

Peer Review in Canada: Results from a Promising Experiment[†]

FREDERICK ZEMANS * & JAMES STRIBOPOULOS **

The end point in the access to justice debate often focuses on expanding the availability of legal services for the poor. This article argues that true access to justice requires greater focus on the quality of legal services provided. It tells the story of the introduction of peer review in Canada as a quality assurance tool for evaluating the legal work of a group of criminal lawyers. The article chronicles the various obstacles encountered in making even a very limited form of peer review a reality in Canada, where historically there has been skepticism about the peer review process in the legal profession. A key challenge was negotiating a baseline understanding of competence and quality. In doing so, the authors adapted the evaluative criteria used for peer review in England, Wales, and Scotland to develop a process-driven set of criteria. The authors conclude that peer review is a viable quality assurance tool for legal aid lawyers in Canada.

Le point final des débats concernant l'accès à la justice se centre souvent sur le développement de la disponibilité des services juridiques en faveur des démunis. Cet article argue qu'un véritable accès à la justice nécessite de porter un plus grand intérêt sur la qualité des services juridiques fournis. On y raconte l'histoire de l'introduction du contrôle par les pairs au Canada à titre d'outil d'assurance de la qualité servant à évaluer le travail juridique d'un groupe d'avocats spécialisés en droit pénal. L'article relate les divers obstacles rencontrés lorsqu'il s'est agi de concrétiser une forme - même très limitée - de contrôle par

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* Professor Emeritus and Senior Scholar, Osgoode Hall Law School, York University.

** Associate Professor and Director of Clinical Education, Osgoode Hall Law School, York University.

les pairs au Canada, où de tout temps, le processus du contrôle par les pairs de la profession juridique s'est buté à un certain scepticisme. L'une des principales gageures était de négocier une définition de base de la compétence et de la qualité. Ce faisant, les auteurs ont adapté les critères d'évaluation utilisés pour les contrôles par les pairs en Angleterre, au Pays de Galles et en Écosse, afin de développer un ensemble de critères basés sur le processus. Pour conclure, les auteurs déclarent que le contrôle par les pairs représente un outil d'assurance de la qualité pour les avocats de l'aide juridique au Canada.

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CONCERNS ABOUT "ACCESS TO JUSTICE" routinely focus on the availability of legal services for the poor.¹ This is understandable, given that for those occupying the economic margins of society, and increasingly even for the so-called middle class, the cost of legal services has grown prohibitively expensive.²

There is, however, a shortcoming in the access to justice literature. The focus has often been too narrow, directed mainly at whether those in need of legal assistance have access to lawyers and, therefore, a means by which to effectuate their legal rights. As Roderick Macdonald has incisively observed, "mainstream access to justice literature is largely instrumental; it is a literature about access to law, rather than access to justice."³ Consequently, a major focus of access to

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1. See *e.g.* Deborah L. Rhode, "Access to Justice" (2000-2001) 69 *Fordham L. Rev.* 1785.
 2. See Hon. Coulter A. Osborne, *Civil Justice Reform Project* (Toronto: Government of Ontario, 2007). Osborne observes that "cost and delay ... continue to be cited nationally and provincially as formidable barriers that prevent average Canadians from accessing the civil justice system" (at 1). An earlier 1995 report commissioned by the government of Ontario pegged the average cost of a three-day civil trial at \$38,200. See Government of Ontario, *Ontario Civil Justice Review: First Report* (Toronto: Government of Ontario, 1995) at 144, online: <<http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/cjt/firstreport/>>.
 3. Roderick A. Macdonald, "Access to Justice and Law Reform" (1990) 10 *Windsor Y.B. Access Just.* 287 at 294. In a more recent paper, Macdonald emphasizes the needs of the "socially marginalized [who] do not want better access to lawyers or courts":

They want their own lawyers and their own institutions, so that they can better express their legal needs. An access to justice strategy must confront these claims of social disempowerment so as to generate

justice literature has often been the undoubted need for greater legal aid funding and more expansive legal aid coverage,⁴ coupled with a need for court reform, especially in the civil justice system.⁵

Making a lawyer available to those who might otherwise be unable to afford one obviously increases the chances for justice, but, standing alone, it far from guarantees it. What the existing access to justice literature implicitly assumes is the quality of the legal services that will be supplied by the lawyer who is funded by legal aid. At least in Canada, this is an essentially untested assumption. Despite the fact that hundreds of millions of taxpayer dollars are spent on legal aid in Canada each year,⁶ there have been surprisingly limited systemic efforts toward ensuring the quality of legal services provided through these programs.

This article details an experiment undertaken by the authors involving the use of peer review as a means for evaluating the quality of legal services provided by a group of criminal lawyers employed by Legal Aid Ontario (LAO) at three staff offices. As utilized in this experiment, peer review meant that the work of lawyers practising in these offices was assessed by peers—other lawyers, who were independent and had relatively recent and significant experience in the area of criminal law—who conducted their assessments with the benefit of established evaluation criteria and guidelines.⁷

greater confidence in official law and legal institutions. One need only contemplate the relationship of Aboriginal people to the Canadian justice system to appreciate the magnitude of the problem.

Roderick A. Macdonald, "Access to Justice in Canada Today: Scope, Scale, Ambitions" in Julia Bass, W.A. Bogart & Frederick H. Zemans, eds., *Access to Justice for a New Century: The Way Forward* (Toronto: Law Society of Upper Canada, 2005) 19 at 24-25.

4. See e.g. Deborah L. Rhode, "Access to Justice: Again, Still" (2004-2005) 73 *Fordham L. Rev.* 1013 at 1016. For a Canadian perspective, see Faisal Bhabha, "Institutionalizing Access-to-Justice: Judicial, Legislative and Grassroots Dimensions" (2007) 33 *Queen's L.J.* 139 at 153-60. A closely related development is an increased emphasis on the use of non-lawyers to provide legal assistance in less complex and more routine matters. See e.g. Alex J. Hurder, "Nonlawyer Legal Assistance and Access to Justice" (1998-1999) 67 *Fordham L. Rev.* 2241. Such developments only accentuate the need for more rigorous quality assurance measures.
5. See e.g. Austin Sarat, "The Litigation Explosion, Access to Justice, and Court Reform: Examining the Critical Assumptions" (1984-1985) 37 *Rutgers L. Rev.* 319.
6. See e.g. Erin Smith, *Legal Aid in Canada: Resource and Caseload Statistics 2006/2007* (Ottawa: Canadian Centre for Justice Statistics, 2008), online: <<http://www.statcan.ca/english/freepub/85F0015XIE/85F0015XIE2007000.pdf>>. Smith reports that in 2006-2007, Canadian governments collectively spent \$658,820,000 on legal aid services (at 22).
7. Professor Alan Paterson, the leading expert on peer review in Scotland, defines it as "the

This experiment came about because of a unique chain of events involving legal aid in Ontario. Most Canadian jurisdictions use a certificate model for delivering criminal and much of the civil and immigration legal aid services. Under this *judicare* model, the eligible individual hires a lawyer and pays for the legal services provided with a certificate. Recently, in response to studies that have recommended increased innovation in the delivery of legal aid services,⁸ LAO has begun to experiment with alternative delivery models.

In 2003, as part of its experimentation efforts, LAO established a pilot project involving three Criminal Law Offices (CLOs), where staff lawyers would provide representation to financially eligible clients charged with criminal offences. These offices were established in three Ontario jurisdictions: Ottawa, Barrie, and Brampton. The criminal bar greeted the creation of these staff offices with considerable skepticism (for reasons detailed in Part I, below).

In order to assess the impact of this innovation, LAO commissioned an independent evaluation to examine the performance of these three offices over their first three years of operation, from 2004 to 2007. Frederick Zemans, a co-author of this article, was one of the chief investigators involved in that evaluation. As a discrete aspect of the larger evaluation framework, LAO also agreed to the development of a peer review process to assess the quality of the work performed by the lawyers in the CLOs that made up this pilot project. To assist with the development of the peer review process, Zemans recruited the second co-author, James Stribopoulos, a law professor and former criminal trial and appellate lawyer.

evaluation of specified aspects of service provided by a person or organization against specified criteria and levels of performance by an independent person (or persons) with significant current or recent practical experience in the area(s) being reviewed.” See Alan Paterson, “Peer Review and Quality Assurance” (2006-2007) 13 *Clinical L. Rev.* 757 at 759.

8. Over the last decade, legal aid in Ontario has been the subject of three separate reports, each of which addressed the need for experimentation in the delivery of legal aid services. See Frederick H. Zemans & Patrick J. Monahan, *From Crisis to Reform: A New Legal Aid Plan for Ontario* (North York: York University Centre for Public Law and Public Policy, 1997) [*Zemans & Monahan Report*]; Ontario Legal Aid Review, *Report of the Ontario Legal Aid Review: a blueprint for publicly funded legal services*, vol. 3 (Toronto: Ontario Legal Aid Review, 1997) (Chair: John D. McCamus) [*McCamus Report*]. These two reports spurred the current changes. More recently, see Michael Trebilcock, *Report of the Legal Aid Review 2008* (Toronto: Ontario Legal Aid Review, 2008), online: <http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/trebilcock/legal_aid_report_2008_EN.pdf> [*Trebilcock Report*].

Borrowing from a model created in England and Wales, which is now well established both there⁹ and in Scotland,¹⁰ the authors were responsible for developing and administering the first evaluation of Canadian legal aid lawyers by means of a peer review process. This article tells the story of the peer review experiment. It proceeds in two parts: Part I weaves together two seemingly unrelated debates, which converge to provide the backdrop for the discussion of the peer review experiment in Part II.

On the one hand, there is the long-standing debate in Canada regarding the best delivery model for legal aid services. In Ontario, that debate can be traced to the very origins of legal aid. At present, it looms large in the context of recent controversies surrounding the adequacy of legal aid funding and the rate of remuneration for legal aid lawyers. These persisting tensions provided the backdrop for the establishment of the three CLOs that were the subject of the experiment detailed in this article.

