was to identify issues related to the language in which services are available.

To properly understand the impact of the lack of legal aid or reduced access to legal aid, it would have been necessary to undertake a significant number of additional interviews with other stakeholders. This could include, for example, interviews with legal aid staff, lawyers, judges, those who have accessed family legal aid or been denied legal aid, in particular women, Indigenous peoples, people with disabilities, LGBTQ2S+ people, and newcomer and immigrant groups.

Despite these limitations, the methodological approach of this review was rigorous enough to provide a good overview of the impact of limited or no access to legal aid in family law in Canada.

2.0 Background to family legal aid in Canada

Family law disputes are complex and occur within an emotional and often negative atmosphere where each party may feel a sense of betrayal, fear, anger and loss. Unlike other disputes (e.g., property and civil matters), parties in family law cases are expected to interact and positively engage years after their legal proceedings as they share care and responsibility for children. If the family justice process leaves the parties angry or fearful, this will negatively affect both parties and their children. Many family law cases require individualized legal advice based on their complex social and parenting context (Bala, Hebert, & Birnbaum, 2017). However, the reality is that access to legal aid is limited, and legal assistance is financially out of reach for many individuals. Often women, children, and those in vulnerable and marginalized communities suffer serious consequences (e.g., loss of parenting time, inadequate financial support) without access to family legal aid services (Canadian Bar Association, 2013; Elman & Hughes, 2013; Housefather, 2017; Hughes, 2013; Neilson, 2017; Semple, 2010; Trebilcock, Duggan & Sossin, 2012).⁴

The Canadian Bar Association (2015) aptly summarizes the costs of inadequate legal aid services, in both civil and criminal contexts:

when people cannot use the legal system to protect their rights or defend their interests, there are obvious costs to society as a whole. Costs to society include:

- slower court process and more staff time when unrepresented people try to defend themselves or their rights;
- social assistance when a person loses a job as a result of having a criminal record;
- protection services for children at risk;
- shelters for women and children who cannot get legal protection from an abusive spouse/parent;
- social assistance for a parent and children who cannot establish and enforce support obligations;
- homelessness;
- incarceration;
- the marginalization of people who cannot participate fully in society.

The inadequate funding of legal aid services is costly and not a cost-saving.⁵

There has been significant Canadian research on:

- access to justice concerns in general (Currie, 2006; Elman & Hughes, 2013; Hughes, 2013; Rankin, 2012; Trebilcock et al. 2012);⁶
- the prevalence of family law problems and subsequent impacts on the justice system (Farrow, Curry, Aylwin, Jacobs, Northrup & Moore, 2017);

⁴ Also see *Study on Access to Justice System—Legal Aid* (CBA, 2016) at:

<https://www.cba.org/CMSPages/GetFile.aspx?guid=8b0c4d64-cb3f-460f-9733-1aaff164ef6a> (Accessed June 12, 2019).

⁵ Canadian Bar Association at: <https://www.cba.org/Sections/Legal-Aid-Liaison/Resources/Resources/Legal-Aid-in-Canada> (accessed September 24, 2019).

⁶ See UNB Special Issue Journal (52), 2012 on access to justice; and the Canadian Bar Association (2013), *Reaching Equal Justice Report: An Invitation to Envision and Act* at:

https://www.cba.org/CBAMediaLibrary/cba_na/images/Equal%20Justice%20-%20Microsite/PDFs/Equal-Justice-Summary-Report-eng.pdf (accessed October 1, 2020).

- the impact of self-representation in family law disputes on the justice system (Birnbaum & Bala, 2012; Birnbaum, Bala, & Bertrand, 2013; Birnbaum, Poitras, Saini, Bala, & Cyr, in press; Farrow, Lowe, Albrecht, Manweiller, & Simmons, 2012; Macfarlane, 2013; Thompson & Reiersen, 2001);⁷
- the importance of legal aid to protect and enforce the rights of certain population groups⁸ (e.g., women, Indigenous people, LGBTQ2S+ people, and members of other groups that have faced systemic disadvantage) (Bertrand et al, 2002; Buckley, 2010; Canadian Bar Association, 2013; Elman & Hughes, 2013; Zemans & Amaral, 2018);⁹
- challenges in access to family justice for members of certain population groups (Abel, 2012; Artz, Jackson, Rossiter, Nijdam-Jones, Grezeczy & Porteus, 2014; Birnbaum & Bala, 2019; Birnbaum, Bala & Jaffe, 2014; Birnbaum et al. forthcoming; Fidler, Bala, & Saini, 2013; Di Pietro & Illes, 2014; Government of Canada, 2014, Hughes, 2013; Jaffe, Scott, Jenny, Dawson, Straatman & Campbell, 2014; Saini, Birnbaum & Bala, 2016).

The lack of legal aid funding has serious implications in parental disputes about children, family violence, relocation, children who refuse visitation with one parent, and children with special needs (e.g., fetal alcohol syndrome, autism spectrum disorder, epilepsy, cerebral palsy).

The social, human and economic costs¹⁰ of family violence are significant, as family violence can have devastating consequences for women and children, in particular.¹¹ Women are generally more economically disadvantaged than men by separation and divorce, and often require access to legal services to protect themselves and their children at separation, when the risk of family violence is heightened (Gadalla, 2008; Jaffe et al. 2014; Leopold, 2018; Mosher, 2015).¹²

Bertrand et al. (2002) reported that the availability of family legal aid is more often an issue for women, who make up 70 percent of family legal aid clients across Canada. In 2016, Karen Hudson, at that time the Executive Director of Nova Scotia Legal Aid, stated, “The demographics are that family legal aid is used predominantly by women and criminal legal aid is used predominantly by men.”¹³

⁷ Department of Justice, *JustFacts* at: <https://www.justice.gc.ca/eng/rp-pr/fl-lf/divorce/jf-pf/srl-pnr.html> (accessed June 14, 2019).

⁸ Marginalized people are defined broadly by virtue of their social exclusion, disempowered as a result of lack of resources, and/or vulnerable due to mental health issues or other issues (Crenshaw, 1995; Iyer, 1993).

⁹ Canadian Bar Association (2016), <https://www.cba.org/CMSPages/GetFile.aspx?quid=8b0c4d64-cb3f-460f-9733-1aaff164ef6a>; and The Law Society of Ontario: A Report of the Legal Aid Working Group: An Abiding Interest, 2018: <http://www.lawsocietygazette.ca/wp-content/uploads/2018/02/2018-LAWG-Report.pdf> (accessed June 18, 2019).

¹⁰ Department of Justice: https://www.justice.gc.ca/eng/rp-pr/cj-jp/fv-vf/rr12_7/rr12_7.pdf; and Department of Justice: *Making the Links in Family Violence Cases: Collaboration among the Family, Child Protection, and Criminal Justice Systems* can be found at: <https://canada.justice.gc.ca/eng/rp-pr/cj-jp/fv-vf/mlfvc-elcvf/index.html> (accessed June 6, 2019). Also see Moore (2017), *The Cost of Experiencing Everyday Legal Problems Related to Physical and Mental Health* at:

<http://www.cfcj-fcjc.org/sites/default/files/docs/The%20Cost%20of%20Experiencing%20Everyday%20Legal%20Problems%20Related%20to%20Social%20Assistance.pdf> (accessed June 6, 2019).

¹¹ Domestic Violence Death Review Committee (2017) and impact on women as a result of separation and divorce: <http://www.mcscs.jus.gov.on.ca/english/DeathInvestigations/OfficeChiefCoroner/Publicationsandreports/DVDR2017.html> (accessed June 6, 2019).

¹² See Department of Justice Canada at: <https://www.justice.gc.ca/eng/rp-pr/fl-lf/divorce/jf-pf/ecds-cfds.html> (accessed June 6, 2019). Also see: Fontaine and Haeck (2017) at: <https://www.cirano.qc.ca/files/publications/2018RP-07.pdf> (accessed June 14, 2019).

¹³ In Smith, J. (2016) at: <https://globalnews.ca/news/2752556/women-left-out-of-federal-money-for-legal-aid-lawyers/>. (accessed June 28, 2019).

In 2016-2017, the Department of Justice Canada¹⁴ reported that the majority of the women (64 percent) who used legal aid did so for civil legal matters, which were largely child welfare and family cases.

It is, however, important not to generalize the impacts of lack of access to legal aid on different population groups, such as women, LGBTQ2S+ people, people with disabilities, Indigenous peoples, newcomers and language minorities. Members of these groups are not homogenous and do not all experience the same challenges in accessing family legal aid across Canada (Bernhard, Landolt & Goldring, 2005; Elman & Hughes, 2013; Mosher, 2015; Neilson, 2017; UN Office of Drugs and Crime, 2016; Yu, Ouelett & Warmington, 2007).

Buckley (2010) noted that increases in the cost of living without similar increases in the minimum wage and social assistance benefits have created challenges and pointed out that eligibility levels for legal aid in Canada have generally not kept up with inflation, “leaving people without access to legal services” (p. 5). The lack of consistent legal aid funding and the high cost of legal services have resulted in increasing numbers of self-represented litigants, especially in family courts (Abel, 2012; Birnbaum & Bala, 2012; Birnbaum, Bala & Boyd, 2016; Birnbaum et al. forthcoming; Hughes, 2013; MacFarlane, 2013; Rankin, 2012; Thompson & Reiersen, 2001).

