

Legal Aid in Canada: The Need

JOHN P. NELLIGAN*

Toronto

I

A short time ago a prisoner in a Canadian jail wrote a letter to the John Howard Society. In pencil, almost illegible, its plea is still clear and thought-provoking. At the date of the letter the writer had been in custody five months awaiting trial on a charge of theft. A thousand miles from home and without funds, he had tried in vain to find a lawyer who would defend him. After describing his unsuccessful search, he goes on:

Sr im very confused and mxted up about this and i would like it very mutch if you would stratin this out for me. Are you people going to get me a barrister like the letter sead or not. Im still in the dark and very confused about the hole thing. I nead a barrister and soon i do hope you will do something about that. . . . Yes Mr. B——im very confused nead someone to tell me the strat of things. . . .

In this particular case a barrister's help was obtained and at the trial the prisoner was acquitted of the offence charged. But there are many more Canadians, charged with crimes or harassed by family or money troubles, who are "mixed up" and need a lawyer "to tell them the straight of things". Not all of them find one.

To ensure that everyone, regardless of economic status, can find a lawyer when he needs one, the legal profession has established legal-aid bureaus across Canada in increasing numbers during the past few years.¹ In spite of this recent growth, however, the development of organized legal aid in Canada, almost entirely dependent on both the labours and financial support of lawyers alone, is still far behind that in England and the United States. Perhaps the greatest deterrent has been the general feeling that no

*Assistant Director of the Survey of the Legal Profession in Canada. This report is one of a series prepared for the Survey of the Legal Profession. The views expressed by the author are not necessarily those of all members of the Survey's Council.

¹ Existing facilities were described in a companion article, by the same author, *Legal Aid in Canada: Existing Facilities* (1951), 29 *Can. Bar Rev.* 589.

serious need for organized effort exists. This feeling, though less prevalent today than it has been, is still found among both lawyers and laymen. Wherever it exists, all discussion of legal aid tends to be academic. Even where organizations have been established, uncertainty about what the need really is sometimes results in inadequate facilities being provided.

Certainly, mere approval of legal aid in principle is not enough. Before any action is taken, some effort should be made to determine the nature and extent of the need. With this in mind, and to secure an objective appraisal of a problem that is usually dealt with in broad generalities, the Survey of the Legal Profession in Canada sought out those groups and individuals who could best answer the questions that must be asked before any legal-aid programme is begun: Who needs help? What kind of help is needed? How great is the need? To what extent is it already being met?

It was found that lawyers themselves are not always the best judges of how well the poor are being provided with legal services. Before the announcement of the new legal-aid plan in Ontario, all county law associations were asked to report on the need for legal-aid facilities in their counties. The majority of the replies, including those from two of the largest counties, categorically denied the need for organized aid of any kind. Subsequent investigation has shown that the experience of others in these areas is quite different. There is no doubt that the lawyers' opinions were expressed in all honesty. Lawyers frequently assume that, since they look after their own poor clients without charge, every poor person is similarly cared for. What many of them fail to appreciate is that most of the legal difficulties of the poor never get to a lawyer's office at all.

Because of their intimate contact with the poor, welfare agencies can frequently speak with special authority in estimating the possible demand for legal aid. To obtain the benefit of their views and experience, two questionnaires were distributed to welfare groups across the country. Over three hundred replies were received to the first, which was sent out before the inauguration of the legal-aid clinics sponsored by the law societies of British Columbia, Ontario and Nova Scotia. As might be expected, the number of legal problems encountered by welfare groups varied greatly with the type of work being carried on. Practically all reported some need for legal services, however, and few had complete success in obtaining them.

The second questionnaire was distributed to a smaller group

of agencies after the new clinics had been operating for some time. Although the replies indicated that the need for legal aid was increasing rather than decreasing, most agencies in those provinces where clinics have been established now have little difficulty in obtaining help for clients with legal problems. Elsewhere the situation remained unchanged, with agencies in most cities and towns stating that some form of organized aid was urgently needed.

The reports of existing legal-aid groups, both here and in the United States, indicate that not all those needing help are known to the welfare agencies, and that their estimates of the need tend to be too low rather than too high. American results, if applicable to Canada, would suggest that even in those Canadian cities where facilities have been established, the need is still far from being met. Certainly, even when comparing the volume of work done in some parts of Canada with that in others, the conclusion is clear that much remains to be done in many of our larger cities.