At the same time, there is another protracted debate regarding both the desirability and the feasibility of developing and implementing quality assurance measures for the legal profession.¹¹ Because of their professional status, it has been assumed that Canadian lawyers provide their services at a high level of competence. Although that assumption has occasionally been questioned, there has been virtually no success so far at efforts to empirically assess such claims beyond the initial licensing requirements for entry to the bar.

9. In recent years, the Legal Services Commission (LSC), which is responsible for the provision of legal aid services in England and Wales, has worked closely with the Institute for Advanced Legal Studies (an arms-length organization) to develop and implement a peer review process. This process has been up and running since 2005. See generally Legal Services Commission, *Independent Peer Review of Legal Advice and Legal Work: A Consultation Paper* (London: Legal Services Commission, 2005), online: <http://www.legalservices.gov.uk/docs/civil_contracting/Independent_Peer_Review_Process1105.pdf> [*Consultation Paper on Independent Peer Review*].

10. See *supra* note 7.

11. It has been observed that the legal profession lags behind other professions such as doctors and chartered accountants when it comes to ensuring basic levels of competence amongst its membership. See Law Society of Upper Canada, "Quality Assurance in the Legal Profession" (2006) 10:3 Ont. Law. Gaz., online: <<http://www.lsuc.on.ca/news/b/olg/fallwinter-2006-vol10-no3/quality-assurance-in-the-legal-profession/>>. The Law Society of Upper Canada has developed a Spot Audit Program and a Practice Management Review Program. These programs, however, are focused on practice management procedures and maintaining proper financial records, rather than the quality of legal services provided by the lawyer to individual clients.

Part I introduces these two narratives, which ultimately converge to provide the backdrop for the peer review experiment undertaken by the authors. That experiment is described in Part II, which chronicles the various obstacles that were confronted in order to make even a very limited form of peer review a reality, and explains how each was ultimately overcome. A key challenge was negotiating a baseline understanding of “competence” and “quality.” To do this, the authors borrowed from, and then elaborated upon, the evaluative criteria used for peer review in England, Wales, and Scotland. Like their counterparts in the United Kingdom, the authors developed a process-driven set of criteria. In doing so, they deliberately avoided some admittedly difficult and deeply contested questions regarding the lawyer’s professional role. The realities of designing and executing a peer review project of this kind, which necessitated the process-driven criteria developed and employed by the authors, are discussed in detail below.

The experiment demonstrates that peer review is a viable quality assurance tool for assessing the delivery of publicly funded legal aid services. At present in Ontario, quality assurance as developed by LAO is primarily dependent upon self-reporting by lawyers who seek membership on a particular legal aid service panel (for example, criminal law, family law, and immigration law) regarding their level of experience in that area. Self-reporting is generally perceived as a proxy for competence. The utility of this sort of self-reporting as a quality-assurance tool has recently been called into question.¹² In addition, two recent

12. For example, in October 2007, LAO established the “Extremely Serious Criminal Cases Panel.” Admission onto the panel is required before a lawyer may be retained through legal aid to defend a “serious criminal charge,” which is defined as one carrying a “mandatory minimum sentence of four years.” Eligibility depends on having a prescribed amount of experience (for example, at least 100 days of contested trial or preliminary hearing work). At the Goudge Inquiry, the adequacy of these criteria was questioned by Professor Michael Code, who testified at the Inquiry and whose evidence was accepted. That testimony was summarized in the final report:

Professor Code was of the view that the LAO Extremely Serious Criminal Cases Panel is an inadequate measure for ensuring that only competent counsel defend child homicide cases. The current eligibility criteria do not ensure competence in these cases. Moreover, he emphasized that in pediatric forensic pathology cases, counsel must be “strongly qualified to cope” with pediatric forensic pathology evidence in order to competently defend such cases. He also stressed the ethical rule that defence counsel cannot take on cases that they are not competent to conduct and suggested that LAO and the Law Society of Upper Canada insist that defence lawyers not take on these cases unless they are trained in pediatric forensic pathology. In an independent research study for the Inquiry, Professor Christopher Sherrin also documented the difficulties that defence counsel has in obtaining training in pediatric forensic pathology.

studies have underlined the need for the introduction of more sophisticated quality assurance measures in Ontario legal aid services. The *Trebilcock Report*, a review of legal aid in Ontario, specifically recommended a “targeted form of peer review ... where a pattern of client complaints or billing irregularities suggests a need for further scrutiny of a legal aid service provider’s legal aid files.”¹³ The *LeSage & Code Report*, which examined the problems associated with long and complex criminal trials, echoed this recommendation.¹⁴ The experiment that is detailed in this paper demonstrates that these recommendations are indeed feasible.

The viability of peer review as a quality assurance tool for legal professionals has far-reaching implications. For instance, in the hands of researchers, it could play an important role as an evaluative tool in comparing the strengths and weaknesses of competing legal aid delivery models. From an access to justice standpoint, the benefits of peer review are obvious and considerable. Although expanding the breadth and depth of legal aid is an important step in the struggle for access to justice, the realization of that goal also requires that the lawyers delivering these services meet minimum competency standards. Peer review provides a means for ensuring that when a low income individual receives legal assistance through legal aid, a competent lawyer will be in their service to enhance their chances for justice.

I. THE LONG AND WINDING ROAD TO PEER REVIEW IN CANADA

To gain a sense of the larger context that provides the backdrop for the peer review experiment undertaken by the authors, it is necessary to have some

See *Inquiry into Pediatric Forensic Pathology in Ontario: Report*, vol. 3 (Toronto: Queen’s Printer for Ontario, 2008) at 458-59.

13. *Trebilcock Report*, *supra* note 8 at 151. Professor Trebilcock does not recommend, “at this time, the highly proactive, system-wide, and costly form of peer review of legal aid service providers that has recently been initiated in the U.K.” Although peer review in the United Kingdom is indeed costly, it appears to account for less than .01% of the LSC’s annual budget. For example, in 2007, the total cost of peer review was £1,716,000, relative to a total legal aid budget of approximately £2 billion per year. See Legal Services Commission, *Annual Report and Accounts 2006/07* (London: The Stationery Office, 2007) at 68, 101, online: <http://www.legalservices.gov.uk/docs/archive/FINAL_56543TSOLegalServicesRpt_WEB.pdf>.
14. See Hon. Patrick J. LeSage & Michael Code, *Report of the Review of Large and Complex Criminal Case Procedures* (Toronto: Queen’s Printer for Ontario, 2008) at 95-120, online: <http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/lesage_code/lesage_code_report_en.pdf> [*LeSage & Code Report*].

understanding of two seemingly unrelated narratives that ultimately converge to provide the context for this experiment. On the one hand, there are the contemporary controversies surrounding delivery models that can be traced to the origins of legal aid in Ontario. At the same time, there are also long-standing discussions concerning the viability and desirability of quality assurance programs in the legal profession more generally.

We begin with a brief introduction to the history of legal aid, with particular emphasis on its development in Ontario. For almost half a century, Canada has witnessed the rise of publicly funded legal aid programs in each of its provinces and territories. Over the years, these programs have taken various forms, with two models—the “certificate model” and the “staff model”—competing for dominance and, at times, co-existing within particular jurisdictions.¹⁵ Ontario is no exception.¹⁶

By the mid-1970s, following some early tinkering, legal aid was firmly established in Ontario and administered through a combination of three delivery models: certificates,¹⁷ duty counsel,¹⁸ and community legal clinics.¹⁹ With respect

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15. For an overview of the legal aid service-delivery models used in each of Canada’s provinces and territories, see Albert Currie, “Legal Aid Delivery Models in Canada: Past Experience and Future Developments” (1999-2000) 33 U.B.C. L. Rev. 285 at 288.
 16. For a description of the beginnings of legal aid in Ontario, starting in 1951 with a small group of criminal lawyers who undertook pro bono work in capital cases and were then followed by local committees throughout the province that formalized these arrangements, see Martin L. Friedland, “Criminal Justice in Canada Revisited” (2004) 48 Crim. L.Q. 419.
 17. The certificate system, which came first in 1967, replaced earlier arrangements that saw indigent accused in capital cases being represented by lawyers on a pro bono basis. The certificate system followed the recommendations of a joint committee (made up of representatives from the government and the Law Society) that considered a number of different legal aid delivery models and weighed the benefits and drawbacks of systems employed in the United States, including the assignment of counsel by courts, voluntary defenders, public defenders, and mixed private and public systems. The joint committee preferred a certificate or “judicare” system. Like the system in use (at the time) in England and Scotland, clients that qualify for legal aid were issued a certificate that could be redeemed for legal services by any private lawyer who accepted legal aid. The lawyers who accepted these certificates were to receive fair compensation for their work. See generally Ontario, *Report of the Joint Committee on Legal Aid* (Toronto: Joint Committee on Legal Aid, 1965). This system was implemented through provincial legislation that established the Ontario Legal Aid Plan (OLAP). See *Legal Aid Act*, S.O. 1966, c. 80.
 18. See Ontario, Ministry of the Attorney General, *Report of the Task Force on Legal Aid* (Toronto: Ontario Ministry of the Attorney General, 1974) at 65-70 [*Report of the Task*

to criminal, family, and civil litigation, however, the certificate system was the principal way in which legal aid services were delivered.²⁰ These various components made up the Ontario Legal Aid Plan (OLAP), which was financed by the government of Ontario, but administered by the Law Society of Upper Canada (LSUC).

For nearly two decades, all went relatively well in Ontario's legal aid system. Operational costs, which continued to be financed by the government of Ontario, increased in direct response to growing demand, ensuring adequate funding for OLAP to meet the legal needs of the province's poor.²¹

Although relatively modest, the compensation provided under OLAP's certificate system was perceived as fair. It proved sufficient to attract experienced lawyers to legal aid matters. This was especially true in criminal cases, where some of the province's most respected criminal lawyers routinely acted in cases funded by legal aid. Although no one realized it at the time, the 1970s and 1980s would come to mark the "golden years" for legal aid in Ontario.