2.1 The state’s obligation to provide legal aid

In 2017-2018, there were 598,848 legal aid applications for summary assistance (e.g., legal advice, information) and legal representation (e.g., more extensive legal assistance, preparation of documents, representation in court). Of the total number of applications, 54 percent were for criminal matters and 44 percent were for civil matters (e.g., including immigration and refugee assistance), with the highest proportion of civil matters being applications for family (44 percent) and child protection (22 percent).¹⁵

In British Columbia in August 2019, West Coast LEAF¹⁶ won a ruling allowing its case against the provincial Legal Services Society (LSS) to proceed to trial, where it will argue that restraints on BC’s legal aid system are increasing the risk of family violence to women and children and violating their rights under sections 7 and 15 of the Charter and s. 96 of the *Constitution Act*. There may well be more applications citing the Charter to argue for governments to provide legal aid assistance, particularly for legal services for women and children in family violence cases. However, no court in Canada has yet ruled a constitutional right to legal assistance in family cases, even those raising family violence concerns.

The next section explores the implications of coverage and eligibility guidelines of family legal aid across Canada on access to justice. The section will also explore the differences between obtaining legal aid under the *Divorce Act* and provincial/territorial legislation, as well as specific issues such as those involving family violence, race,¹⁷ culture, and marginalized populations.

¹⁴ See Department of Justice Canada at: <https://www.justice.gc.ca/eng/rp-pr/jr/aid-aide/p1.html#table13> (accessed June 28, 2019).

¹⁵ *Legal Aid in Canada 2017-2018*, Department of Justice Canada: <https://www.justice.gc.ca/eng/rp-pr/jr/aid-aide/1718/1718.pdf> (accessed September 24, 2019).

¹⁶ *Single Mothers’ Alliance of BC Society v. British Columbia*, 2019 BCSC 1427.

¹⁷ In Ontario’s, General Auditor’s Report (2018) race based-client information is only beginning to be collected to assist in formulating legal aid strategies to serving vulnerable groups.

3.0 Family legal aid in Canada: coverage and eligibility guidelines

Each province and territory has its own unique characteristics. They differ, for example, in demographic composition, population size and density, as well as social and physical infrastructure. They also each have their own financial eligibility guidelines and coverage provisions related to obtaining and qualifying for family legal aid. The Canadian Bar Association's (2013) *Equal Justice: Balancing the Scales*¹⁸ reports that:

"In some places, people qualify only if they are living at subsistence levels (social assistance), leaving out the working poor. Eligibility rates do not keep pace with inflation and budgetary targets are often met by offering legal aid for fewer matters, to fewer people, or through only partial assistance or repayment requirements." (p. 9)

The vast geography of northern Canada versus southern Canada leaves many people in the North without effective access to justice (e.g., no courts or fly-in courts only at specific time periods) and general family law services (e.g., no family law information or mediation services). This is particularly challenging for low-income individuals living in Yukon, Northwest Territories, Nunavut, and Newfoundland and Labrador, where legal aid offices are only located in larger centres. Transportation and communication problems also exist due to inaccessibility related to weather and other micro (e.g., individual) and macro (e.g., structural/policies) barriers (e.g., lack of motor vehicles, lack of bus transportation, lack of air transportation) creating additional access to justice issues.¹⁹

Reid & Malcolmson (2008) and Baxter & Yoon (2014) also raised concerns about the lack of accessibility of legal services based on the geographic distribution of lawyers and the resulting disparities in access to justice. They recognized that the geographic barriers across Canada systematically disadvantage certain groups, such as Indigenous peoples and those who live in northern and remote communities where there may not be any lawyers.

The limited coverage of family legal aid also raises concerns with respect to people with disabilities (visible and non-visible),²⁰ language minority communities (e.g., particularly for individuals with French as their mother tongue seeking legal services in Ontario, Nova Scotia and Cape Breton)²¹ and those with little education and poor literacy requiring face-to-face contact with a lawyer rather than print or internet materials (Elman & Hughes, 2013).

Women are the majority of family legal aid recipients (Addario, 1998; Bertrand et al., 2002). In 2017-2018, women in New Brunswick received more family legal aid certificates than men. Women in New Brunswick also had a higher application rate and were more likely to be approved for family legal aid than men (82 percent versus 72 percent, respectively (excluding child protection)).²² During that same time period, women

¹⁸ CBA (2013) at: https://www.cba.org/CBAMediaLibrary/cba_na/images/Equal%20Justice%20-%20Microsite/PDFs/EqualJusticeFinalReport-eng.pdf (accessed June 20, 2019).

¹⁹ Key stakeholder telephone interviews with Karen Wilford, Director of Legal Aid in the Northwest Territories and with Barbara Barker, Legal Services Solicitor in Newfoundland and Labrador.

²⁰ Convention on the Rights of Person with Disability, United Nations, Treaty Series (2015).

²¹ See JUST, Evidence, 1st Session, 42nd Parliament, 16 May 2017 (Réjean Aucoin, President, Association des juristes d'expression française de la Nouvelle-Écosse) at: <https://openparliament.ca/committees/justice/42-1/57/rejean-aucoin-1/only> (accessed June 20, 2019). Also see *Report of the Standing Committee on Justice and Human Rights* (October, 2017), p. 20-21 at: http://publications.gc.ca/collections/collection_2017/parl/xc66-1/XC66-1-1-421-16-eng.pdf (accessed June 29, 2019).

²² See *New Brunswick Commissioner Legal Aid Report, 2017-2018*, p. 15, <https://www.gnb.ca/legis/business/currentsession/59/59-1/LegDoc/Bil/November/NBLSC-CSAJNB-AR-RA2017-2018.pdf> (accessed June 15, 2019).

in Nova Scotia made more requests for summary family law advice than men (55 percent versus 45 percent, respectively), and 71 percent of all family applications were made by women (Annual Report, p. 19).²³ In the Northwest Territories, statistics gathered for civil legal aid approvals by case type and gender revealed that legal aid was granted most often to women in family law cases.²⁴

To apply for legal aid in any jurisdiction in Canada, individuals must provide evidence of financial eligibility (i.e., proof of poverty). The challenge for many women, in particular those fleeing family violence, is that they may not have access to the necessary financial documents. However, in almost all jurisdictions, social assistance recipients are automatically financially eligible for legal aid assistance, and family violence is a major priority.

None of the jurisdictions provide coverage for obtaining a divorce decree if there is no corresponding application being requested for parenting issues (e.g., custody and access, child support, spousal support). New Brunswick and Newfoundland and Labrador also exclude property claims for unmarried partners.

As outlined in Appendix 2, each jurisdiction uses a mix of income and assets to assess financial eligibility. Québec has the highest financial eligibility guidelines among the provinces, and as a result provides family legal aid services to a greater proportion of family cases than other provinces (Poitras et al., 2021).

Poitras et al. (2021) found that Québec also had a higher rate of trials for parenting disputes than other provinces. While the reasons are complex, one reason for more family trials may be related to the greater eligibility for legal aid services in Québec.²⁵ For example, in 2014-2015, there were 22,512 legal aid applications granted for family law related matters in Ontario, compared to 75,104 in Québec. This means that there are more than three times the number of applications granted in Québec with a smaller population (8.3 million) than Ontario (14 million) in 2015. This highlights the disparity in coverage between the two provinces.

Collecting statistics about the demographic profiles of those who use legal aid²⁶ is only part of a much larger story in understanding how a lack of access to family legal aid affects the most vulnerable populations in society.²⁷ While annual reports provide statistics on application outcomes and telephone inquiries, those reports do not capture the human condition of poverty, let alone the impact of the lack of legal aid assistance for family law problems post separation and divorce (Addario, 1998; Bertrand et al., 2002; Elman & Hughes, 2013; Hughes, 2013). Moreover, few jurisdictions collect data on the use of family legal aid by age, race, ethnicity, culture, disability, or by newcomers and immigrant populations. Further, generally, the data are presented as one category and are not separated by type of civil legal aid, (e.g., family, civil non-family, child protection).

²³ See *Nova Scotia Legal Aid Annual Report, 2017-2018*: <https://www.nslegalaid.ca/wp-content/uploads/2018/10/Annual-Report-2017-2018-1.pdf> (accessed June 15, 2019).

²⁴ *Annual Report, 2017-2018* can be accessed at: <https://www.justice.gov.nt.ca/en/files/legal-aid-commission/Annual%20Reports/2017-2018%20Annual%20Report%20.PDF> (accessed, June 14, 2019).

²⁵ Québec eligibility legal aid rates: <https://www.csj.qc.ca/commission-des-services-juridiques/aide-juridique/volet-gratuit-ai/en> and Ontario eligibility legal aid rates: <http://www.legalaid.on.ca/en/getting/eligibility.asp> and, <http://legisquebec.gouv.qc.ca/en/ShowDoc/cr/A-14,%20r.%202>. Accessed at (in French): <https://www.cirano.qc.ca/files/publications/2018RP-07.pdf> (accessed June 29, 2019).

²⁶ See Department of Justice Canada, *Legal Aid in Canada, 2016-2017*, demographic profiles (e.g. criminal and civil) at: <https://www.justice.gc.ca/eng/rp-pr/jr/aid-aide/p1.html#table13> (accessed June 19, 2019).

²⁷ Also, see nine composite stories about individuals accessing the legal system in general and the impacts on their lives at: CBA (2013) https://www.cba.org/CBAMediaLibrary/cba_na/images/Equal%20Justice%20-%20Microsite/PDFs/EqualJusticeFinalReport-eng.pdf p. 16- 37 (accessed June 20, 2019).