In the criminal field, the views of magistrates on the need for legal aid in their courts were obtained by means of questionnaires. The great majority were convinced that some provision should be made for the defence of accused persons who are unable to retain their own counsel. The exception, rather than the rule, was the magistrate who replied: "I really do not believe that there is any particular need for legal aid in my courts. Where the accused is charged with a capital offence and cannot afford to hire a lawyer, he can obtain the services of some young lawyer who will act for him for nothing. No doubt there are many other people charged with offences who cannot afford to hire a lawyer, but these people plead guilty and are just sentenced." Perhaps the need for legal aid in his court was greater than he suspected.

None of these sources, or even all of them combined, can give us a completely accurate picture of the need for legal aid. Nor can the ideal standards sometimes recommended soon be achieved. It is hoped, however, that the information obtained will prove of some help to local committees that are contemplating the establishment of new legal-aid facilities or the extension of old.

II. *Who Needs Help?*

Before any appraisal can be made of the number of persons who may require legal aid, some standard of eligibility must be fixed. Care should be taken to avoid rigid formulas, for every case brings its own set of peculiar circumstances. A frequently quoted test is the one used by the Harvard Legal Aid Clinic, which sets the

standard as follows: "Would the payment of a fee to an attorney seriously impair the client's ability to furnish himself and his family with the bare essentials necessary to keep them decently fed, clothed, sheltered, and living together as a family?"

Although income is an important consideration, it is dangerous to base any test of eligibility on income alone. A number of other considerations should also be taken into account. Eligibility should vary depending on the convertible assets the applicant has, his earning power, outstanding debts, and the probable cost of the legal assistance he requires. Only when all economic factors are taken into consideration can an individual's eligibility be fairly assessed.

The most obviously eligible are those persons who are dependent upon public relief.² Since these people are largely dependent on the sums they receive from welfare agencies and charity, they can hardly be expected to pay anything for any legal help they may require. In Manitoba, a solicitor is attached to the Department of Welfare to look after the legal problems of those who come under the jurisdiction of his department. So far as can be ascertained, similar arrangements are not to be found in any other province.

Those on public relief are usually without any other means of support. There is a much larger group whose incomes, although disqualifying them from public assistance, cannot provide all the basic necessities of life. In the United States this group is estimated to be 20% of the total population.³ Although inquiries have been made through the various welfare federations, it has been found impossible to obtain a reliable estimate of the exact number of Canadian families whose incomes are below subsistence levels. To assist its member agencies, the Toronto Welfare Council has drawn up a series of tables showing the expenditures required to provide a minimum level of health and self-respect.⁴ Where welfare ap-

² Figures for each of the provinces as of January 1st, 1951, were as follows:

| | | | |
|------------|---------|-------------|---------|
| B.C. | 43,000 | Que. | 185,000 |
| Alta. | 25,000 | N.B. | 20,000 |
| Sask. | 25,000 | N.S. | 24,000 |
| Man. | 26,000 | P.E.I. | 4,000 |
| Ont. | 120,000 | Nfld. | 40,000 |

Figures include heads of families and single individuals only. Provincial totals include old age and blind pensioners and those on mother's allowance and municipal relief, except in New Brunswick and Nova Scotia where municipal relief figures were not available.

³ Browne, *Legal Aid in the United States* (Rochester: Lawyers Co-operative Publishing Co., 1951) p. 85.

⁴ *A Guide to Family Spending* (Toronto Welfare Council, February 1952).

plicants cannot meet the minimum, the usual practice is to charge them no fee for any services provided. A table setting out the minimum expenditure requirements of individuals and selected family groups will be found at the end of this article. Although the amounts shown may seem high, they represent the painstaking research of economists, social workers and others. In general they correspond very closely with the average maximum income requirements applied by legal-aid bureaus in the United States in cities of under 100,000 population.⁵

Even where the family income exceeds the bare minimum, it is often difficult for the family to assume the full burden of unexpected legal costs. Many welfare agencies emphasized the importance of giving consideration to those who can pay something, but not the normal fees that lawyers charge. Several suggested that free services were rarely necessary, but that there should be some method of providing legal help at reduced rates to those with modest incomes. It is often this group that finds it most difficult to obtain legal assistance. The obviously poor can frequently find someone to help them; those with money to pay the normal fee can choose any lawyer they please; but the man with a low income, qualifying neither as a charity case nor as a paying client, often goes unaided.