During the same period, the subject of quality assurance was beginning to emerge as a topic for concern within the legal profession. It makes sense, then, to turn now to this second narrative, which is equally important in framing the experiment detailed below in Part II.

The most thorough discussion of this subject at the national level occurred at a 1978 conference convened by the Federation of Law Societies of Canada

Force on Legal Aid]. Beyond the certificate system, OLAP also maintained a limited duty counsel program to provide representation in criminal courts for individuals without counsel. These lawyers, employed by OLAP, were to assist the unrepresented during the preliminary phases of the criminal process, including at bail hearings or during their first court appearance, and essentially cover any gaps in representation between an individual's formal legal aid application, the issuance of a certificate, and the hiring of a private lawyer.

19. *Ibid.* at 59-64. By the early 1970s, gaps in the certificate and duty counsel system were evident. A further study recommended augmenting the certificate and duty counsel systems with neighbourhood clinics staffed by lawyers and paralegals who could provide specialized "poverty law" services to clients, but leaving divorce, matrimonial work, and conventional criminal and civil litigation in the hands of the private bar under the certificate system. For a detailed discussion of why community legal clinics proved necessary, see Lenny Abramowicz, "The Critical Characteristics of Community Legal Aid Clinics in Ontario" (2004) 19 J. L. & Soc. Pol'y 70 at 71-73.
20. See generally *Report of the Task Force on Legal Aid*, *ibid.*
21. Ruth Lawson, "The Ontario Legal Aid Plan in the 90's" (1998) 16 Windsor Y.B. Access Just. 252 at 252.

(FLSC) and the Canadian Bar Association (CBA) in order to address the quality of legal services. W.H. Hurlburt, Director of the Institute of Law Research and Reform (Edmonton) and past president of the FLSC, wrote the introduction for, and edited the proceedings of, the conference.²² In his introduction, Hurlburt stated that the time had arrived for the Canadian legal profession to seriously concern itself with the issue of competence in delivering quality legal services. As explained elsewhere, the profession previously “concerned themselves only with standards of conduct, *i.e.* ethical standards, and not with standards of performance, *i.e.* competence, and did not perceive that failure to provide competent service may itself be unethical.”²³

In a subsequent article, “Incompetent Service and Professional Responsibility,”²⁴ Hurlburt provides an excellent overview of the development of competence as a concept that should be more closely linked to the quality of legal services. He discusses two formal acts of recognition of the profession’s responsibility for competence that occurred in 1973. In Quebec, the Professional Code enacted in that year provided for investigation by professional governing bodies of the competence of their members. In British Columbia, a Special Joint Committee on Competency of the law society and the B.C. Branch of the CBA made extensive recommendations that the Law Society should be given jurisdiction over competence, which were followed by legislation.²⁵ In 1974, the CBA introduced a new *Model Code of Professional Conduct* (CBA Code) which accepted the American view that a lawyer has an “ethical duty to give competent service.”²⁶ The first expectation of the CBA Code is that lawyers must provide

22. W.H. Hurlburt, ed., *The Legal Profession and Quality of Service: Report and Materials of the Conference on Quality of Legal Services* (Ottawa: Canadian Institute for the Administration of Justice, 1979) [Hurlburt, *The Legal Profession and Quality of Service*].

23. W.H. Hurlburt, “Incompetent Service and Professional Responsibility” (1980) 18 Alta. L. Rev. 145 at 145 [Hurlburt, “Incompetent Service and Professional Responsibility”].

24. *Ibid.* For a more detailed discussion of the legislative attempts to deal with competence and incompetence in the Canadian legal profession, see Pamela Siegel, “The Lawyer’s Obligation of Competence: Policy Implications and Current Legislative Authority to Regulate Competence in Canada and Britain,” in Hurlburt, *The Legal Profession and Quality of Service*, *supra* note 22, 457. Siegel discusses how legislative efforts to regulate lawyers’ professional conduct focused more on ensuring honesty and personal integrity than on legal competence.

25. Hurlburt, “Incompetent Service and Professional Responsibility,” *ibid.* at 145.

26. *Ibid.* at 150. Hurlburt discusses how the lawyer’s ethical duty to provide competent services specifically derives from the CBA *Code of Professional Conduct*:

competent service. As Hurlburt notes:

A practising lawyer, by the very fact that he practices, holds himself out as having the knowledge, skill and judgment of a lawyer. He knows that a client consults him for that reason, and by undertaking work for the client he impliedly undertakes to have and apply the knowledge, skill and judgment necessary for the work. If he does not have it and does not intend to get it, he is in automatic and immediate breach of an ethical duty to the client.²⁷

The second requirement of the CBA Code requires the practising lawyer to “serve the client in a conscientious, diligent and efficient manner so as to provide a quality of service at least equal to that which lawyers generally would expect of a competent lawyer in a like situation.”²⁸ Currently, the ethical duty to provide competent service is included in most provincial law society codes of professional conduct.²⁹

In 1975, the Law Society of Alberta formally approved a committee report recognizing its responsibility in the field of competence, and in 1977, the Law Society of Manitoba’s Special Committee on Competence, commonly known as the Matas Committee, made wide-ranging recommendations for the promotion and control of competence.³⁰ In the *Matas Report*, competence is linked closely to quality: “[c]ompetence is the demonstrated capacity to provide a quality of legal

1. The lawyer owes the client a duty to be competent to perform any legal services undertaken on the client’s behalf.

2. The lawyer should serve the client in a conscientious, diligent and efficient manner so as to provide a quality of service at least equal to that which lawyers generally would expect of a competent lawyer in a like situation.

See Canadian Bar Association, *Code of Professional Conduct*, rev. ed. 2004 and 2006 (Ottawa: Canadian Bar Association, 2006), c. 2, r. 1, 2 [CBA, *Code of Professional Conduct*].

27. Hurlburt, “Incompetent Service and Professional Responsibility,” *ibid.* at 149-50.

28. CBA, *Code of Professional Conduct*, *supra* note 26, c. 2, r. 2; see also Hurlburt, “Incompetent Service and Professional Responsibility,” *ibid.* at 150.

29. See e.g. Law Society of Upper Canada, *Rules of Professional Conduct*, r. 2.01 [*Rules of Professional Conduct*]. The Commentary to this rule states:

A lawyer should not undertake a matter without honestly feeling competent to handle it or being able to become competent without undue delay, risk, or expense to the client. This is *an ethical consideration* and is to be distinguished from the standard of care that a tribunal would invoke for purposes of determining negligence [emphasis added].

30. Hurlburt, “Incompetent Service and Professional Responsibility,” *supra* note 23 at 145-47. The *Matas Report*’s recommendations are included in Hurlburt, *The Legal Profession and Quality of Service*, *supra* note 22 at 358-62.

service at least equal to that which lawyers generally would reasonably expect of a lawyer providing the service in question.”³¹ The concepts of competence and quality are intertwined, and “in the case of an investigation of competence or incompetence, competence will be established or refuted by evidence of the quality of services actually rendered or by evidence of ability to render services as determined by examination.”³²

Hurlburt argues that it is the legal profession’s responsibility to maintain and improve the competence of its members for two reasons. First, it is unethical for a lawyer to undertake to provide services that he is not competent to undertake. Second, incompetent legal service, like other forms of unethical legal service, is injurious to the public interest and difficult for the public to detect.³³ He states that a lawyer’s duty to be competent should be enforced as a means of improving the quality of legal services, and that the governing body of the legal profession should assume responsibility to supervise and enforce legal competence.³⁴

There are concerns expressed by both governing bodies and members of the profession with respect to assessing the quality of legal services, and specifically, to the issue of invading solicitor-client confidentiality to review a client’s file for the purpose of assessing competence.³⁵ Hurlburt argues that such an intrusion is justified and balanced by the fact that “the protection of lawyers’ clients against unethical conduct by lawyers is an objective sufficiently important to justify the disclosure of clients’ information to those involved in the discipline process, who are lawyers, employees of the disciplinary body or official reporters who are obliged and accustomed to keep the information confidential.”³⁶

31. Hurlburt, *The Legal Profession and Quality of Service*, *ibid.* at 358.

32. Hurlburt, “Incompetent Service and Professional Responsibility,” *supra* note 23 at 147.

33. *Ibid.* at 149.

34. *Ibid.* at 161-62. It is beyond the scope of this article to examine whether the governing bodies of the legal profession are the appropriate supervising bodies for quality assurance. It was agreed during the 1980s in Canada that the legal profession, both through the provincial law societies and the CBA, should provide the leadership to maintain and improve competence in general through continuing legal education, specialization, and the use of their powers to police incompetence.

35. *Ibid.* at 156-59.

36. *Ibid.* at 157. Recognizing that “any invasion of the solicitor-client privilege is a serious matter and one which any responsible lawyer approaches with trepidation,” Hurlburt discusses proposals outlined by the Manitoba Committee to reduce the risk of injury to the client from unauthorized disclosure of confidential information. These proposals include treating a

It is significant that in the late 1970s, the Canadian legal profession's perception of quality and competence was changing from one that "relied upon the individual lawyer to maintain and improve his competence after admission" to a view that "it is [the profession's] responsibility to take measures to maintain and improve the competence of their members."³⁷ By 1978, the objectives of the Conference on Quality of Legal Services (Quality Conference) were two-pronged:

- (1) To improve the quality of legal services by measures designed to improve the general level of competence of lawyers, and
- (2) To control incompetence by measures designed to avoid the effects of the incompetence of individual lawyers.³⁸

The Quality Conference's fundamental proposition was "that the quality of legal services is ultimately dependent upon the honesty, integrity and good faith and competence of the individual practitioner."³⁹ The conference was thus concerned with one of the core issues in our peer review pilot project—that of defining "what is competence?"