Notably, as British Columbia has implemented a pilot project of extended duty counsel in the family courts, it has started to collect demographic information, including age, Indigenous ancestry and languages spoken.²⁸ However, this pilot project was undertaken as a summative evaluation process for examining cost-efficiencies and cost-effectiveness and not part of ongoing data collection by the legal aid agency.

Since April 1, 2018, Ontario has been collecting raced-based information on clients using legal aid certificates. The 2018 Auditor's Report outlines the following users of legal aid: 11-13 percent of clients are Indigenous, 32-37 percent are visible minority clients, 44-48 percent are White clients, and 7-9 percent "others."²⁹ In addition, the report states, "for family law, about three out of four certificates are issued for women, and over 50% of these were for cases involving domestic violence" (Ontario Ministry of the Attorney General, 2018, p. 270).³⁰

The Canadian Bar Association in its report on Equal Justice (2013) pointed out that there is, "little hard data about Canada's justice system—especially—relative to what we know about our healthcare and education systems" (p. 6). Without collecting data to be able to inform practice and policy, it is difficult to evaluate the impacts of lack of funding or reduced funding on family legal aid (Moore & Farrow, 2019). In fact, when there is a reduction in funding to legal aid, rarely if ever, is there also a strategy to monitor and evaluate the cost and benefit (e.g., costs to society and socio-emotional and behavioral costs to the litigants) on those who are already marginalized. Reduced funding to legal aid budgets leave more people vulnerable and marginalized and increase inequities in access to justice (Moore & Farrow, 2019).³¹

The recent report of the National Inquiry into Missing and Murdered Indigenous Girls and Women (2019) details in poignant terms the impacts not only the colonialization and oppression of Indigenous women and girls, but "the distinct disadvantage in their access to justice and justice-related resources necessary to respond to violence (p. 631)."³² Among the 231 recommendations was a call for more training and education for lawyers in general, and more access to family law lawyers who understand family violence concerns.³³

The lack of legal aid or limited legal aid has resulted in an increase in the number of self-represented individuals (Birnbaum, Bala & Bertrand, 2013; MacFarlane, 2013). The Canadian Bar Association argues that the lack of current funding for family legal aid may save governments money in the short term, but imposes long term increased financial and human costs on society and individuals, especially women and their children.³⁴

Buckley (2010) described the legal aid crisis (one element of the access to justice crisis) as having three dimensions: under-funding, disparities in coverage across jurisdictions (e.g., being funded in one province

²⁸ See *Legal Services Society of BC: Expanded duty counsel evaluation* (2017) at: <https://lss.bc.ca/sites/default/files/2019-03/EXP%20FDC%20Refresh%20Evaluation%20Report-Final.pdf> (accessed June 20, 2019).

²⁹ See Auditor's Report, *Legal Aid Ontario* (2018), p. 269 at: http://www.auditor.on.ca/en/content/annualreports/arreports/en18/v1_305en18.pdf (accessed on June 14, 2019).

³⁰ See Auditor's Report, *Legal Aid Ontario* (2018), p. 270 at: http://www.auditor.on.ca/en/content/annualreports/arreports/en18/v1_305en18.pdf (accessed on June 14, 2019).

³¹ See Raine, N.C. (August 23, 2018) and concerns about the impacts in Saskatchewan on restructuring legal aid at: <https://www.eaglefeathernews.com/news/concerns-around-restructuring-layoffs-at-legal-aid>. Also see ARCH Disability Law Center, August 2019, 20(2) where they discuss legal aid impacts on the disabled (Lattanzio, R. Executive Director) at: https://archdisabilitylaw.ca/arch_alert/arch-alert-volume-20-issue-2/#cuts-to-legal-aid (accessed June 17, 2019).

³² See Final Report at: <https://www.mmiwg-ffada.ca/final-report/> (accessed June 17, 2019).

³³ See: <https://www.cbc.ca/news/canada/edmonton/cultural-sensitivity-training-legal-aid-alberta-1.5172395> (accessed June 17, 2019).

³⁴ Canadian Bar Association at: <https://www.cba.org/Sections/Legal-Aid-Liaison/Resources/Resources/Legal-Aid-in-Canada> (accessed September 24, 2019).

but not in another), and fragmentation of coverage within each legal aid program. She argued that the trend has been away from a conception of a publicly funded scheme for legal services and towards schemes that prioritize cases based on rationed resources. In 2019, very little appears to have changed given the reductions in legal aid in some parts of the country.

In June 2019, Ontario announced that their legal aid services will no longer issue certificates for independent legal advice (ILA) for family mediation or separation agreement certificates, and that they are eliminating family law advice counsel summary advisory services.³⁵ In British Columbia, the recent announcement of a one-time grant of 7.9 million dollars to temporarily increase payments to legal aid lawyers is a very welcome development, but the lack of access to family justice services in that province remains a significant concern.³⁶ Saskatchewan is also facing challenges due to funding shortages and the restructuring of legal aid in Saskatoon.³⁷

One of the few studies to explore methods for cost-savings in delivering family legal services and the economic impacts of using Pro Bono Ontario (PBO) to provide assistance (e.g., duty counsel, amicus counsel and legal information) to self-represented litigants in certain Ontario courts, found that there was a ten dollar return for every dollar invested (The Resource, 2017). The authors found, “the estimated cost savings and economic benefits provided by PBO’s services in FY [fiscal year] 2015-16 amounted to \$5.76 million” (p. 2).³⁸ “The Ontario provincial government was the biggest beneficiary (\$5.16 million) of the total economic impacts of PBO’s services”.³⁹

³⁵ See: https://www.legalaid.on.ca/en/news/newsarchive/2019-06-12_changes-to-legal-services.asp; and there will no longer be duty counsel available in Superior Court in Ontario, except for Unified Courts, see: http://legalaid.on.ca/en/info/downloads/Service-Guide_2019-DC-family-EN-FR.pdf (accessed June 17, 2019). Also see cut backs to duty counsel at: http://legalaid.on.ca/en/news/newsarchive/2019-06-18_DC-services-changes.asp (accessed July 6, 2019).

³⁶ See: <http://www.slaw.ca/2019/04/29/access-to-justice-more-legal-aid-funding-is-not-enough/comment-page-1/> (accessed June 17, 2019).

³⁷ MacPherson, A. (Sept. 20, 2018): <https://thestarphoenix.com/news/local-news/cupe-ramps-up-pressure-as-dispute-over-legal-aid-restructuring-continues> (accessed June 30, 2019). Also see: <https://thestarphoenix.com/news/local-news/ndp-calls-on-province-to-review-legal-aid-funding-after-alberta-system-gets-70m-injection> (accessed June 30, 2019).

³⁸ The Resource for Great Programs, Inc. (2017). *Return-on-investment analysis for Pro Bono Ontario*: Final Project Report, September 18, 2017 at: <https://www.probonoontario.org/wp-content/uploads/2018/10/ROI.pdf> (accessed October 4, 2019).

³⁹ Ibid.

4.0 Innovative family law approaches to providing services to specific communities

4.1 Unbundling of legal services

The number of family law litigants is growing, especially among lower and middle-income populations who are ineligible for legal aid⁴⁰ but cannot afford full legal representation, and who need and see the value in some personalized assistance from a lawyer. Limited scope legal services or unbundling of legal services is different from providing full legal representation. This approach recognizes that for some clients, legal services may not be necessary for every issue or step in the legal process, and therefore provides clients with the option of retaining a lawyer for a discrete legal step (e.g., completing court forms, reviewing court documents and arguing a motion), or seeking assistance for dealing with only one issue in a case (e.g., property issues). Research suggests that there is significant public interest and support for improving access to family justice by increasing access to affordable, limited scope legal services.⁴¹

Unbundled legal services (e.g., lawyers providing drafting services or in-court representation for one appearance), legal coaching (e.g., lawyers assisting clients by offering advice, guidance and support) and private duty counsel services (e.g., lawyers on a rotating schedule providing in-court duty counsel services paid by litigants) are all innovations meant to facilitate access to justice.⁴²

Alberta,⁴³ Ontario, and British Columbia are encouraging the use of unbundled legal services and coaching⁴⁴ (Buckley, 2013). A study of the Alberta Limited Legal Services Project found that 90 percent of participating clients were very satisfied with the unbundled legal services they received (Boyd, 2018). Also, 85 percent of participating clients said the amount that they were charged by a lawyer providing unbundled legal services was reasonable and 86 percent said unbundled legal services were cheaper than traditional retainers. Moreover, 90 percent of clients who received unbundled legal services said that getting help from a lawyer on an unbundled basis was better than having no legal assistance at all.

The Canadian Institute for Access to Justice (2016) surveyed lawyers across Canada about what services they provide. The survey found that 59 percent of lawyers reported that they offer limited scope retainers or legal coaching (p. 8).⁴⁵ Gershbain (2017) surveyed family lawyers in Ontario and other provinces about their use and views of different types of legal services provided. She found that over 80 percent of lawyers have

⁴⁰ See article in Lawyer's Daily, October 22, 2019 at: <https://www.thelawyersdaily.ca/articles/7623/access-to-justice-new-models-for-legal-services-marcus-sixta> reporting that fewer people qualify for the legal aid threshold at about \$19,000/year and on average earn, \$70,000/year while a typical two-day trial costs \$30,000, many more individuals will be able to access family legal services in a more cost-effective manner (accessed June 19, 2019).