III. *What Help is Needed?*

The legal services the poor require are not always those demanded by the paying client. In addition to the differences that economic status may make, many in need of legal aid are socially maladjusted, and this in turn creates new problems that are not usually encountered in the normal office.

It has been a universal experience that the greatest number of legal-aid cases are concerned with family matters. In Canada, legal-aid organizations report that domestic cases constitute from 60 to 90% of all work done. Where less reliance is placed on cases referred from welfare agencies and a greater proportion of applications comes from the poor directly, the percentage is not quite as high. In the United States, roughly 33% of all cases handled by legal-aid offices are domestic.⁶

Legal services required range from the drafting of separation agreements to the protection of parents' interests where children's aid societies apply for custody of their children. One difficulty felt

⁵ Brownell, *op. cit.*, p. 70.

⁶ Brownell, *op. cit.*, p. 173.

acutely by agencies all over the country is the enforcement of support and maintenance orders against delinquent husbands. Once a husband has left the locality where his family is living, welfare agencies are usually helpless to pursue him. Without funds, the wife is unable to pay the costs of having the husband brought back under arrest or of commencing proceedings against him in his new location. Although most provinces now have reciprocal legislation permitting the mutual enforcement of maintenance orders between one province and another, there is still no means available for the poor to set the necessary legal machinery in motion.

In those districts where family courts have been established, the need for free legal services has been alleviated to some extent. The services of court workers and the informal procedures of the court itself usually provide a deserted wife with the relief she seeks without the intervention of a lawyer. There are still occasions, however, where a lawyer's services are required. In many cases it is found that a husband summoned to appear before the court is represented by counsel, whereas the wife must appear unsupported. It has been suggested that in cases of this kind legal services should also be available to the deserted wife. Even where the husband is not represented, a timid wife, faced with an irate husband, often requires an advocate to ensure equality between the parties.

The economic difficulties of the legal-aid client usually have to do with petty money and wage claims, insignificant to the lawyer but important to the applicant. Garnishee proceedings, seizure of furniture, minor disputes with tradesmen and storekeepers constitute the largest proportion of their problems. Many are unsure of themselves and are imposed upon by others. Default judgments are obtained against them for doubtful debts, and insurance and other claims are refused. Lacking initiative, they require help in asserting their rights. Frequently the dispute can be settled by a lawyer's letter or even a phone call.

A problem mentioned frequently in the welfare reports is assisting those who must apply for public relief.⁷ In many cases, the intervention of a lawyer on behalf of the applicant is necessary before relief will be granted. Frequently, too, persons who should be confined to mental hospitals have difficulty in gaining admission because they cannot afford the fees required for the necessary court order.

⁷ Assistance is already provided applicants for soldiers pensions. The Department of Veterans' Affairs has a special staff of pension advocates who appear before the Pension Board on behalf of applicants.

However interested they may be in legal aid generally, most lawyers are reluctant to offer aid in cases involving property. In fact, when an applicant owns or is entitled to property, he is usually disqualified from receiving any free legal assistance. The notaries of Quebec, whose duties are primarily concerned with questions of property, have not established any form of legal aid because of this natural reluctance to assist anyone who *prima facie* has some means. As their spokesman said: "No needy persons ever buy real estate or borrow on mortgages; to make a will *a priori* requires an estate; and when a poor man inherits it involves some improvement on property. Hence we deal only with people who may not necessarily be wealthy but who surely are not needy."

Although this principle of eliminating all those with capital works fairly in most instances, there is a small group of people upon whom it inflicts hardship. Widows and old people particularly find that property is a poor substitute for earning power. An invalid of sixty entitled to an estate of \$2,000 may be poorer than a healthy person of twenty-five with no assets of any kind except the ability to work. In the replies received from welfare organizations the bulk of requests for help with property transactions came from workers in the departments of public welfare, who are constantly dealing with old-age pensioners and recipients of mother's allowances. Many workers complained of the high cost of administering estates. Where the widow of an old-age pensioner has no other means of support, the payment of full fees for the settlement of her husband's estate amounts to a tragic encroachment on her means of subsistence.