It is interesting to consider the discussion at a plenary session at the Quality Conference in which the topic for debate was: "that a governing body dealing with a complaint of incompetence should have access to a lawyer's records relating to the matter complained of and other matters."⁴⁰ The positions taken then were echoed in the often-heated discussions that ensued when we raised the subject of peer review twenty-five years later.

During the debate, a speaker who opposed the motion stated that she perceived peer review as a "Draconian method" which might not even be effective at assessing competence, since "a large portion of the file is contained in the lawyer's head, and without that portion, it's almost impossible to interpret the portion that you find in the documents that are there."⁴¹ The price that the legal

breach of confidentiality as a matter of professional misconduct; giving clients who suffer damage from unauthorized breaches of confidentiality a right to compensation; and disallowing any original information found in any files to be used in any other legal proceedings (at 158-59).

37. Hurlburt, *The Legal Profession and Quality of Service*, *supra* note 22 at 9.

38. *Ibid.* at 18.

39. *Ibid.* at 38.

40. *Ibid.* at 57-67.

41. *Ibid.* at 57.

profession would have to pay to assess competence would be clients' confidences, an essential part of the lawyer-client relationship, and a privilege that must not be eroded. A judge attending asserted, "I'm appalled that no one is here to speak on behalf of the client, whose contract is now being changed unilaterally."⁴² Another voice, in opposition to the motion, pointed out that if the resolution were passed, "the smarter, not necessarily competent practitioner, in fear of the confidence being let out that his client has given to him, will refuse to make notes and therefore may be more incompetent in helping his client."⁴³ Harry Arthurs (then Dean of Osgoode Hall Law School) favoured peer review of client files because "how else are we to detect a pattern of incompetence...? We cannot depend on a number of clients coming forward. By the very nature of incompetence much of it is obscured from the client's view."⁴⁴ A Quebec notary indicated that file review

has been regarded by our peers, not as a disciplinary measure, but much more as a preventative measure and a helpful measure for the people who are inspected. And I think it has brought improvement to the practice of some of the notaries and their competence. ... The only thing I can say, Mr. Chairman, is that it has worked very well. I don't recall having any complaints, or the Board of Notaries receiving any complaints, from the public as far as confidentiality is concerned.⁴⁵

The resolution was ultimately defeated, but the discussion remains as relevant—and as heated—today as it was in 1978. The report of the Quality Conference noted that in Quebec, peer review was required of notaries by statute, and recommended that peer review for lawyers should be given further study to determine whether such a system would be practicable and desirable.⁴⁶

42. *Ibid.* at 64.

43. *Ibid.* at 65.

44. *Ibid.* at 60.

45. *Ibid.* at 59.

46. *Ibid.* at 65. Another speaker in favour of peer review of client files argued that such an assessment is done to help and not hurt the client. The speaker argued that the issue has been blown out of proportion since the reality is that, in most large law firms, many people already have access to a client's file. This has not made the public concerned, nor should it:

What's the difference between lawyers, for instance, who are trying to investigate the affairs of somebody else? So that if one assumes that the investigating people can be committed to prescribe a code of conduct, it seems to me it's inevitable that they should have the right to look at somebody's files. How else are you ever going to judge the competence of a lawyer? If the man's in the courtroom, fine, everybody can see him. If he's a solicitor nobody sees the work, and there's only one way to see it and that's to go in the door, open the cabinet and have a look at the files (at 59-60).

In 1978, when peer review of lawyers was first being debated in Canada, the idea was embryonic, and that is how things remained for over a quarter of a century. The flashpoint for change, which led directly to the experiment undertaken by the authors, was the recent and still ongoing controversy in Ontario regarding both the funding of and access to legal aid services.

Recent controversies surrounding the delivery of legal aid in Ontario can be traced directly to the onset of a recession in the early 1990s. The economic downturn was severe and, by the middle of the decade, the province was running an \$11 billion budget deficit. In 1994, faced with rising legal aid costs—which had more than quadrupled from \$75 million to \$350 million over the preceding ten years—the provincial government capped its contribution to legal aid.⁴⁷ It committed to provide the LSUC with fixed amounts of funding, on a decreasing basis, for a four-year period.⁴⁸ The federal government also imposed a cap on increases in its contribution to OLAP.⁴⁹ This led to severe cutbacks, with OLAP reducing: (1) the types of legal matters that it would agree to fund, (2) the number of hours that lawyers would be compensated for on certain types of cases, and (3) the hourly rate that lawyers could charge for legal aid services.⁵⁰ The results were dramatic. The number of legal aid certificates issued was reduced from 231,383 in 1991-1992 to 80,000 in 1996-1997.⁵¹ At the same time, as one would expect given the extent of the cutbacks, there was a drastic increase in the number of self-represented accused persons appearing in the province's criminal courts.⁵² Not surprisingly, these changes were extraordinarily unpopular with criminal defence lawyers, most of whom had historically accepted at least some legal aid work. The cutbacks led to a crisis of confidence, with many

47. See Martin L. Friedland, "Governance of Legal Aid Schemes" in *McCamus Report*, *supra* note 8, 1017 at 1027-28. For a description of the combination of circumstances that led to this profound increase in the demand for legal aid, see Lawson, *supra* note 21 at 252-53.

48. See Lawson, *ibid.* at 252.

49. Friedland, "Governance of Legal Aid Schemes," *supra* note 47 at 1027-28.

50. Lawson, *supra* note 21 at 252-53.

51. *Ibid.* at 256.

52. *Ibid.* On the growing number of self-represented accused in Canada's criminal courts more generally, see Robert G. Hann *et al.*, *Court Site Study of Adult Unrepresented Accused in Provincial Criminal Courts: Part 1: Overview Report* (Ottawa: Department of Justice Canada, 2002), online: <http://canada.justice.gc.ca/eng/pi/rs/rep-rap/2003/rr03_la2rr03_aj2/rr03_la2-rr03_aj2.html>.

criminal lawyers deciding to simply stop accepting legal aid. In some parts of the province, these efforts were more organized, with all lawyers taking job action and collectively withdrawing their services from legal aid clients.⁵³

Public discourse regarding legal aid shifted, with an increased focus being placed on controlling costs and a corresponding decrease in the emphasis on meeting needs.⁵⁴ Following this, there were two major reports which explored options for the future and made a number of recommendations.⁵⁵ The most important recommendation proposed that the administration of legal aid be taken away from the LSUC because an independent Crown agency would be better positioned to interact with the provincial government. Another recommendation suggested alternative models for the delivery of legal aid services, especially in relation to criminal law, where reliance on the certificate model had proven costly.⁵⁶

In the aftermath of these recommendations, the Ontario Government enacted the *Legal Aid Services Act, 1998*.⁵⁷ The Act established LAO as an independent but publicly funded and publicly accountable non-profit corporation, to administer legal aid in the province.⁵⁸ Amongst its stated purposes, the Act was intended to “promote access to justice” throughout the province through “consistently high-quality legal aid services” delivered “in a cost-effective and efficient manner.”⁵⁹ Also significant for this inquiry is the Act’s express purpose of “encouraging and facilitating flexibility and innovation in the provision of legal aid services, while recognizing the private bar as the foundation for the provision of legal aid services in the areas of criminal law and family law.”⁶⁰

53. See Tracey Tyler, “Criminal lawyers want agency to run legal aid” *Toronto Star* (24 November 1995) A5; Tracey Tyler, “Another legal aid walkout looms, Lawyers accuse province of stalling on promise to pay” *Toronto Star* (27 October 1995) A1; Lee Prokaska, “Two lawyers stop taking legal aid work: Others will follow, says law association” *The Hamilton Spectator* (28 October 1995) B1; and Tracey Tyler, “Legal aid jobs are refused, Lawyers angry at province’s refusal to fund aid plan” *Toronto Star* (23 August 1995) A2.

54. For a critical evaluation of this apparent shift in priorities, see Mary Jane Mossman, “From Crisis to Reform: Legal Aid Policy-Making in the 1990’s” (1998) 16 *Windsor Y.B. Access Just.* 261.

55. See *Zemans & Monahan Report*, *supra* note 8; *McCamus Report*, *supra* note 8.

56. *Zemans & Monahan Report*, *ibid.*; *McCamus Report*, *ibid.*

57. S.O. 1998, c. 26.

58. *Ibid.*, s. 1(d).

59. *Ibid.*, s. 1(a).

60. *Ibid.*, s. 1(b). See also s. 14(2).

Despite these legislative assurances, the criminal defence bar in Ontario, weary from the funding struggles of the 1990s, remained skeptical regarding the future of the certificate system. By the early 2000s, the criminal bar's apprehension had become focused on the hourly rate of remuneration for legal aid work—the tariff—which had remained unchanged for over fourteen years. In the aftermath of a substantial increase in prosecutor's salaries in Ontario, the defence bar's resentment boiled over with job actions in several parts of the province, where criminal lawyers en masse refused to accept legal aid.⁶¹

It was against this backdrop that, in 2003, LAO announced the creation of three CLOs in Barrie, Brampton, and Ottawa.⁶² These offices were opened in the late spring and summer of 2004 to provide representation to financially eligible accused who were unable to obtain a legal aid certificate (because they did not meet the “loss of liberty” criterion that had become a precondition for legal aid funding following the cutbacks of the 1990s) and to accused who were granted a certificate and chose to hire a CLO lawyer. There was also an expectation that the CLOs would serve their local communities, with particular emphasis on the needs of the mentally ill, Aboriginal people, and young offenders. The staff lawyers and community legal workers were also expected to undertake community outreach and law reform activities.

As mentioned earlier, there is a longstanding debate regarding the optimum model for the delivery of legal aid services in Canada. Not surprisingly, those segments of the bar that have historically provided legal services under the certificate system (criminal lawyers, for example) strongly favour maintaining the status quo. Their principal argument in this debate boils down to a matter of quality: they maintain that the existing *judicare* model provides clients with a

61. See Cheryl Stepan, “Lawyers to cast vote on legal aid boycott; After 15 years without a raise, frustrated defence bar pushes its case with attorney general” *The Hamilton Spectator* (5 June 2002) A4; Peter Van Harten, “Disorderly court as lawyers walk; ‘Study session’ walkout over ‘disgusting’ legal aid funding” *The Hamilton Spectator* (18 April 2002) A11. The remuneration issue continues to this day as the principal grievance amongst members of the private bar who continue to accept legal aid work. The *Trebilcock Report* is the most recent study that recommends a tariff increase. It also recommends the creation of a process going forward that will ensure periodic increases that take into account inflation. See *Trebilcock Report*, *supra* note 8 at 115-44.