⁴¹ See survey results at: https://theactiongroup.ca/wp-content/uploads/2015/08/Abacus_TAG_Release_Oct14.pdf (accessed on June 17, 2019).

⁴² Only being offered as a pilot program in Barrie, Ontario funded by the Law Foundation of Ontario. The first author is the principle researcher for this project as well as the unbundled legal services in Ontario with Professor Bala.

⁴³ See Boyd, J.P. (2018). http://www.crilf.ca/Documents/Unbundled_Legal_Services_Report_-_Aug_2018.pdf (accessed on June 19, 2019).

⁴⁴ See in Ontario: <https://www.familylawlss.ca/> and in British Columbia at: <https://www.lawsociety.bc.ca/our-initiatives/legal-aid-and-access-to-justice/unbundling-legal-services/> (accessed June 19, 2019). See Gershbain, N. (2017) at: http://www.justicedevelopmentgoals.ca/sites/default/files/justice_development_goals_-_2017_progress_report.pdf (accessed on June 17, 2019).

⁴⁵ See results at: http://www.justicedevelopmentgoals.ca/sites/default/files/justice_development_goals_-_2017_progress_report.pdf (p. 8) (accessed on June 17, 2019).

provided some unbundled and/or legal coaching services, either informally or formally. The participating lawyers also believed that these services were cost-effective and less stressful for them to provide than full legal representation.⁴⁶

Legal aid programs in Canada make considerable use of unbundled legal services in family law cases. Duty counsel services, available to assist low-income litigants on the day of appearance at some family court sites, are an example of this type of service. There are also family legal aid clinics that provide assistance such as court document preparation for people with low income.⁴⁷ Legal aid plans have call centres offering legal information and advice to low-income individuals in Manitoba, Ontario, British Columbia, and Alberta. Nova Scotia and British Columbia also offer online chats with individuals who are in need of legal information/advice (Canada's Justice Development Goals: A2J Progress, 2017).⁴⁸

The National Action Committee on Access to Justice in Civil and Family Matters Family Justice Working Group Report highlighted the need for improved access to legal services in over half of that report's recommendations. Recommendation 16 specifically called for institutional changes to authorize and support the use of unbundled legal services for family cases: "essential legal services, including unbundling, should be available to everyone [in Canada] by 2018."

4.2 Internet based legal services

New technologies and online portals can help people to obtain online legal information in plain language (e.g., Steps to Justice, Ontario; Mylaw in BC; Clicklaw and LegalAve in Alberta). These technologies are intended to provide easy access to useful legal information on family law issues and to assist people who are self-represented.⁴⁹

There are also private internet-based service providers that provide legal information to the public. Most notably, [MySupportCalculator](#), provides limited free information about child and spousal support calculations (e.g., taking account of the income of the parties and duration of their relationship), and for a modest fee provides much more detailed support and property calculations and information based on the user's income and asset information.

4.3 Community-based information and services

⁴⁶ See Gersh bain, N. (2017) at:

http://www.justicedevelopmentgoals.ca/sites/default/files/justice_development_goals_-_2017_progress_report.pdf (accessed on June 19, 2019).

⁴⁷ See: <https://queenslawclinics.ca/family-law> (accessed October 4, 2019).

⁴⁸ See Tracking Action Report at:

http://www.justicedevelopmentgoals.ca/sites/default/files/justice_development_goals_-_2017_progress_report.pdf (accessed on June 17, 2019).

⁴⁹ Also see other innovative services across Canada, Goal #4 at:

<http://www.justicedevelopmentgoals.ca/sites/default/files/2018jdgsworkingtowardsa2jreport.pdf> (accessed July 10, 2019).

A range of free family community legal information services in Alberta, British Columbia and Ontario provide legal information about separation and divorce.⁵⁰ Other government initiatives focus on Indigenous communities and provide legal information that is available in local languages (e.g., Inuktitut in Nunavut, Mi'maq in Nova Scotia,⁵¹ and Siksika in Alberta).⁵² In New Brunswick,⁵³ Ontario, and Nova Scotia,⁵⁴ legal clinics assist newcomers and those who work with refugees about civil legal matters as well as some family law related matters. It is important to reach out to Indigenous and newcomer communities to provide culturally appropriate legal information.

4.4 Child representation

In Ontario,⁵⁵ Northwest Territories,⁵⁶ Prince Edward Island⁵⁷ and Yukon,⁵⁸ there are government funded legal representation programs for children in family law disputes. Ontario has the largest formally structured child legal representation program in Canada. There are also cases referred by the courts for child legal representation where there is no lawyer appointed due to fiscal limitations (Bala & Birnbaum, 2018; Bala, Birnbaum, & Bertrand, 2013; Birnbaum & Bala, 2009).

Alberta's *Family Law Act* provides that for cases involving disputes between parents, "the court may at any time appoint an individual to represent the interests of a child."⁵⁹ There are no legislative provisions regarding payment for services rendered if an order is made for child representation. The services are provided by a private lawyer paid by Alberta Legal Aid, unless the parents can afford to pay for the lawyer. Although some of the child legal representation work in Alberta is done by lawyers on the Legal Representation Children and Youth (LRCY) roster, there is no requirement for this and the LRCY does not supervise or support the lawyers doing this work. Appointment in family law cases may be made in provincial court under the *Family Law Act*, and in the Court of Queen's Bench by judges exercising their *parens patriae* jurisdiction, who do so not infrequently in Alberta⁶⁰ (Bala & Birnbaum, 2018).

In Québec, Article 34 of the *Civil Code* requires that children be "heard" by the court in any case where their interests are affected if the children have the ability to express themselves.⁶¹ The courts in that province

⁵⁰ See Access to Justice Goals, Section 1 that lays out the many initiatives across Canada at: http://www.justicedevelopmentgoals.ca/sites/default/files/jdg1_in_2018_0.pdf (accessed September 27, 2019).

⁵¹ See Access to Justice Goals, Section 1 that lays out the many initiatives across Canada at: http://www.justicedevelopmentgoals.ca/sites/default/files/jdg1_in_2018_0.pdf (accessed September 27, 2019).

⁵² See Nowicki J. (February 21, 2019) at: <https://www.canadianlawyermag.com/legalfeeds/author/julia-nowicki/legal-aid-alberta-emphasizes-access-to-justice-in-three-year-strategic-plan-16887/> *Canadian Lawyer*, (accessed June 20, 2019).

⁵³ See immigrant resources in New Brunswick at: <http://www.legal-info-legale.nb.ca/en/uploads/file/pdfs/Family%20Law%20Immigrants/Family%20law%20and%20immigrants-ENG-web.pdf> (accessed June 20, 2019).

⁵⁴ See Legal Aid website at: <https://www.nslegalaid.ca/legal-information/> (accessed June 20, 2019).

⁵⁵ *Courts of Justice Act*, R.S.O. 1990, c. C.43, art. 89.

⁵⁶ Where the court has inherent *parens patriae* jurisdiction, see *Kalaserk v. Nelson*, 2005 NWTSC 4.66.

⁵⁷ *Child Protection Act*, R.S.P.E.I. 1988, c. C-5.1, art. 34 (1) b).

⁵⁸ *Children's Law Act*, R.S.Y. 2002, *supra*, note 30, art. 168; and *Child and Family Services Act*, S.Y. 2008, c. 1, art. 76. For a discussion of the role of the child's lawyer, see *T.E.A. v. R.S.A.*, 2012 YKSC 65, and *B.L. v. M.L.*, 2011 YKSC 67.

⁵⁹ *Family Law Act*, S.A. 2003, c. F-4.5, art. 95 (3).48.

⁶⁰ See *Puszczak v. Puszczak*, 2005 ABCA 426, which took a relatively broad view of the *parens patriae* power of judges to order representation for a child in a family case.

⁶¹ see Barreau du Québec, *Mémoire. La représentation des enfants par avocat dix ans plus tard*, 2006, Accessed at: www.barreau.qc.ca/pdf/medias/positions/2006/200605-representation_des_enfants.pdf (accessed June 21, 2019).

have statutory jurisdiction to order that a child be provided legal representation in both family and child protection cases. It is often a lawyer in private practice paid at legal aid rates by the government, though the courts may order parents with substantial resources to pay. A significant number of lawyers in Québec do child representation work, with mostly government funding and some private funding; however, there is no formal agency or organization that has responsibility to recruit, train or supervise children's lawyers (Bala & Birnbaum, 2018).

British Columbia's *Family Law Act* s. 203 provides that a lawyer may be appointed by the court to represent a child in a family law case if "the court is satisfied that the degree of conflict between the parties is so severe that it significantly impairs the capacity of the parties to act in the best interests of the child, and [the appointment] is necessary to protect the best interests of the child", and one or both parents together have the ability to pay the lawyer.⁶²

In Manitoba, New Brunswick, Saskatchewan, Nova Scotia, Newfoundland and Labrador, and Nunavut, there is no formal provision or program for the appointment of child legal representation in family law disputes (Bala & Birnbaum, 2018).

⁶² *Family Law Act*, S.B.C. 2011, c. 25, art. 15, art. 203 (1) a) and b).