Special reference should be made to those "hard cases" that must be given particular attention in legal-aid work. Lawyers, for personal or social reasons, are sometimes reluctant to handle certain types of cases. It is always a distasteful duty to sue hospitals or charitable organizations or to conduct an action against another solicitor. Where the claimant is without funds, the assignment of counsel by an impersonal legal-aid organization would avoid any implication of personal malice on the part of the lawyer prosecuting the claim.

Most cases handled by legal-aid bureaus are disposed of by giving advice only. In the United States, it has been estimated that 75% of all cases are looked after in this way; 15 to 20% require further negotiation and discussion; and only 5 to 10% require court action. At the Winnipeg Legal Aid Clinic, over fourteen years experience has indicated that less than one-third of all applicants

require anything more than the advice which is given them by the clinic panel. A similar experience is reported by the more recently established clinics in Vancouver, Toronto and elsewhere. In the United States, in cities where legal aid has been established for some time, there is a growing tendency for the poor to seek counsel before their difficulties reach unmanageable proportions. By making legal advice readily available, the need for more complicated action is often avoided.

Although few in number, cases requiring court action are usually the most important and the most costly. Much court work, of course, never appears in legal-aid statistics at all. In the United States, where attorneys may accept a percentage of any judgment obtained as their fee, all cases that can be handled in this way are refused by legal-aid organizations. Even in Canada, where such arrangements are almost universally banned, many solicitors will take cases without retainer when there is a reasonable chance of success. Since the successful party in Canadian courts usually gets costs against the other side, a solicitor is willing to take his chance of eventually recovering from the other party. With this in mind, many of the legal-aid organizations in Canada will not accept cases where a lawyer would be willing to wait for his fee. There is still a need, however, in those situations where the applicant's claim is not for a money award, or where an action must be defended to minimize the damages awarded. In motor accident cases, a defendant is liable to lose his driver's licence, which may be his means of livelihood, if he fails to pay the amount of the judgment. In other cases a man who permits default judgment to be entered against him for lack of means to pay a lawyer's fee may subsequently find himself harassed by garnishee proceedings and threats of seizure.

IV. *How Great is the Need?*

The class of person who requires legal aid having been discussed, and the type of assistance he usually requires, the question remains: How many of these people will require assistance in the course of any one year?

Because no two countries are alike, either in their standard of living or in their social structure and legal organization, it is dangerous to rely too much on comparisons arising from the need for legal aid in other countries. At the same time, we have so much in common with the United States that the vast body of experience they have acquired should be significant. There it has been said

that legal-aid bureaus, if efficiently conducted and properly publicized, could expect to handle ten cases a year for every thousand of population in the area of operation.⁸ This estimate was made on the basis of the experience of many of the well-established legal-aid bureaus in the principal cities of the United States.

In order to determine the actual case-load of existing legal-aid groups in the United States, a study was made of the experience of 43 representative agencies over a period of twelve years from 1936 to 1947.⁹ It was found that these agencies averaged $7\frac{1}{2}$ cases for every thousand of population in the cities in which they operated. The agencies selected came from cities ranging in size from 60,000 to 7,000,000, and included offices manned by one or two volunteers and bureaus run by large staffs of paid attorneys. Since the period covered included both depression and war years and extended partly into the post-war boom, the averages obtained cover a fairly representative period. None of the agencies concerned felt that they were meeting the full need of their communities. Assuming other factors to be the same, a legal-aid bureau in Toronto might then expect 8,500 cases a year; Vancouver, 4,000; and Montreal, 10,500.

As an example of the volume of work that any of our larger cities might expect if a full time bureau were established, the experience of one of the more recently organized bureaus in the United States might be cited. The city of Syracuse has a population of roughly 300,000, including the surrounding area. At the instigation of the local bar and with the support of a charitable fund, a legal-aid office was opened there in 1949 with a full-time staff of one lawyer and one stenographer. Within a year an additional lawyer and stenographer were required. About 1,200 cases are now being handled every year.

In Canada, with one possible exception, no office of this kind has been established, and the experience of the organizations in operation is largely affected by the amount of publicity they have received and the method of organization employed.

The busiest organization at the present time is the weekly legal-aid clinic in Toronto, where volunteers from the local bar handled over 2,654 applications last year. New cases come in at the rate of 50 a week. Other cities with smaller populations have had a lesser flow. Vancouver, for example, after two years activity, still receives about 10 cases a week.¹⁰ The clinic in Halifax hears about 5 cases weekly.