62. See David Gambrill, “LAO establishing criminal law staff offices” *Law Times* 14:31 (15 September 2003) 1; David Gambrill, “Not political maneuvering, LAO staff lawyers part of a plan” *Law Times* 14:16 (5 May 2003) 1.

higher quality of legal assistance than would be received under a “public defender” system. This view, however, is more intuitive than it is empirical. Outside Ontario, a number of other provinces experimented with the use of staff offices for the provision of legal services.⁶³ The results have been the subject matter of extensive study and reporting.⁶⁴ The conclusions drawn from these various studies are summarized in a federal report as follows:

- (1) Staff lawyers spend less time per case than private lawyers.
- (2) Staff lawyers tend to plead clients guilty more often than do private lawyers.
- (3) Similar proportions of staff and private bar clients are convicted.
- (4) Staff lawyer clients draw fewer jail terms than private lawyer clients.⁶⁵

The debate remains ongoing. Proponents of the *judicare* model, such as members of the private bar, point to methodological shortcomings in the comparative studies undertaken so far. They argue that their principal flaw is an undue emphasis on outcomes based on statistical measurements without the multivariate controls—for example, accounting for factors such as case complexity—that are essential for ensuring that meaningful comparisons are being made.⁶⁶ Not far from the surface, however, is a motivation for this debate that goes beyond methodological differences. As the CBA frankly explains,

there are few areas of legal aid policy which appear to arouse such strong and varying opinions as the choice of delivery model. Ideology and personal experience come together on this topic, allowing most lawyers to hold and advocate positions with great conviction.⁶⁷

In such an environment, there is a critical need for objective empirical evidence regarding the relative merits of competing delivery models. In England

63. For an introduction to the delivery model debate in Canada and a review of the studies exploring the efficacy of the competing models, see Currie, *supra* note 15 at 289-95.

64. *Ibid.*

65. Canada, Department of Justice, *Patterns in Legal Aid II* (Ottawa: Department of Justice, 1995) at 41.

66. See Currie, *supra* note 15 at 295. This is a methodological flaw that the private bar rightly fastens upon in making its argument for maintaining the status quo. There has only been one study undertaken in Manitoba that partially controls for this variable. It concluded that even when controlling for the complexity variable, staff lawyers obtained similar results for lower costs (at 299-300).

67. Canadian Bar Association, National Legal Aid Liaison Committee, *Legal Aid Delivery Models: A Discussion Paper* (Ottawa: Canadian Bar Association, 1987) at 19.

and Wales, for example, peer review has proven useful in assessing the relative strengths and weaknesses of alternative models for criminal legal aid.⁶⁸ As Part II of this article will demonstrate, there is good reason to believe that it could do the same here in Canada. For now, it is necessary to complete the story of how the peer review experiment, which is the focus of this paper, came about.

LAO's three CLOs came into existence against the backdrop of the larger and long-standing delivery model debate. With the creation of this pilot project, LAO also recognized a need for an objective measure regarding the impact and effectiveness of these offices. To that end, it established the evaluation process to study and evaluate the performance of the three CLOs over their first three years of operation, from 2004 to 2007. Given the background outlined above, that review process was not without its own share of challenges. As the final evaluation report explains,

[a]n important aspect of the context for understanding the design and results of both the CLO initiative and this evaluation are the differing views that are held in different stakeholder communities about the "true purpose" and ultimate result of this service delivery innovation embodied in the CLOs. ... [S]ome members of the private bar have from the outset opposed the CLOs. That viewpoint is to a large extent driven by the widespread conviction that the CLOs were established as part of a generalized LAO strategy to erode *judicare*; and that some of the particular sites chosen by LAO for the CLOs were chosen as a "strikebreaking" measure, since it was in those sites where the heaviest withdrawal of service occurred during the Ontario bar's dispute with LAO over *judicare* tariff rates.⁶⁹

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68. See Lee Bridges *et al.*, *Evaluation of the Public Defender Service in England and Wales* (London: Legal Services Commission, 2007). Peer review was one of the tools employed to assess the relative quality of legal services provided by "contract" solicitors (private lawyers who provide legal aid services pursuant to government contracts) as compared to solicitors working in Public Defender Offices (PDOs). The study concluded that, with respect to quality, lawyers within the PDOs "performed consistently well, with some of the PDOs achieving standards significantly better than private practice, and at levels of excellence or 'competence plus' on the various measures of case handling" (at 261). In terms of cost-effectiveness, however, the study also concluded that the costs of delivering legal services through PDOs ranged "from between 40% to just over 90% higher" than doing so through the private offices (at 263).
69. Robert Hann, Fred Zemans & Joan Nuffield, *Evaluation of Criminal Law Offices: Third Year Report* (Toronto: Robert Hann & Associates Limited, 2008) at 1-2, online: <http://www.legalaid.on.ca/en/publications/reports/doc/CLO_EVAL_3rdYearReport_FINAL.pdf> [*CLO Evaluation Final Report*].

In an environment this charged, with some stakeholders responding to the establishment of the CLOs with outright hostility, it was essential to the integrity of the overall assessment process to obtain an objective measure of the quality of legal work performed by the lawyers in these offices. This established the perfect conditions for peer review to make its debut in Canada as a quality assurance tool for legal services.

II. THE PROCESS AND CHALLENGES OF PEER REVIEW IN ONTARIO

A. MAKING PEER REVIEW A PART OF THE EVALUATION PROCESS

Since it was first debated in Canada in the late 1970s, peer review has been accepted over the intervening years as a quality assurance measure for lawyers in England, Wales, and Scotland.⁷⁰ This has included the use of peer review to evaluate the quality of the work performed by lawyers in both the private and public sectors, from those involved in challenging welfare benefits decisions to those defending criminal cases and acting in immigration and refugee matters.⁷¹

Given the success of peer review in the United Kingdom, the evaluation team charged with assessing the performance of the CLOs over their first three years of operation concluded that, if properly designed and executed, peer review could provide an invaluable tool for measuring the quality of the legal services provided by the CLOs in Ontario.

B. METHODOLOGY

Once it was decided that peer review would form a part of the evaluation process, Stribopoulos was recruited to assist in designing and overseeing the peer review process. Primarily a criminal law academic, Stribopoulos also has practical experience as a criminal trial and appellate lawyer.

Two major challenges in developing a peer review process were defining measures of quality and competency as they relate to the provision of legal services, and developing a methodology for assessing them. In this respect, the authors benefitted tremendously from the work already undertaken in England

70. See generally Paterson, *supra* note 7. See also *Consultation Paper on Independent Peer Review*, *supra* note 9.

71. Richard Moorhead *et al.*, *Quality and Cost: Final Report on the Contracting of Civil, Non-Family Advice and Assistance Pilot* (London: The Stationery Office, 2001).

and Wales by the Institute of Advanced Legal Studies (IALS), including its *Consultation Paper on Independent Peer Review*⁷² and the *Peer Review Crime Criteria*.⁷³ The latter document identifies the hallmarks of quality legal representation. It was developed through a consultative process involving members of the legal profession in England and Wales, as well as a number of other interested stakeholders. In other words, the criteria resulted from a deliberative process that involved a number of knowledgeable and respected participants who reached a consensus on what quality legal representation should look like.⁷⁴

Taking guidance from these resources, the authors developed a Peer Review Form for the CLO project.⁷⁵ Closely modeled on the *Peer Review Crime Criteria* developed by IALS,⁷⁶ with modifications to address procedural differences in the practice of criminal law in Canada, the form identifies a variety of criteria to be used in assessing a lawyer's performance in individual cases. The review is based, as is the case in England, Wales, and Scotland, on an examination of a lawyer's closed client files. The lawyer's performance is scored⁷⁷ based on a review of the work performed as it relates to these criteria:

- The File;
- Communication;
- Information and Fact Gathering;
- Advice and Assistance;
- The Work / Outcome;
- Efficiency; and
- General.⁷⁸

72. See *supra* note 9.

73. See Legal Services Commission, *Peer Review of Criminal Files* (London: The Stationery Office, 2006), online: <http://www.legalservices.gov.uk/docs/cls_main/PeerReviewofCrimeCriteria2006.pdf> [*Peer Review Crime Criteria*].

74. See *Consultation Paper on Independent Peer Review*, *supra* note 9 at 7-9.

75. The form is an appendix to the overall evaluation report. See Appendix A.2 in *CLO Evaluation Final Report*, *supra* note 69 at 201-04.

76. *Supra* note 73.

77. The Peer Review Form sets out a number of discrete criteria within each of these larger areas of inquiry. Most aspects of a lawyer's performance are rated on a five-point scale, for example, with "1" indicating "not performed /very poor," "3" indicating "competent" in the sense of meeting "the standard of a reasonably competent criminal lawyer," and "5" indicating "well above the standard of a reasonably competent criminal lawyer."

78. *CLO Evaluation Final Report*, *supra* note 69 at 201-04.