5.0 Impacts of limited or reduced family legal aid funding

5.1 Self-representation and family justice system impacts

There have been significant increases in self-representation in family proceedings in Canada over the past two decades. This is concerning because self-represented litigants, especially those with vulnerabilities due to limited literacy or education, family violence or other factors, often experience worse outcomes in terms of obtaining support and protection for themselves and their children. The concerns arise not only because of the effects of lack of representation in court hearings, but even more in cases that are settled without an active judicial role. Restrictions on access to legal aid, the cost of legal services and the limited financial resources of litigants are significant factors in the increase in self-representation (Birnbaum & Bala, 2012; Birnbaum, Bala & Bertrand, 2013; Birnbaum, et al. forthcoming; Dandurand & Jahn, 2018; Flynn & Hodgson, 2017; Macfarlane, 2013; Sarophim, 2010; Thompson & Rierson, 2002; Zorza, 2009). The increase in self-representation and cuts to legal aid impose significant resource costs on the family justice system, thus negatively impacting the efficiency of the family justice system.

Birnbaum & Bala (2012) surveyed 335 Ontario lawyers at a family law educational conference about the reasons litigants choose to self-represent. The lawyers reported a 44 percent increase in self-representation in the previous five years. While the reasons for this increase are complex, the lawyers identified the inability to afford a lawyer (79%) and not being eligible for family legal aid (96%) as the major reasons. The lawyers also expressed, “concern that when the other party has no lawyer, this increases the costs for the represented party” (p. 108).

Birnbaum, Saini & Bala (2016) surveyed 67 lawyers representing children, 45 clinical investigators at the Office of the Children’s Lawyer, as well as 93 judges in Ontario about their views and experiences with self-represented litigants in disputes about children. The majority of respondents in all three groups reported an increase in self-representation in the previous five years, and a consequential increase in the length of the proceedings, as well as a decrease in the likelihood of a settlement that meets the interests of the children. When asked about the average dollar amount to the Office of the Children’s Lawyer (i.e., the government) as a result of a party being self-represented, the lawyers reported an average of \$900 in added costs. Judges also reported the challenges that they face in dealing with self-represented litigants, and the added costs to the justice system (i.e., the government) as they have to provide additional assistance to the self-represented litigant and the length of proceedings is increased. As observed by one judge, “[I] explain relevant documents to be exhibits – enormous time, weaning out irrelevant docs and encouraging consent to obvious joint documents and encouraging the production and filing of relevant needed documents” (p. 130). In the Cost of Justice project of the Canadian Forum on Civil Justice (2018), the authors noted:

“We know that when people show up in court or at a court services office, it typically takes significantly longer to service someone who is self-represented as opposed to someone who has a lawyer. That’s just a matter of fact. Lawyers have the training; they have the experience; they get how the system works, whereas everyday Canadians don’t. ... That’s just one example of how supporting individuals leads to benefits, and specifically, cost savings to the system.”⁶³

The lack of (full) legal representation can jeopardize the goal of access to justice in several ways. First, equality before the law for individuals may be at risk if one party has access to legal assistance and the other

⁶³ “Researchers to follow legal aid clients for year-long access to justice research project,” July 10, 2019, *Lawyers Daily*.

does not. Second, a legal aid funded lawyer may have a limited amount of time to devote to a case, which impacts their ability to resolve complex family disputes. This is particularly concerning in family violence cases where multiple interviews may be required to allow the client to feel safe enough to disclose abuse in the relationship (Birnbaum et al., 2014). Third, some vulnerable groups (e.g., those with low literacy or other communication challenges) require more time to process information and may require face to face contact which may be affected by the number of hours legal aid is available (Elman & Hughes, 2013)

Governments and courts have responded in a range of ways to assist self-represented litigants, including providing more information online, simplifying court processes, providing judges with guidelines on assisting them in court,⁶⁴ and training court staff to support self-represented litigants (Birnbaum et al., 2018).

5.2 Financial and emotional impacts on litigants

The Cost of Justice project of the Canadian Forum on Civil Justice (2018) examined the short-term financial, physical and mental impacts experienced by people struggling with legal issues. According to this study, 82 percent of people who reported trying to solve a family law dispute experienced a “related health or social problem.” The principal investigator on that study, Prof. Trevor Farrow of Osgoode Hall Law School, observed:

“We know from some studies around the world that getting legal help leads to better results for people in different contexts....We also know from emerging research ... that investing in justice typically pays off multiples of the investment in terms of benefits. What we want to do is add to that cost-benefit analysis by looking at actual clients receiving actual legal interventions and following those people over a period of time and getting a sense ... if their lives were improved because of the intervention and, if so, how. And that would include qualitative well-being, qualitative impacts, and also quantitative [impacts], including cost savings and cost benefits.

I think it’s a false economy to say that saving money on justice to put it elsewhere in the system is a good idea. What our research demonstrated, and what some of the early research around the world is showing, is that ... every dollar you spend on justice typically bears significant amounts of fruit and significantly more than the dollar put in. What we ultimately really need to do is start persuading those who hold the purse strings that ... justice needs to be invested in. At the moment, it is significantly underfunded, and we will be collectively way better off if we adequately fund it. It will actually save us money in the end in terms of housing costs, medical costs, social assistance costs.”⁶⁵

In addition, the lack of or limited family legal aid results in some low- and middle-income persons not pursuing claims in the court system (Hughes, 2013). Others may choose “informal methods” to resolve a dispute (e.g., religious leaders serving as decision-makers or community mediation), which may also result in the loss of legal rights or exposure to harm. Other low- and middle-income persons may self-represent out of necessity, not choice; and as a result, may have great difficulty in achieving fair, just and protective

⁶⁴ See judicial statement of principles for self-representation at:

https://www.cjc-ccm.gc.ca/english/news_en.asp?selMenu=news_2006_1212_en.asp (accessed June 17, 2019).

⁶⁵ “Researchers to follow legal aid clients for year-long access to justice research project,” July 10, 2019, *Lawyers Daily*.

outcomes. Such outcomes may lead litigants to experience greater and longer-term impacts (e.g., financial, physical and emotional).

As stated earlier, it is vitally important to know the human costs (e.g., socio-emotional, health, employment, and housing) for adults and children in addition to the financial costs of not being able to access legal aid in family disputes. While there has been empirical research on the impact of self-representation as a result of lack of legal aid assistance, there needs to be a comparable examination of the impacts on vulnerable and marginalized communities. The Civil Forum will be undertaking a small one-year study starting in 2020 on the effects and costs of access to justice problems on Ontario Legal Aid Clinic clients, but it will not focus on family law concerns.⁶⁶

⁶⁶ Ibid.

6.0 Challenges and impacts on vulnerable and marginalized groups

The Ontario Civil Legal Needs Report (Ontario study, 2010)⁶⁷ and the BC Civil Legal Needs Survey⁶⁸ (BC study, 2009) identified vulnerability factors such as income, gender, age, membership in equality seeking groups (e.g., Francophones outside Québec, people with disabilities, members of racialized communities, and LGBTQ2+ people), geographic location, and type of legal problem. Members of these groups, in general, are compromised not only in terms of having legal problems resulting from or exacerbated by social and financial disadvantages, but may also lack the ability to know where to access legal aid services in their community. Both studies confirm earlier findings of other barriers in accessing justice as well as legal aid, such as:

- the complexities of the legal aid system (e.g., the documents required to apply for legal aid, understanding the eligibility guidelines);
- little or no legal aid coverage for some matters⁶⁹ (e.g., divorce, property); and,
- the lack of knowledge regarding legal aid information and location of services (e.g., geographic inequities).

The Ontario study (2010) also identified additional barriers faced by:

- Francophones in rural areas, immigrants and persons whose first language is neither English nor French;
- people with disabilities;
- those with limited education and literacy;
- racialized communities;
- women; and,
- individuals living in northern and rural communities where services, particularly legal aid services do not exist (also see Housefather, 2017; Reid & Malcolmson, 2008).⁷⁰

Yu, Ouelett & Warmington (2007) provide an empirical examination of services for refugee integration into Canadian society. Many of the challenges faced by newcomers are compounded by separation and divorce. These researchers also found that barriers to accessing legal aid create additive challenges that negatively impact integration into Canadian society. Many refugees and immigrants settle in urban areas where housing is expensive, and this exacerbates social and economic barriers upon separation and divorce. Wayland (2006) reports that public policy fails to appreciate that newcomers and refugees have not only settlement problems upon arrival, but also require legal information about their rights in general. Women from newcomer communities seeking to leave abusive relationships may be especially vulnerable.

Refugees and newcomers⁷¹ often lack awareness that their family problems, including family violence, may have a legal dimension or that they can seek help through the legal system. They also often lack awareness

⁶⁷ See the Ontario Report at:

https://lawsocietyontario.azureedge.net/media/iso/media/legacy/pdf/m/may3110_oclnreport_final.pdf (accessed June 20, 2019).

⁶⁸ See BC Report at: <https://www.lawfoundationbc.org/wp-content/uploads/Civil-Legal-Needs-Research-FINAL.pdf> (accessed June 2, 2019).

⁶⁹ See immigrant and racialized groups that will experience limited to no legal access and implications at: <https://ocasi.org/media-release-legal-aid-cuts-attack-immigrants-refugees-racialized-communities> (accessed June 22, 2019).

⁷⁰ See Reid and Malcolmson Report (2008) at: http://international2.justiceeducation.ca.nmsrv.com/themes/framework/documents/Voices_from_the_Field_Final_August_2008.pdf (accessed June 21, 2019).

of how to access legal services, have language challenges, and may experience trauma from the migration process. As a result, immigration support services in many communities try to provide access to legal information and legal aid. However, these immigration support agencies also lack resources and do not have legal staff (Wayland, 2006).