⁸ Brownell, *op. cit.*, p. 18.

⁹ *Ibid.*, p. 79.

¹⁰ Before the inauguration of the clinic, the Vancouver Bar Association

On the other hand, the extension of the Ontario legal-aid plan into every community in that province has demonstrated that fully organized clinics, sitting at regular hours, are not always necessary. Although facilities have now been established by each of the 44 county law associations, only 8 found it necessary to hold regular weekly clinics. Five more did so as occasion required. The remainder were able to deal with cases as they arose by referring them directly to members of the local bar. In only 5 counties, however, were no applications made for legal aid during the year.

V. *Is the Need Being Met?*

A comparison of the statistics of legal-aid organizations in the United States with those in Canada, or even of the results achieved in some Canadian cities with those in others, suggests that there are still many poor persons whose legal troubles never reach a lawyer's office.

At the same time it would be dangerous to base any conclusion on these facts alone. Most American organizations are in cities much larger than the average Canadian community. The greater proportion of lawyers to general population in the United States may indicate that legal services are needed there more frequently than in Canada. Within Canada itself the tradition of public service of the bar in one district may obviate the necessity of organization, whereas in another community of similar size organization may be essential.

A further check on how well the need is being met is provided by the reports of welfare agencies on their success in obtaining legal assistance for poor persons under their care. When the first questionnaire was sent out two years ago, only 24 out of the 331 replying were able to refer their clients to a legal-aid bureau or committee. Where committees were not available, several devices were used. Welfare organizations of a public or semi-public nature usually called on the town solicitor, crown attorney or magistrate. Private organizations often had a small group of lawyers available who volunteer to handle cases requiring assistance. Elsewhere, workers had to rely on the co-operation of agency executives or personal friends who were lawyers. In 70 of the replies re-

handled cases referred to it by the local Family Welfare Bureau. In its first two months of operation, the new clinic heard as many applications as had been received by the bureau in the previous two years. The tremendous increase suggests very strongly that welfare agencies do not encounter all legal-aid cases and that a great many people are in need of legal assistance who have no association with welfare agencies of any kind.

ceived the agencies concerned admitted complete failure in obtaining help of any kind.

Replies to the more recent questionnaire present a rosier picture. Over half of the 110 agencies questioned now say that they are able to enlist the help of some legal-aid organization. The greatest change is found in the provinces of British Columbia and Ontario where the law societies have established province-wide facilities. When the replies from these two provinces are set apart, however, one-third of the remaining agencies still report that they are unable to obtain legal aid from any source.

Wherever agencies have been working with lawyers, few serious complaints were made of the co-operation received. A few welfare workers with experience in both urban and rural areas were of the opinion that co-operation was better in the latter. A serious difficulty in some cases seemed to be that workers were unfamiliar with the lawyers in their community and consequently were reluctant to turn to them for help. This was sometimes reflected by the entirely different views of the attitude of the local bar reported by two agencies from the same city or town. In those areas where no form of organization existed, a frequently expressed opinion was that, although individual members of the bar were willing to do what they could, legal services were still not adequately provided. As one agency said: "The members of the Bar have been most co-operative with our agency and have been willing to assist whenever possible. We are indeed proud of the friendly relationship which exists between us, but have felt very keenly for some time that legal service for those with inadequate means should be more available than it is at the present time."

There was some criticism of existing facilities in all the larger provinces. In British Columbia, most agencies were pleased with the work of the legal-aid clinics in Victoria and Vancouver, but felt that consideration should be given to broadening the rules as to eligibility and the types of cases in which assistance is given. Some agencies in other parts of the province still seem unaware that a province-wide legal aid scheme has been instituted. In Alberta, agencies in Calgary and Edmonton were unanimous in requesting an extension of the present needy-litigant procedure to provide assistance in cases not involving litigation. Such a step, they reported, was urgently needed. In Saskatchewan, although it was not suggested that the need was great, a general lack of system for turning over cases to the legal profession was reported. One agency in Saskatoon suggested that some form of needy litigant

procedure should be established, apparently totally unaware of the fact that it had been in existence since 1939. Other agencies in the same city seem to have worked out a very satisfactory arrangement with the local bar. The work of the Winnipeg legal-aid clinic met with general approval, but there was regret that similar clinics had not been established elsewhere in the province. Agencies in several of the medium-sized towns in Manitoba were particularly anxious to have some facilities established.