These criteria steer clear of larger philosophical questions regarding the lawyer's professional role. For example, in a Canadian context, Tanovich contends that "there is a disconnect between the role lawyers want to pursue (*i.e.*, a facilitator of justice) and the role that they *perceive* the profession demands they play (*i.e.*, a zealous advocate)."⁷⁹ By necessity, the evaluative criteria neither deny the existence of this tension nor attempt to resolve it. In fact, some scholars would contend that such resolution is simply not possible. Tata argues, for example, that the proper role of the lawyer "is highly contestable,"⁸⁰ and that it is ultimately "mediated and refracted through a range of normative lenses."⁸¹

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79. David Tanovich, "Law's Ambition and the Reconstruction of Role Morality in Canada" (2005) 28 Dal. L.J. 267 at 270 [emphasis in original]. Tanovich argues that the lawyer's role is in the midst of a transition toward greater acceptance of the lawyer as "facilitator of justice." Other commentators would characterize this transition rather critically. For Spaulding, the move has been away from "client centered representation," and toward "cause" or "identification" lawyering. He criticizes the latter as "typically a self-interested perversion of the service norm." See Norman W. Spaulding, "Reinterpreting Professional Identity" (2003) 74 U. Colo. L. Rev. 1 at 7.
80. Cyrus Tata, "In the Interests of Clients or Commerce? Legal Aid, Supply, Demand, and 'Ethical Indeterminacy' in Criminal Defence Work" (2007) 34 J.L. & Soc'y 489 at 496. See also Tamara Goriely, "Debating the quality of legal services: differing models of the good lawyer" (1994) 1 Int'l J. Leg. Prof. 159 (also cited by Tata on this point).
81. Tata, *ibid.* Tata goes on to identify and define a non-exhaustive list of these competing lenses, as follows:

Trait perspective – [W]ith its emphasis on distinct legal knowledge, skill, and accuracy, whereby technical knowledge is applied to case "facts." Service to the client (and indeed the wider public interest) comes before narrow self-interest. The invocation of the trait perspective suggests a formalistic approach to problem-solving: there is no acknowledgement that cases are constructed by the process; the facts are the facts; the rules are the rules; there are correct answers waiting to be found to legal problems. Thus, cases are either inherently simple or inherently difficult.

Bureaucratic-efficiency model – [W]hich stresses the importance of mass casework and "efficiency" on the basis of the supposed core "needs" of different categories of cases. In this perspective, there is an emphasis on the criminal process as a conveyor belt in which the best interests of the case are served by following standardized practices. A voracious desire for early guilty pleas is justifiable because from experience one can expect that the accused/defendant is likely to plead guilty anyway, and so clients (and/or others) may be rewarded with a discounted sentence. Clients are regarded as wanting to "put off the evil day." Pleading is therefore seen as a largely tactical matter of gamesmanship, enveloped in an "ideology of triviality."

Adversarialism – [W]ith its emphasis on suspicion of and protection from the state. This justifies, for example, the need to put the prosecution to proof; a willingness to obstruct and delay the prosecution; the strongest presumption of innocence; and the moral aversion to plea bargaining. A quality indicator might be the overall acquittal rate.

Radical lawyering – [W]here there is a conception of community need because of social disadvantage, which requires to be tackled. Law is seen as an instrument of social change or amelioration of oppression.

The authors acknowledge that there is indeed long-standing and considerable controversy surrounding the lawyer's role and professional identity.⁸² Nevertheless, there is also a fair amount of consensus amongst lawyers—even lawyers who hold conflicting visions of their professional role—as to the process involved in being a competent lawyer. For example, borrowing on Tanovich's categories, both the "facilitator of justice" and the "zealous advocate" would undoubtedly agree that a competent lawyer must meet with the client and keep the client abreast of developments in his or her case. There are a number of other potential examples of these sorts of core competency requirements that are the subject of widespread consensus within the legal profession.⁸³ And it is these large areas of

Client-centered – [E]mphasizes the different approaches of clients to different problems and the importance of their particular concerns and emotional needs. Although this may be seen as a client participation model, a client-centered perspective can also be selectively used to explain particular decisions guided by the lawyer as those motivated by the client; and to emphasize the voluntariness of decisions of clients who "instruct" their lawyers (at 497).

- Brooks offers a more comprehensive list, identifying and defining seventeen different ethical identities that lawyers may assume, from time to time. See Richard O. Brooks, "Ethical Legal Identity and Professional Responsibility" (1990) 4 *Geo. J. Legal Ethics* 317 at 322-51.
82. Tanovich, *supra* note 79. For some other well-known historic and contemporary examples, see also Oliver Wendell Holmes, Jr., "The Path of the Law" (1896-1897) 10 *Harv. L. Rev.* 457; Charles Fried, "The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation" (1975-1976) 85 *Yale L.J.* 1060; Anthony T. Kronman, *The Lost Lawyer: Failing Ideals of the Legal Profession* (Cambridge: The Belknap Press of Harvard University Press, 1993); and William H. Simon, *The Practice of Justice: A Theory of Lawyers' Ethics* (Cambridge: Harvard University Press, 1998). For an exhaustive bibliography of pre-1980 works on the topic, see Richard L. Abel, "The Sociology of American Lawyers: A Bibliographic Guide" (1980) 2 *Law & Pol'y Q.* 335.
83. There is wide consensus, for example, on the need to identify relevant legal issues and potential defences, conduct legal research, interview potential witnesses, carry out work in a timely manner, etc. These core competency requirements are often captured in the rules of professional conduct governing lawyers in particular jurisdictions. See *e.g.* *Rules of Professional Conduct*, *supra* note 29, r. 2.01(1). We do not mean to suggest that the lawyering process is itself morally neutral. For example, Janet Mosher has argued that the "lawyering process" can serve to "undermine progressive social change." She contends that the lawyering process can do so

because lawyers routinely and actively suppress the voice and agency of the persons they purport to "represent." For decades lawyers have purported to know what it is that their marginalized clients need (they have frequently been authoritative arbiters of such needs) and while they have engaged in zealous efforts to satisfy those needs, they have done so in a manner which includes the "client" as at best a marginal player, but more commonly an observer or mere object of the lawyering efforts.

See Janet E. Mosher, "Legal Education: Nemesis or Ally of Social Movements?" (1997) 35 *Osgoode Hall L.J.* 613 at 616.

consensus that ultimately provided the foundation for the peer review criteria developed by the IALS for use in England and Wales, as well as the analogous criteria developed by the authors for use in a Canadian context. That said, the road towards making peer review a reality was not without its share of hurdles.

A major challenge, which became manifest in a number of different ways as the process went forward, was the absence of any experience with peer review within the legal community in Canada. As a result, at least initially, the proposal was met with skepticism on the part of the various stakeholders, members of the private bar, lawyers employed by the CLOs, and some of the representatives at LAO who were involved in the evaluation process. There were two principal concerns that needed to be addressed.

First, concerns about client confidentiality were invariably raised, usually quite strongly, as an absolute impediment to going forward with peer review. These objections were reminiscent of those raised a generation earlier when the idea of peer review was first debated in Canadian legal circles.⁸⁴ It took considerable effort on the part of the authors to overcome these concerns.

Ultimately, it was accepted that quality assurance measures must implicitly come within the scope of any legal aid client's reasonable expectations regarding confidentiality.⁸⁵ Provisions in the *Legal Aid Services Act, 1998* that expressly contemplate such measures buttressed this.⁸⁶ Lingering concerns were addressed by having each peer reviewer enter into a contractual arrangement with LAO that included an express duty of confidentiality vis-à-vis the clients whose files were involved in this process.

If the use of peer review is expanded by LAO in the future, as has been recommended by both the *Trebilcock Report* and the *LeSage & Code Report*,

84. See *supra* notes 35, 36, and 42 and accompanying text.

85. In Ontario, for example, *The Rules of Professional Conduct* contemplate that, unless the client directs otherwise, it is an implied term of the client's retainer that the lawyer may "disclose the client's affairs to partners and associates in the law firm and, to the extent necessary, to non-legal staff, such as secretaries and filing clerks." *Rules of Professional Conduct, supra* note 29, r. 2.03(1) and supporting commentary. The rationale is that such disclosure is necessary in order to properly represent the client. Arguably, the same rationale can be offered for allowing access to the peer reviewers. Like the access of the lawyer's associates, the purpose of the peer reviewers is ultimately for the benefit of the client. This was essentially the view taken by Hurlburt in advocating peer review more than twenty-five years ago. See *supra* notes 22 and 24 and accompanying text.

86. See *supra* note 57, s. 92.

those applying for legal aid should be specifically informed that their file could be subject to review for quality assurance purposes. This would be based on the express understanding that confidentiality and privilege would be strictly maintained. For consent to be meaningful, clients would need to be given the option of opting out. But if the purpose of peer review and the maintenance of confidentiality were explained, it is difficult to imagine that many would. In any event, there would undoubtedly be enough files left in the pool to provide a wide enough sampling to make peer review meaningful.

Another concern, raised in varying degrees by members of all three CLOs, was the utility of a peer review process premised on a review of closed files. A fear was expressed that not everything a criminal lawyer does will necessarily be captured in the client's file. As a result, the evaluation process would be based on little more than a lawyer's file management ability, an important but discrete skill that is not necessarily reflective of the overall quality of legal services provided. The authors therefore spent a fair amount of time, at the outset of the process, explaining to the various stakeholders how the review of closed files can provide meaningful insight into a lawyer's overall performance. This included convincing the staff lawyers involved that good file management practices are a key indicator of a lawyer's competence. There are a number of reasons for this, each of which had to be identified.

First, a client's case can take time to work its way through the court process. If important information is not properly recorded, it can fade from the lawyer's memory and ultimately the benefit of that information may be lost. Good practice dictates that, early in the litigation process, a lawyer should take the time to carefully interview the client. Although experienced criminal lawyers may disagree on when the client interview should take place—whether it should come shortly after the lawyer is retained or after receipt of the Crown's disclosure materials—all would agree that a detailed interview relatively early in the life of a file is required. It is essential that the lawyer document the client's version of events while it is still fresh in the client's mind. This early record of the client's story can be critical later, for example, in preparing the client to testify at trial.

In addition to being in the best interests of the client, it is also in the best interests of a lawyer for his or her client file to be properly documented. There are two principal reasons for this. First, if a lawyer became unable to complete a client's matter, a well-documented file would permit another lawyer to assume responsibility for the file with minimal disruption. Second, if a client subse-

quently made allegations of ineffective assistance by counsel, either by seeking appellate relief or civil redress, a well-documented file might at least partly counter such a claim.