The challenges that refugees, newcomers, Indigenous populations, racialized minorities and people with disabilities face in getting access to justice reflect broader concerns about the effects of income inequality.

6.1 Women and family violence concerns

Family violence was once viewed as a “private matter,” with the police and criminal courts involved only in the most serious cases. In the last quarter of the twentieth century, there were significant changes, with the establishment of shelters and other programs for victims and survivors of family violence, and the enactment of new laws and policies to deal more effectively with this issue in criminal, child welfare and family law matters.

Family violence concerns in family law disputes post-separation and divorce are highly gendered, as the woman’s common role as primary caregiver for their children often exacerbates their vulnerability (Bala et al., 2017; Neilson, 2017; Sinha, 2013).⁷² Women are more likely than men to be the victims and survivors of abuse and are more likely to be in need of legal aid services for economic and parenting issues, as well as court protection (Birnbaum et al., 2014; Birnbaum et al., 2017; Leopold, 2018; Gadalla, 2008).

In addition to the concerns of family violence in refugees and newcomers, the Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls (2019) and Martinson & Jackson⁷³ (2017) have raised awareness of the special challenges faced by Indigenous women who are victims and/or of family violence, highlighting the need for professional education and collaboration between the family and criminal justice systems.⁷⁴

To prove family violence in family law cases and ensure that the family court addresses it appropriately, victims often need legal representation, which for many means access to family legal aid services.⁷⁵ More work needs to be done as outlined in the Department of Justice Canada report (2013) on linking the criminal and family justice systems in responding to family violence as well as with legal aid organizations.⁷⁶

⁷¹ See 2016 census data on immigration and ethnocultural diversity of Canada at: <https://www150.statcan.gc.ca/n1/daily-quotidien/171025/dq171025b-eng.htm> (accessed July 10, 2019) that describes where immigration is from. Also see by provinces at: <https://www12.statcan.gc.ca/census-recensement/2016/dp-pd/prof/index.cfm?Lang=E> (accessed July 10, 2019).

⁷² See portrait of children’s family life in Canada at: <http://www.legal-info-legale.nb.ca/en/uploads/file/pdfs/Family%20Law%20Immigrants/Family%20law%20and%20immigrants-ENG-web.pdf>

⁷³ See: <http://www.fredacentre.com/wp-content/uploads/2010/09/Martinson-Jackson-20171.pdf> (accessed June 20, 2019).

⁷⁴ See: <http://www.fredacentre.com/> (accessed June 20, 2019).

⁷⁵ See recent federal funding announcement of two million dollars specifically to women’s legal organizations to support fair and equal treatment of women in the justice system at: <https://www.thelawyersdaily.ca/family> (accessed July 19, 2019).

⁷⁶ See Department of Justice Report (2013) at: <https://www.justice.gc.ca/eng/rp-pr/cj-jp/fv-vf/mlfvc-elcvf/index.html> (accessed October 5, 2019).

7.0 Conclusions: opportunities for future research

The purpose of this report is to examine the impacts of the lack of or limited legal aid in family law matters. The discussion here is not meant to be exhaustive, but rather it intends to explore and highlight the significant challenges in accessing family legal aid. The lack of access to legal aid for family law particularly affects women, Indigenous peoples, marginalized groups, and those in remote and rural communities. The effect of the lack of access to legal aid services can be serious, for example: loss of parenting time, loss of appropriate child and spousal support, and loss of rights to matrimonial property and pensions.

Technology continues to be offered as a “solution” to address access to justice issues (e.g., web sites that provide legal information). While technology can play a significant role in improving access to justice and increasing the efficiency of the justice system, many technological responses to access to justice concerns have less value to those with limited education, poor literacy, cognitive problems, disabilities (invisible as well as visible), cultural differences or limited financial resources. This is particularly concerning for those in the North and rural areas, where there may not be legal aid offices or access to even basic services (e.g., legal information).

While in some jurisdictions legal aid funding has been stable or even increasing in real per capita terms, in others, legal aid budgets have not kept up with inflation and increases in population. In some jurisdictions, there have been cuts to the legal aid budget. Reductions in legal aid funding are concerning due to the negative consequences of the lack of access to family legal services on individuals (Addario, 1998; Brewin, & Stephens, 2004). One concern is that reduced funding and limited legal aid services increases self-representation, which in turn increases costs for the justice system, and imposes significant financial and human costs on parents and their children.

Buckley (2013) refers to the need for evidence-based legal aid policy making. Evidence-based research must also include listening and hearing from vulnerable and marginalized groups in society such as the recent Report on Missing and Murdered Indigenous Women and Girls (2019). Only then can society begin to appreciate the limitations of law and the justice system.

A possible research initiative could include mapping the challenges of limited legal aid funding, with the collaboration of academic researchers, federal/provincial/territorial partners, lawyers, legal organizations, and the judiciary. These stakeholders have important insights and knowledge about the impacts of lack of access to family legal aid, and may have ideas about how to improve the efficiency of legal aid services. In addition, community organizations and the public, who use and benefit from family legal aid, should be involved. The Alberta Legal Services Mapping project on the self-represented is a good example of mapping, and the benefits of obtaining information on the impacts.⁷⁷ Long-term planning may also include rethinking social programs, understanding the effect of demographic changes in immigration and aging, and changes in the family justice system as it moves towards more unified family courts and greater emphasis on non-court dispute resolution. These types of issues will become more pressing if legal aid in general and family legal aid is being eroded or if coverage is being significantly reduced.

⁷⁷ Stratton, M. (2007) at: <https://www.cfcj-fcj.org/sites/default/files/docs/2011/mapping-final-en.pdf> (accessed June 24, 2019).

Appendix

Appendix 1: Key informant & interview guides

Legal Services Solicitor, Newfoundland and Labrador

Legal Director, Rankin Inlet, Nunavut

Executive Director, Yukon Legal Services, Whitehorse, Yukon

Executive Director Manitoba Legal Aid, Winnipeg, Manitoba

Deputy Executive Director, Legal Aid Manitoba

Executive Director, Legal Aid, Yellowknife, Northwest Territories

Directrice déléguée au Comité de révision

Interview guide for key informant stakeholders

1. What challenges/barriers, if any, are there in providing legal aid to family law disputes?
2. What challenges/barriers, if any, exist between providing certificate and/or duty counsel and/or clinic funding and services? (Prompt: funding, types of cases, language barriers, demand and cost; culture and communication)
3. What challenges/barriers, if any, exist to providing access to family justice services in rural and remote northern communities? (Prompt: language, distance and transportation, lack of technology; culture)
4. Do you have any documents that you can share for inclusion in this project on challenges /successes in access to justice in family law cases? (Prompt: government reports, public documents)
5. Are you aware of any innovative practices/programs in your jurisdiction that provide family legal aid services? (Ask for descriptions). Please elaborate on the impact of these innovative practices/programs on the litigants and service providers?
6. Can you describe whether cases that involve family violence, Indigenous peoples, or other vulnerable and marginalized groups receive priority over others for family legal aid funding? If so, what criteria do you use?

Appendix 2: Coverage and eligibility criteria for family legal aid

All legal aid programs have some form of financial eligibility guidelines or income cut-off (Bertrand et al., 2002; Wright, 2017). The financial eligibility and coverage guidelines for legal aid across Canada has been reviewed by Bertrand et al. (2002), Currie (1999, 2013), Tsoukalas & Roberts (2002), Trebilcock (2008), and Wright (2017). The Department of Justice Canada has also documented the financial eligibility guidelines and coverage in the provinces and territories.⁷⁸

The financial eligibility guidelines take into account the household income, family size and assets. While they vary across the country, in most jurisdictions the legal aid eligibility criteria are effectively at or below poverty levels, though there is no consistency in how to define poverty.⁷⁹

*British Columbia*⁸⁰

The Legal Services Society (LSS) administers legal aid in British Columbia. In the Annual Service Plan Report (2018),⁸¹ it was reported that costs exceeded the budget in 2016 -2017. As a result, there was a reduction in family services through the elimination of discretionary spending. The LSS no longer approved representation in family cases that did not meet standard coverage criteria or cases even marginally over the financial eligibility requirements. Further, the LSS stopped allowing lawyers to work additional hours on complex family cases that exceed the allotted time limits. However, additional funding was reintroduced by the provincial government in 2018 -2019 to meet the legal aid needs of more individuals. It remains unclear how much will be used for family law cases and whether there will be coverage for child and spousal support. Further, if a woman requires a restraining order for family violence, family legal aid will provide a staff lawyer, without testing for financial eligibility.

Alberta

The Legal Society of Alberta (LSA) administers the delivery of legal aid services. For those who are financially eligible, legal aid covers most family matters, including parenting orders, property and child support, but not divorce or spousal support (Bertrand et al., 2002; Wright, 2013).

⁷⁸ See: <https://www.justice.gc.ca/eng/fund-fina/gov-gouv/aid-aide.html> (accessed June 14, 2019). For low income level cut-offs across Canada, also see: <https://www150.statcan.gc.ca/n1/pub/75f0002m/2012002/lico-sfr-eng.htm> (accessed June 14, 2019).