In Ontario, the introduction of the province-wide legal aid plan has received the enthusiastic approval of most welfare officials. Some expressed the fear, however, that the reliance on volunteers still places an unfair burden on a small section of the profession. Over half the Quebec agencies replying felt that there was a serious need for legal aid of some kind, both in the cities and in the larger towns. None considered present facilities adequate.

In the Maritimes, the legal-aid bureaus in Halifax and Saint John were highly praised, but elsewhere a combination of lack of organization in the cities and scarcity of lawyers in the rural areas seriously limited the amount of legal care available to the poor. Only in Prince Edward Island and Newfoundland did the agencies seem content with present methods. From the few replies received it would appear that welfare organizations felt the need in these provinces was not great and that the bar was adequately looking after what there was on an informal basis.

For the most part, the replies indicated that some type of legal-aid organization is necessary in both rural and urban areas. In some of the smaller centres the lawyers assisted in providing an adequate service, but many agencies asked that machinery be established to distribute the load equitably over the entire profession. A surprising proportion of the more serious complaints came from towns with a population from 10,000 to 40,000. In a number of these towns the agencies were most emphatic in their denial that legal aid was available. A great part of the difficulty may have arisen from the failure of the agencies to advise the local bar when help is needed, but the replies still emphasize the need for some machinery to bring the welfare worker and the lawyer together.

VI. *Need for Aid in Criminal Cases*

The question of legal aid in criminal cases is part of the larger problem of the preservation of order and the punishment and rehabilitation of law breakers. The penal aspects of this problem

have been dealt with in a special issue of the Canadian Bar Review.¹¹ Whatever changes are made in the social approach to crime and the criminal, the lawyer will always have an important part in enforcing the laws of the country, on the one hand, and protecting the life and liberty of the subject, on the other. His rôle should not be left to the fortuitous circumstance of whether or not the prisoner at the bar has money.

To an even more pronounced extent than in civil matters, the need for legal assistance in the criminal courts is difficult to determine. It will never be possible, nor is it necessary, to defend every person charged with the commission of an offence. There must be some limit to the availability of legal aid if it is to be effective at all, but the restrictions must not be so severe as to destroy its whole purpose. Every year nearly 50,000 persons are charged with indictable offences in Canadian courts. Over three-quarters of a million convictions are registered for lesser offences. Experts in the United States estimate that 60 to 80% of all persons appearing in the criminal courts are unable to pay for a lawyer. The question remains of course: How many of these cases can be assisted by the intervention of a lawyer?

However an accused is finally tried, he must first appear before a magistrate or justice of the peace. Of those magistrates replying to a questionnaire dealing with their official duties generally, 90% said that they believed organized legal aid of some kind was needed in their courts. Only 9 of 106 reporting considered legal aid unnecessary in their courts and, of these, 7 were in rural or semi-rural areas.

Suggestions for providing legal aid fell into two main groups. The larger body of opinion favoured the payment of defence counsel by the state. Although the principle of the public defender was approved by many, it was felt that the volume of work did not warrant the appointment of one in most districts. The second group believed that the need could be adequately met through arrangements between the magistrate and the local bar association. Roughly one-third of the magistrates expressed no opinion.

The replies indicated a mixed opinion regarding the present co-operation of the bar in providing aid in lower courts. Although 27 magistrates considered the bar's co-operation to be satisfactory, and another 10 rated it as fair, 17 suggested that it was slight, and 30 reported that there was none at all. In many places where the magistrate has taken an active interest in the procurement of

¹¹ (1949), 27 Can. Bar Rev. 999 *et seq.*

counsel for poor prisoners, the bar has given him whole-hearted support. Where the magistrate has not been particularly concerned, his lack of interest has frequently been reflected by the bar.

Although it is rarely acknowledged publicly, many lawyers and others feel that the test of indigency should be applied far more strictly in criminal than in civil matters. The assumption seems to be that when a man is in trouble in the criminal courts he is largely responsible for being there himself, and should be required to get out of it as best he can. In fact, without giving it much thought, these advocates of stricter rules are placing themselves in the position of the judge and are condemning the accused in advance. Certainly, in all justice, the limits of eligibility should not be more restricted than in civil matters.