At least initially, it was expected that the peer review process would proceed based on the use of the Peer Review Form, combined with a definition of the ratings to be used that was similar in substance, style, and brevity to those developed by the IALS.⁸⁷ That proposal, however, was met with some resistance. Representatives of LAO expressed concern that the criteria and brief definitions for the available ratings were not detailed enough to guide the exercise of each peer reviewer's discretion. Without more detailed guidelines, there could be marked differences in how the assessment criteria were applied by individual reviewers, a variation that had the potential for significant unfairness.

The authors took these concerns seriously, developing detailed guidelines that structured and confined the discretion of individual peer reviewers so as to ensure consistency in the application of the evaluation criteria between files and between lawyers. The Peer Review Guidelines were developed to explain each potential score along a five-point scale with respect to each of the evaluation criteria.⁸⁸ Finally, remembering that lawyers hold differing perspectives on their professional role, the Peer Review Guidelines expressly recognized that

[t]he integrity of any peer evaluation depends on there being consistency between reviewers and their reviews. The PR Form is one means to ensure the required consistency. These guidelines elucidate the meaning of the criteria set out in the form. It is essential that the peer reviewers selected be experienced criminal lawyers who have both the disposition and training to review the work of their peers. Peer reviewers must appreciate that there are a number of "correct" approaches to handling any file, rather than approaching the file subjectively—*i.e.* "That's not the way I would have done it" approach.⁸⁹

Preliminary drafts of the Peer Review Form and Peer Review Guidelines were circulated to representatives from LAO, the directors of the individual CLOs, the lawyers at each of the CLOs, and senior members of the criminal bar. Feedback from all four groups was sought and used to make further revisions before the evaluation tools were finalized.

87. *Supra* note 9 at 10-13.

88. The Peer Review Guidelines ultimately consisted of a detailed sixteen page document. See Appendix A.1 of the *CLO Evaluation Final Report*, *supra* note 69 at 184-200.

89. *Ibid.* at 184.

Generally speaking, there was a remarkable amount of consensus amongst members of all four groups on what should be included and how each item should be valued. This experience seems to confirm that it is indeed possible to identify and describe, in objective terms, what good quality criminal legal service does and does not entail.

At the same time, there were a few topics that precipitated a considerable amount of debate on the content and ranking of particular criteria. Invariably, however, much of that debate was fuelled by the subjective experiences and practice habits of those involved. So, for instance, if a lawyer had a habit of acting on guilty pleas for clients without first obtaining written instructions, he or she might offer resistance to the idea that it is poor practice not to get such instructions in writing. To the extent that there were bumps along the road in finalizing the Peer Review Form and Peer Review Guidelines, it was typically due to idiosyncrasies in the practice habits of some of the participants.

In addition to creating the Peer Review Form and Peer Review Guidelines, it was also necessary to prepare the lawyers who were to be evaluated. Most had begun their careers as criminal lawyers in private practice, usually in small firms or as sole practitioners. As a result, few had ever had the quality of their work evaluated by other lawyers. Although these lawyers were co-operative, it was apparent that most were somewhat uneasy, and some even anxious, about the prospect of being subject to peer review.

A full-day training session was held for all eight of the lawyers at the three CLOs. At this session, the lawyers were introduced to the Peer Review Form and Peer Review Guidelines, and the peer review process was explained. In particular, the training articulated the need for sound file management practices, including the importance of fully documenting all steps taken in the litigation, since such practices were essential for a peer review process prefaced on a review of closed files. The professional obligation placed on all lawyers to maintain a proper file was strongly emphasized.

The initial goal was not simply to subject the work of the lawyers within the CLOs to peer review. The idea was to also recruit criminal lawyers from the private bar, whose practices were made up predominately of legal aid certificate work and whose level of experience was comparable to the lawyers employed at the CLOs, to serve as a comparison and control group. Unfortunately, despite a concerted effort to recruit members of the criminal bar, including running a full-page advertisement in the Ontario Reports (circulated weekly to every lawyer in

the province), it ultimately proved impossible to assemble a group of lawyers who would serve as a fair comparison group. As a result, the peer review process focused exclusively on the CLOs. The absence of a comparator group meant that this experiment would have limited utility in bringing an end to the debate regarding the competing delivery models for legal aid services. While this experiment cannot resolve that debate, it holds real promise as a methodological tool for the future. In fact, peer review has proven invaluable in addressing this very debate in England and Wales.⁹⁰

The recruitment of senior members of the criminal bar to serve as the peer reviewers took place during the winter of 2006-2007. Recruitment efforts included another full-page advertisement in the Ontario Reports, as well as targeted solicitations of individuals who were specifically recommended by the area directors of LAO in the three locations where the CLOs were located. In addition, a number of senior members of the criminal bar were contacted and encouraged to apply.

A number of applications were received from individuals who wished to serve as peer reviewers. From this pool of applicants, a short list was created and each candidate on that list was interviewed. Ultimately, three peer reviewers were selected. All three are experienced and respected members of the criminal bar. The most junior had been practising criminal law for ten years, while the most senior had over twenty-five years of experience. Each of the peer reviewers had some familiarity with the area in which the lawyers they would be evaluating were practicing. The three peer reviewers were paid for their time at an hourly rate that approximated the hourly rate of remuneration for lawyers performing legal aid work in Ontario.

They also received training in order to gain familiarity with the peer review process, including the Peer Review Form and the Peer Review Guidelines. This training included conducting practice peer reviews on actual closed files. The goals of this training were to ensure that each reviewer had a clear sense of the peer review evaluation criteria, and to lay the foundation for ensuring consistency in how the evaluation tools would be applied.

A list of files closed by each lawyer within the CLOs since August of 2006 (which post-dates the training session) was then supplied by LAO to Stribopoulos, who randomly selected twenty closed files for each of the lawyers at the CLOs

90. See *supra* note 68.

for assessment by the peer reviewers. The peer reviewers were instructed to attend the CLOs with these lists and request the specified files. The CLOs were not provided with advance warning of the files the peer reviewers would scrutinize. The peer reviewers were instructed to work through these lists until they had completed a review of fifteen files for each of the lawyers. In doing so they were advised to disregard any file that was not the subject of “meaningful work by the lawyer.” In other words, files that were opened but quickly closed—because, for example, it was determined that the client was not eligible for assistance from the CLO, or because the client ultimately decided not to be represented by the lawyer—were not considered. Ultimately, with at least some of the lawyers, the initial batch of twenty closed files proved insufficient. As a result, Stribopoulos forwarded updated lists in which five additional files were added to the list of files to be scrutinized for each lawyer.

Beyond scoring fifteen closed files for each of the lawyers at the CLOs, the peer reviewers also met with each lawyer at the end of the review process. These exit interviews enabled the peer reviewers to ask for clarification and explanations for any matters that remained unclear based on their review of the lawyer’s closed files. They helped to alleviate the concerns expressed at the outset of the process that closed file review would inadequately capture the overall quality of the legal work performed by CLO lawyers. To the extent that there were gaps in the documents contained in the files, the exit interview provided an opportunity for both the reviewer and the lawyer to fill them.

Based on their scoring of fifteen files for each lawyer, in conjunction with insights gained through the exit interview, the peer reviewers were required to prepare a peer review report for each of the lawyers being evaluated. In this report, the peer reviewers were asked to summarize their findings, highlight strengths and weaknesses observed, and make suggestions for future improvement. Ultimately, each peer reviewer was asked to give the lawyer evaluated an overall score based on a five-point scale.⁹¹ As a result, the process provided the

91. Each lawyer’s overall quality rating was to be informed not only by the scoring of the fifteen closed files assessed, but it was to also represent the peer reviewer’s global assessment of the lawyer’s overall performance, based on all of the files reviewed and the exit interview. In deciding on the lawyer’s quality rating, peer reviewers were directed by the following general ranking criteria:

5 – Excellent

The lawyer has performed well above the standard of a reasonably competent criminal lawyer.

The following may evidence this:

- Client's instructions are fully and appropriately recorded.
- Communication, advice and other work are carefully tailored to each individual client's circumstances.
- Clients are advised fully and correctly.
- All relevant legal and factual issues are identified and managed appropriately.
- The lawyer demonstrates in-depth knowledge and expertise in moving the case to final resolution.
- There is excellent use of tactics and strategies, demonstrating skill and expertise, in an attempt to ensure the best outcomes for clients.
- The lawyer adds value to the file, taking a fully proactive approach and considerably improving the client's position throughout the litigation.

4 – *Above Average*

The lawyer meets the standard of a reasonably competent criminal lawyer and in certain aspects of her work routinely exceeds that standard. The following may evidence this:

- Client's instructions are appropriately recorded.
- Advice and work is tailored to individual client's circumstances.
- Clients are advised correctly and completely.
- Issues are progressed comprehensively, appropriately and efficiently.
- Tactics and strategies are employed to achieve the best outcomes for clients.
- The lawyer adds value to the file and takes a proactive approach.

3 – *Competent*

The lawyer meets the standard expected of a reasonably competent criminal lawyer. The following may evidence this:

- Client's instructions on key issues are appropriately recorded.
- There is adequate but limited communication with the client.
- Key legal and factual issues are identified.
- Some evidence of tactics and strategy informing lawyer's approach.
- The advice and work is adequate although it may not deal with other linked issues beyond the most basic.
- Case outcomes are as should be expected.

2 – *Needs Improvement*

The lawyer is performing below the standard that is expected of a reasonably competent criminal lawyer, and his or her performance requires some improvement. The following may evidence this:

- Information is not being recorded or reported accurately.
- There is limited communication with client and it is sometimes of poor quality.
- Important legal or factual issues occasionally go unnoticed.
- The advice and other work are inadequate.
- Some cases are not being conducted with reasonable skill, care, and diligence.
- The timeliness of the communication, the advice and other work is inadequate.
- There are occasional lapses below the required standard.