⁷⁹ Defining poverty across Canada: <https://mileskorak.com/2018/08/21/canadas-official-poverty-line-what-is-it-how-could-it-be-better/> (accessed July 20, 2019).

⁸⁰ See Brewin and Stephens (2004), Brewin and Govender (2010), Light (2005), and Sarophim (2010) for a review of the history (e.g., 1980's to 1990's) of spending cuts to legal aid in British Columbia and the impact on women, in particular. Also see Housefather (2017) Report from Standing Committee on Justice and Human Rights at: http://publications.gc.ca/collections/collection_2017/parl/xc66-1/XC66-1-1-421-16-eng.pdf (accessed October 5, 2019).

⁸¹ See Annual Report for BC at: <https://lss.bc.ca/about/annualReports> (accessed June 13, 2019).

In 2017-2018, there were a total of 51,729 legal aid certificates issued for all types of cases, of which 6,536 (13 percent) were made for family law matters. Similar to British Columbia, legal aid is available for victims and survivors seeking emergency protection orders for family violence cases, regardless of income.⁸²

Yukon

The Yukon Legal Services Society administers the delivery of legal aid services in the territory. Family law matters are heard in the Supreme Court chambers, while child protection cases are dealt with in the territorial court.

In 2018-2019, the Yukon LSS received additional territorial funding to meet the increasing number of cases being handled by too few lawyers. The funding was also used to update necessary technology and strengthen partnerships with Yukon First Nations and other Yukon communities.⁸³ Twenty-five percent of the overall legal aid budget is used for family law related matters (e.g., child protection and family matters).⁸⁴

Coverage is provided for those financially eligible for most family law matters with the exception of divorce and property. Some low-income individuals are assisted even though they are not financially eligible for matters set for trial, to allow for the review of pleadings for court.

Due to a shortage of lawyers in the North, it is challenging for legal aid to adequately staff positions. Presently, legal aid has nine lawyers. If one person is ill or on vacation, the level of efficiency for intake services is reduced and assignment of files becomes difficult if there are conflicts (e.g., the lawyer has previous involvement with the other side of the case) on a file. The geography is also hard to serve, as there are 13 circuit courts serving 14 Yukon First Nations and other communities, making face-to-face meetings with clients very challenging. As a result, many intake interviews and document preparation are conducted by telephone. For clients who can attend in person, there are support workers available for clients to meet with their lawyers.⁸⁵ In 2017, priority was given to family law applications involving violence or fear of violence.

Northwest Territories

The Legal Services Board of the NWT administers the delivery of legal aid services. Legal aid coverage includes custody, access, child/spousal support (e.g., if child custody is part of relief), restraining orders, possession of matrimonial home, division of property, child welfare issues, and divorce, but only if custody or access is also sought. With respect to financial eligibility guidelines, individuals may be required to contribute or fully repay legal fees if they are not in receipt of social assistance.

Individuals must demonstrate financial need through disclosure of their assets, liabilities, income and expenses of their spouses and dependents. Legal aid funding is approved by application, and priority is given

⁸² *Legal Aid Alberta: Alberta Annual Report 2017-2018* at: <http://www.legalaid.ab.ca/about/Documents/Annual%20Report/LAA%20Annual%20Report%202018.pdf> (accessed, June 14, 2019).

⁸³ In 2018-2019, legal aid received 2.58 million in funding from the federal and territorial government (Hong, J., 2018; *Yukon News*), see: <https://www.yukon-news.com/news/yukon-legal-aid-receives-additional-241k-in-funding>.

⁸⁴ Telephone interview with, David Christie, Executive Director, Yukon Legal Services on June 6, 2019.

⁸⁵ Telephone interview with key stakeholder, David Christie, Executive Director, Yukon Legal Services on June 6, 2019.

to cases with earlier court dates as well as family violence issues.⁸⁶ While the actual number of approved family legal aid applications has decreased since 2012-2013, the reasons vary. An important reason is the lack of available lawyers in the NWT; legal aid has difficulty in retaining staff lawyers (Annual Report, 2017-2018, p. 27).⁸⁷

Saskatchewan

The Saskatchewan Legal Aid Commission administers the delivery of legal aid services under the *Legal Aid Act* and Legal Aid Regulations. The financial eligibility test uses both income and assets of the individuals (Provincial Auditor of Saskatchewan, 2016).⁸⁸ If the individual is on social assistance or is a band member, legal aid is usually granted, depending on their available assets (Auditor's Report, 2016).⁸⁹ Coverage includes all family matters, except for divorce, which is covered only when there is a custody or access request.⁹⁰ When an emergency family violence protection order is sought, the application is handled by Victim Services of Saskatchewan, so no legal aid is required.

Manitoba

Legal Aid Manitoba (LAM) administers the delivery of legal aid services. Manitoba's financial eligibility is determined by considering the annual family income and the number of family members. An individual will qualify for full representation services (in the areas of criminal defence, child protection, family, immigration and refugee, poverty and public interest law) free of charge, if their annual gross family income falls within the "free" legal aid eligibility threshold. Similar to other provinces and territories, individuals on social assistance are presumed to be financially eligible for legal aid. However, if the person owns property, the property may become subject to a lien, and an asset value test may apply to determine eligibility.

If the family income exceeds the guidelines for free legal aid but LAM determines that the individual cannot afford to pay all the cost of a lawyer, the individual may qualify for legal services through the Agreement to Pay (ATP) program. However, they will be expected to pay back all of their fees and disbursements (at LAM rates) plus a 25% program fee.

Manitoba's ATP cases were initially made possible by a one-time grant from the Department of Justice Canada and continued funding from the province and the Manitoba Law Foundation. It continued to operate until October 2014. As of 2015, free legal aid for a single person is available for those with less than \$23,000 in annual income, and the ATP program applies for individuals whose income is between \$23,000 and \$35,000.⁹¹

There is no prioritizing for Indigenous peoples or family violence matters in Manitoba.⁹²

⁸⁶ *Annual Report, 2017-2018* can be accessed at: <https://www.justice.gov.nt.ca/en/files/legal-aid-commission/Annual%20Reports/2017-2018%20Annual%20Report%20.PDF> (accessed, June 14, 2019).

⁸⁷ Key stakeholder telephone interview with Karen Wilford, Executive Director of Legal Aid, NWT on May 27, 2019. Effective April 1, 2019, there is a new financial eligibility criteria and application.

⁸⁸ See Auditor's Report: <https://auditor.sk.ca/search?query=legal+aid> (accessed June 17, 2019).

⁸⁹ See Auditor's Report (2016) Vol. 1 at: <https://auditor.sk.ca/publications/public-reports/item?id=142>.

⁹⁰ See Facts, can be accessed at: https://www.legalaid.sk.ca/community_resources/factsheets/legal_aid_general.php (Accessed on June 14, 2019).

⁹¹ Email from Sam Raposo, Deputy Executive Director of Legal Aid Manitoba, dated June 6, 2019.

⁹² Stakeholder telephone interview with Gil Clifford, Executive Director and Sam Raposo, Deputy Executive Director of Legal Aid Manitoba, June 6, 2019.

On June 3 2019, Manitoba enacted Bill-9, *The Family Law Modernization Act*.⁹³ The Act allows for the establishment of a pilot project under section 1 of the Act “to create a process outside the traditional court system that provides for the fair, economical, expeditious and informal resolution of family disputes.”⁹⁴ It remains unclear whether this Act will affect legal aid financial eligibility and coverage. However, it may affect the delivery of family legal services for those involved in separation or divorce. For example, unmarried parents who cannot resolve their parenting dispute will not be allowed to proceed to court but will go to an administrative tribunal.

Ontario

Legal Aid Ontario administers the delivery of legal aid services. Legal aid covers all family law matters.⁹⁵ After many years without increases in the income eligibility threshold, there were annual six percent increases in financial eligibility criteria from 2014-2018 inclusive. However, in April 2019 the Ontario government announced a 30 percent reduction to the overall budget for legal aid that has affected all services,⁹⁶ including family law certificates, family law duty and advice counsel, and community clinics, which serve some minority communities (e.g., South Asian Legal Services, Muslim Legal Services, and Korean Legal Services).⁹⁷

Family violence continues to have priority with respect to coverage,⁹⁸ with Legal Aid Ontario continuing with the Domestic Violence Strategy announced in February 2015.⁹⁹ However, with the recent cuts in funding, some community-based legal aid clinics may be at risk of eliminating services to victims of domestic violence.¹⁰⁰

⁹³ See Glowacki, L. (March 12, 2019) *CBC News* at <https://www.cbc.ca/news/canada/manitoba/family-law-modernization-act-1.5053359> (accessed June 17, 2019).

⁹⁴ See: <http://web2.gov.mb.ca/bills/41-4/b009e.php> (accessed June 14, 2019). Also see, *Notice to the Profession*, dated February 19, 2019: https://www.legalaid.mb.ca/wp-content/WordPress/PDF/np_37_2019.pdf (accessed June 14, 2019).

⁹⁵ See Auditor’s Report, *Legal Aid Ontario* (2018) at: http://www.auditor.on.ca/en/content/annualreports/arreports/en18/v1_305en18.pdf (accessed June 14, 2019).