The group most obviously entitled to assistance are youthful and first offenders. The blight of a "record" often affects a man's whole career. Jobs are henceforth difficult to obtain and social relations are disturbed so that too often the way is made clear for a second offence. In the rush of work that pours through the magisterial courts in the larger centres, young people may be sent to jail for short periods without much thought being given to the possible effect. The introduction of probation officers into many of our courts has done much to remedy this evil, but their services are usually available only after a conviction has been entered. Valuable as their function is, it is no substitute for legal aid.

Although youthful offenders are the first to be thought of when legal aid is discussed, it is interesting to note that only two magistrates suggested that aid be restricted to them. The remainder were willing to extend it to all accused, whatever their record. There is little danger that this extension would be subject to abuse. In the United States, in places where offenders have been available in the courts, it has been found that habitual criminals show little desire to take advantage of their services. They realize that no tricks will be played on their behalf and would much prefer to conduct their own defence.

At the present time the few provinces that make official provision for the defence of poor prisoners restrict their assistance to the superior courts, where only 8% of all indictable offences, and virtually none of the lesser cases, are tried.¹² In the opinion of many magistrates and court workers, it is the possibility of a jail sentence rather than the seniority of the tribunal hearing the case

¹² Statistics of Criminal and Other Offences for the year ending September 30, 1948 (Dominion Bureau of Statistics, 1950) p. xxvi.

that is the best criterion of the need for legal aid. Wherever the liberty of the accused is threatened, the case should be considered serious enough to warrant the introduction of all possible safeguards to see that justice is done. Vagrancy, for example, is considered a minor offence and is rarely given serious attention by anyone in the courts. Even here, however, since a jail sentence may be imposed, the protection of the innocent must be carefully ensured. Not long ago in Toronto a man was stopped by the police early one morning directly across from his own home. Because he could produce no means of identification, he was charged with vagrancy. The following morning a magistrate with many years experience sentenced him to thirty days in jail. It need scarcely be added that cases of this kind do not frequently occur. The fact that they do occur at all suggests that even in apparently minor cases there may be need for legal counsel.

Particular attention should be given to cases that involve dealings with the police. Magistrates and crown prosecutors are constantly dealing with police officers and very properly respect the work they do and try to back them up in their official duties. Like all humans, however, police officers have been known to err. "Obstructing the police" frequently means frustrating a police officer in his idea of what his rights are. Recently three soldiers were arrested in Orillia for this offence. Fortunately a lawyer who was in court when they appeared undertook to represent them. Examination of the police officer disclosed that their only offence consisted in refusing to give their names when they were asked. Care must also be taken in the defence of persons charged with offences where public feeling is high or where the magistrate is known to take a serious view of a particular type of crime. A young man whose only previous conviction—for common assault—had occurred five years before was charged with the theft of a bicycle in a small Ontario town. Since many of the townspeople used bicycles, and since one or two other bicycles had been stolen previously, the magistrate in order "to set an example" sentenced the man to two years in prison. It was only later, when the young man discovered that his cell-mate was serving only four months for indecently assaulting a young child, that he applied for leave to appeal. As soon as his case came before the appeal court, he was immediately released, but by that time he had been in jail over a year.

The lawyer's part in a criminal case should begin with the arrest of the accused. If the professional criminal with funds is entitled

to demand the presence of his lawyer before making any statement to the police, the man without any resources is entitled to the same privilege. Nowhere is free legal advice made available at this early stage. Some law enforcement officers are frankly opposed to advising accused persons of their right to counsel until after they have been arraigned. In most provinces counsel is rarely provided until the accused is actually brought up for trial.

Many court officials excuse the absence of legal-aid facilities in the lower courts by pointing out the large proportion of guilty pleas received there. Although most of those appearing are guilty of some offence, the actual plea of guilty or not guilty to any particular charge remains one of the most important steps in any criminal trial. Few laymen, for example, know the difference between common assault, aggravated assault and assault occasioning grievous bodily harm. Even lawyers, if not in the criminal courts from day to day, may become confused over the technical definitions of house-breaking and burglary. The accused, in fact, is asked to make a complicated legal decision, which may seriously affect his liberty, with little knowledge of what the decision means. Too frequently he pleads guilty on the warning of a police officer or other official that his sentence will otherwise be much more severe.

