

SWADRON ASSOCIATES

October 29, 2009

BY FACSIMILE

Bob Ward
CEO and President
Legal Aid Ontario
Atrium on Bay
40 Dundas Street West, Suite 200
Toronto, Ontario M5G 2H1

Dear Mr. Ward:

Mental Health Legal Committee Boycott

This letter is further to my October 14, 2009 letter to Brent McCurdy of the Attorney General's Ministry, which was copied to you. In that letter I introduced the Mental Health Legal Committee (MHLC) and expressed our interest in participating in the five Legal Aid transformation groups established by the Attorney General.

The MHLC comprises approximately 60 lawyers and community legal workers in Ontario and was formed in 1997 to promote and protect the rights of psychiatric consumer/survivors. We have, among other things, assisted Legal Aid Ontario in establishing mental health panel standards, made submissions respecting legislation and acted as interveners in a number of Supreme Court of Canada appeals affecting our client group.

Our members regularly represent vulnerable clients before the Ontario Review Board and the Consent and Capacity Board and appeals from these proceedings, which are to the Court of Appeal and the Superior Court of Justice respectively. We are also active representing consumer/survivors in inquests and other administrative, civil, criminal and constitutional contexts. The vast majority of our clients depend on legal aid to access the justice system.

We share many of the concerns identified by the Criminal Lawyers Association (CLA) and the Alliance for a Sustainable Legal Aid (ASLA) respecting current Legal Aid funding levels, including the hourly rates paid to lawyers by Legal Aid. Our clients and our members face many unique hurdles, however, which also must be addressed. Foremost among our concerns is the extent to which we are expected to subsidize the costs of our clients' representation.

Please consider the example of a lawyer with twenty years of experience asked to represent a non-English speaking client who has applied to the Consent and Capacity Board to challenge his detention under the *Mental Health Act*. Rights advisers generally take legal aid applications at the same time as they take application to the Board. Hearings are mandated by statute to take place within seven days of the Board's receipt of the application. The time frame for issuance of a legal aid certificate generally coincides roughly with the date of the hearing.

SWADRON ASSOCIATES BARRISTERS & SOLICITORS

115 Berkeley Street, Toronto, Ontario M5A 2W8 Phone: 416-362-1234 Fax: 416-362-1232 Website: www.swadron.com

To meet with the client, which the lawyer will do, on average, twice prior to the hearing, the lawyer must arrange for an interpreter. In respect of the two-hour meeting, Legal Aid will pay only for the lawyer's actual time spent with the client. The further hour spent by the lawyer traveling 30 kilometres to and from the hospital will not be paid. Nor will Legal Aid pay the parking fee of \$16.00 charged by the hospital or for the lawyer's mileage (\$24.00 for 60 km). The lawyer will be charged at least \$50.00 per hour for the interpreter's services, plus mileage, for a total of \$124.00. Of this disbursement, Legal Aid will (subject to special disbursement authorization which cannot even be sought before a certificate is issued) pay \$50.60.

Based on the above, the lawyer will be paid \$193.90 for the two-hour meeting but will be responsible for paying \$113.40 in unrecoverable disbursements and will have incurred one hour of unrecoverable travel time. The net hourly rate paid to the lawyer for the client meeting (exclusive of law practice overhead) will be \$26.83, or just over half the rate paid to the interpreter. Similar obstacles are faced in cases where the retainer of an expert is appropriate. In appeals, constitutional challenges and inquests, the low hourly rates are compounded by unrealistic expectations in terms of the hours permitted by the tariff or authorized by special legal aid committees.

Our clients regularly face extreme deprivations of their liberty. In treatment capacity cases they risk being forced to accept powerful and potentially lethal medications against their will. Our lawyer members have struggled over the years to maintain a professional standard of service with limited resources. As legal aid funding levels have eroded, the MHLC has seen attrition of our colleagues to better paying work representing hospitals and to other practice areas. Some have left the practice of law altogether. Few new lawyers join our ranks. Those who remain are overburdened and discouraged.

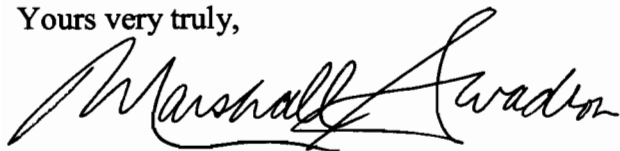
The *status quo* is unacceptable. The three, 5% hourly rate increases paid by Legal Aid in the past 22 years have only seen us fall further behind. At the same time, the government continues to increase funding directly and indirectly to all the participants in the mental health justice system except for those who represent the most marginalized. The Attorney General's most recent legal aid funding announcement demonstrates a failure to grasp the extent of the need for comparable funding within an adversarial system.

I understand from Mr. McCurdy that the five Legal Aid transformation groups have been struck and have started to meet and that participation from the MHLC or any other group representing the interests of our clients has not been requested. Without action on our part, we believe that the most vulnerable among us are at risk of being marginalized even further.

Effective December 15, 2009, the MHLC will ask its members not to accept retainers based on legal aid certificates to provide opinions or conduct appeals from decisions of the Consent and Capacity Board upholding treatment incapacity findings where treatment has not begun. MHLC members will also decline court appointments as counsel or as *amicus curiae* in appeals from decisions of the Consent and Capacity Board unless paid at reasonable rates.

We do not take our decision in this matter lightly. A vibrant, independent, properly-funded mental health bar is essential to our democracy. Our sincere hope is that the Attorney General will take meaningful steps to address the funding issues immediately so that our action will become unnecessary.

Yours very truly,



Marshall A. Swadron
Chair
Mental Health Legal Committee

- c.c.: The Honourable Chris Bentley
Attorney General of Ontario
- c.c.: John McCamus
Chair, Legal Aid Ontario
- c.c.: The Honourable Justice Edward Ormston
Chair, Consent and Capacity Board
- c.c.: The Honourable Chief Justice Warren Winkler
Court of Appeal for Ontario
- c.c.: The Honourable Chief Justice Heather Forster Smith
Superior Court of Justice
- c.c.: The Honourable Justice David M. Brown
Superior Court of Justice
- c.c.: The Honourable Justice Sidney B. Linden
Special Advisor, Legal Aid Transformation
- c.c.: Ryan Fritsch
Legal Counsel, Psychiatric Patient Advocate Office
- c.c.: Wayne Van Der Meide
Protocol Cases Unit, Legal Aid Ontario
- c.c.: Brent McCurdy
Senior Policy Advisor, Ministry of the Attorney General
- c.c.: Frank Addario
President, Criminal Lawyers Association
- c.c.: Raoul Boulakia
Chair, Alliance for Sustainable Legal Aid