1 – *Very Poor*

The lawyer is performing very poorly and is consistently falling well below the standard of the reasonably competent criminal lawyer. Significant improvement is required in order for the lawyer to meet the reasonable competence standard. The following may evidence this:

- Information is not being recorded or reported accurately.
- Communication with the client is very limited and often of poor quality.
- Important legal and factual issues regularly go unnoticed.
- There is a clear lack of preparedness at important stages of the litigation.
- Cases in general are not being conducted with reasonable skill, care, and diligence.
- The timeliness of the communication, the advice or the work is often inadequate.
- There is no meaningful service being provided, or the service leads to potential or actual prejudice to the client.
- Ethical requirements are being ignored, for example acting on a guilty plea where a client does not admit his guilt.

See *CLO Evaluation Final Report*, *supra* note 69 at 103-05.

lawyers involved with what was, for most, an unprecedented opportunity to receive constructive feedback on their professional performance.⁹² If acted upon, this feedback could provide a benefit not only for the lawyer evaluated, but also for that lawyer's future clients.

To ensure that the peer review criteria were applied consistently, Stribopoulos conducted a separate double-blind check on the work of each peer reviewer. On the completion of the work, each peer reviewer supplied Stribopoulos with a list of the fifteen closed files reviewed for each lawyer. The peer reviewers did not share anything about their findings with Stribopoulos. Using these lists, Stribopoulos then attended the three CLOs and reviewed 20 per cent of the files that were considered by the peer reviewers, again scoring each file using the Peer Review Form and Peer Review Guidelines.

On the completion of his reviews, Stribopoulos then communicated to Zemans his general findings regarding how each of the lawyers in the CLOs would be scored based on his assessment. In each and every case, Stribopoulos's conclusions corresponded with those of the peer reviewers. In other words, the ultimate findings were those not only of each peer reviewer, but also of Stribopoulos, whose reviews proceeded separately from that of the individual peer reviewers. This consistency in scoring was the undoubted result of the training undertaken with the peer reviewers. By working through and scoring a number of sample files together, the peer reviewers became familiar with the Peer Review Form and Peer Review Guidelines, and this solidified the application of uniform standards.

C. SUMMARY OF RESULTS

By way of summary, it is worth noting that the average score of the eight lawyers who were evaluated by the peer reviewers was 3.5 on the five-point scale, indicating that the lawyers working at the CLOs were generally found to be providing legal services that exceeded the standard that one would expect of reasonably competent criminal lawyers (a score of "three" equates with "competent," while a

92. Each of the lawyers was provided with a copy of the peer reviewer's report. We do not mean to suggest that opportunities for constructive feedback do not exist for all lawyers. At larger firms or in a clinical environment, performance evaluations are routine. Nevertheless, criminal legal aid is mostly administered by sole practitioners or by lawyers practicing in very small firms or associations, a fact that rarely permits for structured feedback on a lawyer's professional performance.

score of “four” is “above average”). This finding is consistent with the results of a similar study of PDOs in England and Wales that was recently undertaken using peer review.⁹³ In this study, there were instances where peer reviewed lawyers were found to be providing legal services below the reasonable competence level because of poor file management practices. The major concerns of the peer reviewers centered on the lack of written documentation from client files, including clients’ versions of the facts and written instructions from clients. As well, peer reviewers were concerned in several instances that there was a lack of written memos and a lack of evidence with respect to how the lawyer(s) obtained the results achieved (*i.e.*, good results but how did the lawyers get there?).

The Final Report of the CLOs’ evaluation emphasizes that peer review was introduced as a means of monitoring and improving the quality of criminal legal services provided to low income clients, who, in most instances, would not have been eligible for legal aid. The evaluation underlines a consistent observation made by the peer reviewers with respect to the quality of the *results* obtained by the staff lawyers for their clients:

The CLO lawyers got good and in some cases excellent outcomes for their clients. In a reasonable number of cases the peer reviewers noted that the “outcomes were as good as or better than expected in the circumstances.” The CLO lawyers reveal a level of competence that would be expected from criminal counsel of their experience and also suggest that the lawyers are committed to obtaining a “favourable result for their clients and take all factors into consideration.”⁹⁴

Beyond the future of the CLOs in Ontario, the peer review results are also relevant to the larger Canadian debate regarding the best choice of legal aid delivery models. These findings provide further empirical support for those who argue in favour of exploring alternatives for the delivery of legal aid services beyond the existing certificate system.

III. CONCLUSION

The success in England, Wales, and Scotland, coupled with the results of the Ontario experiment detailed in this article, demonstrates that peer review could

93. See Bridges *et al.*, *supra* note 68.

94. *CLO Evaluation Final Report*, *supra* note 69 at 106.

serve as a valuable tool for assuring the quality of publicly funded legal aid services in the future.

The great challenge in making peer review a reality in Canada is overcoming the entrenched assumption that competency automatically flows from a lawyer's professional status. To the extent that there may be problems with the quality of legal services being provided, the principal obstacle in moving forward is their low visibility.

As things currently stand, incompetence by a criminal lawyer has a limited opportunity of being detected. Clients are often the least likely to recognize that their lawyer has performed ineffectively. As a result, complaints to the LSUC or civil suits are extraordinarily uncommon.⁹⁵ In cases where there is an appeal, there is a good chance that appellate counsel may detect the incompetence of trial counsel. Unfortunately, the test for appellate relief based on a claim of trial counsel's incompetence requires a showing of actual prejudice to the result, a fact that deters most criminal appellate counsel from raising such claims as a ground for appeal.⁹⁶ Thus, the nature and extent of the problem remain largely hidden from view.

Recent developments suggest that the time has arrived for peer review to find a more permanent foothold in Canada. In Ontario, the spotlight has been shone on unduly long and complex criminal trials, with at least some suggesting that incompetent criminal lawyers may be a significant contributing factor to this problem.⁹⁷ In the wake of this, it is not at all surprising that the *Trebilcock*

95. In recommending peer review for legal aid lawyers where there is a pattern of client complaints or billing irregularities, Professor Trebilcock emphasizes the low visibility of the problem. See *Trebilcock Report*, *supra* note 8.

96. See *R. v. G.D.B.*, [2000] 1 S.C.R. 520.

97. This very public debate began with a controversial speech by Justice Michael Moldaver of the Court of Appeal for Ontario, who delivered the Sopinka Lecture on Advocacy at the Ontario Criminal Lawyer's annual convention in the Fall of 2005. See Christie Blatchford, "Justice delayed, justice denied" *The Globe and Mail* (5 November 2005) A23. A slightly modified version of the speech was subsequently published in the Criminal Reports. See Justice Michael Moldaver, "Long Criminal Trials: Masters of a System They Are Meant to Serve" (2005) 32 C.R. (6th) 316. Some have taken exception (one of the co-authors included) to the suggestion by Justice Moldaver that defence lawyers are the principal cause of this phenomenon. See Don Stuart & James Stribopoulos, "Don't throw the book at defence lawyers or the Charter for those long complex Trials" *The Globe and Mail* (5 December 2006), online: <<http://www.theglobeandmail.com/servlet/story/RTGAM.20061205.wcomment1205/BNStory/National/home/>>.

Report, which examined the future of legal aid in Ontario, endorsed a targeted form of peer review for lawyers who accept legal aid, focusing on practitioners who have been the subject of a pattern of client complaints or billing irregularities.⁹⁸ Even more recently, the *LeSage & Code Report*⁹⁹ has made a similar recommendation. In identifying the various causes of unduly protracted criminal trials, the *LeSage & Code Report* attributed part of the blame to some members of the criminal bar whose handling of these cases is marred by an absence of sound judgment and experience. To remedy this problem, the authors recommended peer review in order to determine whether particular lawyers ought to continue to receive legal aid certificates in major cases.¹⁰⁰ The experiment detailed in this article demonstrates that these recommendations in favour of peer review for lawyers doing legal aid work are indeed feasible.

Making peer review a reality for those criminal lawyers undertaking legal aid work will undoubtedly be met with much skepticism. Resistance will likely take the same form that it did when the idea of peer review was raised thirty years ago at the Quality Conference. It is no accident that some of these very objections resurfaced when a limited form of peer review was incorporated into the evaluation process for LAO's three CLOs. For example, objections focused on the utility of reviewing closed files and concerns about client confidentiality. As they were in this experiment, these concerns are capable of being overcome.

The great promise of peer review is that it finally provides a means of effectively evaluating long-standing assumptions about lawyers and the professional services they provide. In deciding on the future use of peer review in Canada, it is worth remembering the words of Philip Ireland:

Neither ethical nor client constraints constitute strong deterrents against poor work. ... Low quality service *may* be very rare; at the same time, it *may* be frequent. At the moment either is possible; we simply do not know. It is time we found out.¹⁰¹

Peer review supplies an empirical means for finding out and, should problems be revealed, an important first step toward establishing solutions.

98. See *Trebilcock Report*, *supra* note 8 and accompanying text.

99. *Supra* note 14.

100. *Ibid.*

101. Philip Ireland, "A Preliminary Look at the Constraints on Incompetence in Law Practice" in Hurlburt, *The Legal Profession and Quality of Service*, *supra* note 22, 493 at 503 [emphasis in original].

From an access to justice standpoint, the benefits of peer review are obvious and considerable. Although expanding the breadth and depth of legal aid is an important step in the struggle for access to justice, the realization of that goal also requires that the lawyers delivering these services meet minimum competency standards.

Everyone benefits from effective quality assurance measures. Clients (many of whom are vulnerable) are protected from the serious harm that can be occasioned by incompetent lawyers. The public also benefits, as competent lawyers reduce the risk of miscarriages of justice, while also ensuring that limited public resources are effectively allocated. Finally, as our experiment aptly demonstrates, the lawyers who are subject to peer review also benefit from the opportunity to obtain invaluable feedback on their professional performance, thereby benefiting their future clients and the administration of justice.

In short, the development of effective quality assurance measures for legal aid lawyers could represent an important step forward in the long and continuing struggle for access to justice.