Even where a plea of guilty has been entered and the plea is a proper one, the lawyer's task is far from over. Many of the best counsel in Canada are constantly being paid high fees to plead guilty on behalf of wealthy clients and then address the court in mitigation of sentence. Most court officials acknowledge that the severity of sentence is often considerably affected by the presence or absence of counsel to plead on behalf of the accused. Presentence reports by probation officers can assist in overcoming the disadvantage of the unrepresented accused, but few courts have the necessary facilities, and those that do frequently fail to take advantage of them.

The Convention on Human Rights signed by members of the Council of Europe in 1951 declares that everyone charged with a criminal offence who has not the means to pay for legal assistance should be given it free "when the interests of justice so require".¹³ There is no doubt that in the vast majority of cases heard in Canada the accused is given a fair hearing and is justly sentenced. There are still many cases, however, where the accused is not rep-

¹³ Convention for the Protection of Human Rights and Fundamental Freedoms, article 6 (3) (c).

resented and in which the "interests of justice" might well require counsel. "Justice should not only be done, but should manifestly and undoubtedly be seen to be done."¹⁴ In those cases where an injustice does creep in through failure to provide legal assistance, it is not only the accused but the prestige of our whole judicial process that suffers.

VII

It would never be possible in a report of this kind to present a wholly disinterested and purely scientific appraisal of the need for legal aid. All that can be done is to gather the objective evidence available and to supplement it with the commonly held views of those who are considered best qualified to form an opinion. It still remains for the bar, and the public, in every part of the country to determine the local need and to take steps to meet it.

The need for legal aid is not the result of some sudden failure on the part of the legal profession to offer their services to the poor. It arises, rather, from the gradual moulding of our society into large impersonal communities governed by an ever-increasing web of laws and regulations. Though the principles of justice remain the same, their application becomes increasingly difficult. It is the duty not merely of the legal profession but of the public at large to see that machinery is available to ensure the equal protection of the law for rich and poor alike. Justice is the business of everyone.

Subsidized Law

And yet—in spite of all that medical science has done for each and every one of us, in spite of the generous contributions by physicians of their time and skill to private charity—we find a large number of our people who believe they have a 'right' to free medical services and who, to obtain that 'right', would socialize the medical profession here just as it has been socialized in England, regardless of the consequences on scientific research, medical skill and public health. So great is the hue and cry that some medical associations in this country [United States] are now advocating compromising plans that involve the payment of public funds to doctors, forgetting that the acceptance of government subsidies will inevitably sound the death knell of the independence of the profession. (Hon. Arthur T. Vanderbilt, *Some Principles of Judicial Administration*, an address delivered on October 5th, 1950, on the Alexander F. Morrison Lectureship Foundation, at the Annual Meeting of the State Bar of California)

¹⁴ *Rex v. Sussex Justices*, [1924] 1 K.B. 256, at p. 259.

APPENDIX

*Family Spending Necessary to Maintain a Minimum Level of
Health and Self-Respect (Exclusive of Shelter Costs)*

According to the "Guide to Family Spending"

Toronto, February 1952

| FAMILY COMPOSITION | MINIMUM REQUIREMENTS EXCLUSIVE OF SHELTER COSTS | |
|--|---|----------------|
| | <i>Weekly</i> | <i>Monthly</i> |
| 1. Single woman living alone | \$14.20 | \$61.08 |
| 2. Single man living alone | 17.17 | 73.84 |
| 3. Old age pensioner, male | 12.47 | 53.62 |
| 4. Employed husband, employed wife . | 31.08 | 133.65 |
| 5. Husband, housewife, one child | 34.47 | 148.24 |
| 6. Husband, housewife, 2 children | 39.98 | 171.92 |
| 7. Husband, housewife, 3 children | 47.12 | 202.63 |
| 8. Husband, housewife, 4 children | 55.10 | 236.93 |
| 9. Husband, housewife, 5 children | 63.66 | 273.72 |
| 10. Husband, housewife, 6 children | 66.80 | 287.26 |

The above figures refer to the basic expenditures of the family unit. To them should be added the actual amount paid for rent or other shelter costs. No provision has been made for taxes, savings, debts, medical costs, insurance or compulsory pay deductions, such as union dues or pension contributions.

Minimum standards shown above will vary considerably according to the type of employment of the wage earner and the ages and sex of the children in the family unit. In the illustrations given, the wage earner is assumed to be a manual labourer between 30 and 40 years of age, and the children to be in graduated ages between 4 and 14 years, equally balanced between the sexes.