⁹⁶ See Stengel, J. (2017) at: <https://nowtoronto.com/news/legal-aid-ontario-26-million-deficit-critical-role-family-law/> (accessed June 14, 2019); Beattie, S. (2019) discusses Ontario cuts at: <https://www.msn.com/en-ca/news/politics/vast-majority-of-ontarians-oppose-fords-cuts-to-legal-aid-poll/ar-AABL1tA?ocid=spartandhp> (accessed June 6, 2019). Also see July, 2019 announcements on reduced services for legal aid at: http://legalaid.on.ca/en/news/newsarchive/2019-07-04_changes-to-policies-and-coverage.asp (accessed July 6, 2019).

⁹⁷ See cuts to legal aid in Ontario: <https://www.thestar.com/news/gta/2019/06/12/sweeping-cuts-to-legal-aid-disproportionately-hit-toronto-clinics-parkdale-site-to-lose-1-million.html> and <https://www.lawtimesnews.com/author/anita-balakrishnan/legal-aid-ontario-to-cut-145m-from-clinic-system-17383/> (accessed June 15, 2019).

⁹⁸ See: <https://www.legalaid.on.ca/en/getting/downloads/areyoulivingwithdomesticviolence.pdf> (accessed June 14, 2019).

⁹⁹ Domestic Violence Strategy at: <https://legalaid.on.ca/en/publications/downloads/domesticviolencestrategy/2015-07-DVS-Consultation-Paper.pdf> (accessed on June 14, 2019), and completed in 2017, and <http://legalaid.on.ca/en/publications/paper-Domestic-violence-strategy-2017.asp> (accessed June 14, 2019).

¹⁰⁰ See: https://www.huffingtonpost.ca/entry/legal-aid-domestic-violence-families_ca_5d263205e4b0583e482b3200?utm_hp_ref=ca-politics&guccounter=1 (accessed July 15, 2019).

In addition, while Legal Aid Ontario has prioritized services for Indigenous individuals in the criminal context,¹⁰¹ there remains little to no priority given to Indigenous clients in the family law context, where there are many intersecting issues between family, child welfare and the criminal contexts.¹⁰²

Nunavut

The Legal Services Board (LSB) administers legal aid services in all three regions of Nunavut (Iqaluit, Rankin Inlet and Cambridge Bay). Coverage includes custody, child support cases, maintenance applications, DNA testing if required (e.g., paternity testing), division of property and issues related to possession of matrimonial home, if issues of child custody or related to support are made.¹⁰³

Financial eligibility criteria are set out in the *Legal Services Act*. According to the Nunavut Legal Services Annual Report, 2016-2017, individuals qualify according to annual gross income. However, legal aid is rarely denied even to those with higher incomes, given the significant challenges in finding a private lawyer in Nunavut. Legal aid in Nunavut has the highest per capita legal aid spending in Canada, with both the federal and territorial governments providing funding (i.e., 10 times more per capita than Ontario).¹⁰⁴

The spending on legal aid in Nunavut reflects the unique challenges of serving 25 communities that are hard to access given geography and weather-related factors (e.g., they can be accessed only by air for most of the year). The financial costs of providing legal aid lawyers in a northern area that covers 20 percent of the land mass of Canada cannot be overstated. Government family justice services and supports (e.g., information services, mediation) are lacking, and there are few lawyers in private practice. Providing services in languages other than English is a significant challenge for lawyers in many areas of criminal and civil law, particularly in family legal aid (Clark, 2011).

Québec

The Commission des services juridiques administers legal aid. The Commission provides a statement on quality assurance that is publicly available on their website.¹⁰⁵

There is a two-part eligibility test for legal aid: financial criteria and services covered. Coverage includes all family matters related to custody and access, child support, spousal support (in Québec common law partners cannot obtain spousal support), divorce, and restraining orders in family violence.¹⁰⁶

Recipients of social assistance are eligible for legal aid without any obligation of contribution. Others qualify under a complex formula that examines income, value of property, and liquid assets.¹⁰⁷ Legal aid eligibility increased by 4.17 percent as of May 31, 2019, equal to the percentage increase of the province's minimum

¹⁰¹ See website at: https://www.legalaid.on.ca/en/publications/fact_aboriginaljusticestrategy.asp (Accessed June 20, 2019).

¹⁰² See *Final Report on Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls* at: <https://www.mmiwg-ffada.ca/final-report/> (accessed June 28, 2019).

¹⁰³ Key stakeholder telephone interview with Benson Cowan, Director of Legal Aid on May 31, 2019.

¹⁰⁴ Ibid.

¹⁰⁵ See declaration at: <https://www.csj.qc.ca/commission-des-services-juridiques/Commission/Declaration-de-services-aux-citoyens/en> (accessed July 9, 2019).

¹⁰⁶ Québec Legal Aid: <https://www.justice.gouv.qc.ca/en/programs-and-services/services/legal-aid/> (accessed June 28, 2019).

¹⁰⁷ See: <http://www.csj.qc.ca/commission-des-services-juridiques/aide-juridique/volet-gratuit-aj/en> for eligibility guidelines (accessed June 15, 2019).

wage.¹⁰⁸ As noted above, the income threshold of family legal aid in Québec is the highest among Canadian provinces.

Nova Scotia

The Nova Scotia Legal Aid (NSLA) Commission administers and operates legal aid. Coverage is provided for most family law matters such as parenting, child and spousal support for individuals as well as with children, divorce matters where the individual does not have significant property, and family violence issues (see Annual Report, 2017-2018).¹⁰⁹

Financial eligibility is based on a needs test, based primarily on income, but consideration may also include expenses, debt load, and assets. Individuals on social income assistance qualify, or if paying for a lawyer would put the individual at the income level of social assistance.¹¹⁰

New Brunswick

The Legal Aid Commission administers legal aid in the province. Legal aid covers family related matters, except for divorce, variation of child support, spousal support pursuant to the *Divorce Act*, division of matrimonial property, or property claims for the unmarried.¹¹¹ (New Brunswick Annual Report 2017-2018)

Financial eligibility as of April 15, 2017 is based on an income grid that defines income brackets per household size rather than disposable income. Individuals who receive legal aid may be required to contribute according to the income grid.¹¹²

Prince Edward Island

The Prince Edward Island Legal Aid Program is administered under the Department of Environment, Labour, and Justice. Prince Edward Island does not have specific legal aid legislation.¹¹³ The scope of services and coverage by the program as well as financial eligibility guidelines are determined by government policy.

Coverage is meant to be flexible with the highest priority given to cases involving family violence. The next priority is matters concerning children (e.g., including child welfare matters) where family violence is not the

¹⁰⁸ See announcement at: <https://www.csj.qc.ca/commission-des-services-juridiques/lang/en> (accessed on June 24, 2019)

¹⁰⁹ See: <https://www.nslegalaid.ca/wp-content/uploads/2018/10/Annual-Report-2017-2018-1.pdf> (accessed June 15, 2019).

¹¹⁰ See: <https://www.nslegalaid.ca/who-qualifies/> (accessed June 15, 2019).

¹¹¹ See eligibility guidelines at: <http://www.legalaid.nb.ca/en/uploads/file/2017-18%20NBLASC%20Annual%20Report%20Bilingual.pdf> and, http://www.legal-info-legale.nb.ca/en/uploads/file/pdfs/Legal_Aid_in_NB_EN.pdf (accessed June 15, 2019).

¹¹² See eligibility guidelines at: http://www.legalaid.nb.ca/en/family_law_services (accessed June 15, 2019).

¹¹³ See: https://www.princeedwardisland.ca/sites/default/files/publications/environment_labour_and_justice_annual_report_2013_-_2014.pdf (accessed June 17, 2019).

central issue. Financial eligibility is determined by considering income, assets and liabilities, as well as requiring documentation of a partner's income, assets and debts.¹¹⁴

Newfoundland and Labrador

The Newfoundland and Labrador Legal Aid Commission has administered legal aid since it was established in 1976 by the *Legal Aid Act*. Coverage in family matters is dependent on the nature of the matters in dispute (e.g., parenting, child support). However, for some matters, coverage extends further than in other jurisdictions across Canada.¹¹⁵ For certain categories of family law cases, legal aid will provide coverage without financial assessment, including inter-jurisdictional child support orders, child welfare cases, and lawyers for children in child welfare cases.

Newfoundland and Labrador does not have clear financial assessment guidelines. Income is considered, as well as an asset minus debt analysis, but it is complicated and currently being examined to make it more in line with other jurisdictions and to make it easier for those applying. There are concerns that women, in particular, may not have access to financial information at family breakdown and as a result may be regarded as ineligible and left in vulnerable situations.¹¹⁶

There is an Equity Program that helps individuals with less than \$60,000 worth of assets. They can then be referred by legal aid to a private lawyer and legal aid will provide \$5,000 to assist that lawyer to take them on as clients, with the expectation that legal aid will be reimbursed if there is a favourable court outcome. However, there are few private family lawyers willing to do this type of work, and none in Labrador who do family law work. It is acknowledged that there is a large gap in access to justice across the province, particularly if the individual lives outside of St. John's.¹¹⁷

¹¹⁴ See: <https://www.princeedwardisland.ca/en/information/justice-and-public-safety/legal-aid> and https://www.princeedwardisland.ca/sites/default/files/publications/environment_labour_and_justice_annual_report_2013_-_2014.pdf (accessed June 17, 2019).

¹¹⁵ See financial eligibility, <https://www.princeedwardisland.ca/en/information/justice-and-public-safety/legal-aid> (accessed June 17, 2019).

¹¹⁶ Key stakeholder telephone interview with Barbara Barker, Legal Services Solicitor on June 5, 2019.

¹¹⁷ Ibid.

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