

**BUSINESS CASE:
FAIR PAY and REDUCED DELAY: A PROPOSAL FROM THE CRIMINAL LAWYERS
ASSOCIATION**

ISSUE:

The reallocation of resources to support fair pay for defence counsel, while reducing delay in the administration of the criminal justice system.

DESCRIPTION OF PROBLEM:

One of the most critical contributors to the problem facing the criminal justice system in both complex and routine cases is the chronic underfunding of the legal aid program. As will be explained below, there is a significant link between the underfunding of defence counsel and the current inefficiency of the criminal justice system. There are numerous studies for and by LAO which have documented the compelling public policy reasons for increasing the rate paid to defence counsel in legally-aided cases. As described in the 1997 McCamus Report, legal aid is vitally important to maintaining the integrity of the criminal justice system. Many of the most vulnerable members of our society (for example, the mentally disturbed) are heavily represented in the criminal justice system. These are the people who end up unrepresented or under-represented as a result of a chronically under-funded legal aid system. Not only does this offend a fundamental principle of our democratic system, it also has practical implications for the day-to-day administration of justice.

Because of the failure to adequately fund it, the program has not retained its primary service providers---criminal defence counsel. As Professor Trebilcock noted in his 2008 report, experienced lawyers are increasingly unwilling to take on serious legal aid cases and find it unfeasible to mentor younger lawyers. Lawyers tend to view such cases as something from which they graduate. They draw this conclusion from the significantly higher compensation rates paid to other actors in the administration of justice. The legal aid tariff has failed to keep pace with the cost of living, overhead costs, the market hourly rate for legal services, and significant compensation increases received by all other participants in the criminal justice system. Junior defence counsel cannot afford to attend trial advocacy programs or continuing legal education conferences that are required for excellence.

The adversarial system presumes that opposing counsel will be positioned to represent her client's interests fully and competently. In today's reality, there is increasing recognition that an unacceptable number of accused persons are not meaningfully accorded this right. Although there still remain many excellent counsel who perform their civic duty accepting legal aid certificates, an inadequate tariff has reduced the pool of skilled counsel. As fewer experienced counsel participate in the criminal legal aid program, there are more matters proceeding without counsel or less than adequate counsel. This causes inefficiency and delay in the courtroom – both at the pre-trial and trial stages of the process. Substantively, inadequate representation also increases the

risk of wrongful convictions and unjust sentences. The skill of defence counsel is an important factor in preventing wrongful convictions and unjust sentences.

At the same time as our justice system is struggling to ensure there is real meaning to the “right to counsel” in the criminal context, the Attorney General has identified his concern with the delays occurring in Ontario's criminal courts. He notes that the number of court appearances to bring a charge to completion has doubled to 9.2 appearances since 1992. Over the same period, the average time needed to complete a charge has increased from 115 days to 205 days. In response, the AG has targeted a 30% reduction in the provincial average of days and court appearances needed to complete a criminal case. He has undertaken to meet this target by 2012.

For most participants in the criminal justice system, there is an obvious and undeniable link between the underfunding of the criminal legal aid system and the delays in the criminal courts. Crown attorneys, police, duty counsel, judges, justices of the peace and court administrators recognize that the flight of experienced and professional defence counsel from the criminal process, especially in relation to complex legal matters, has eroded the effective and efficient carriage of criminal cases.

While more and more resources have been steadily added to every other part of the system, there will be no significant improvement to efficiency without the fair resourcing of the criminal defence component of the system. The unanimity on this point was recognized by Code and Lesage at pp. 97-98 of their report:

Senior members of the judiciary, senior Crown counsel and senior police officials forcefully submitted that it is much better to conduct a long complex trial with one of the leading members of the bar because they will generally focus on the real issues in the case, they will consistently prepare in advance and they will have no reason to unduly prolong the case. We were particularly struck by the position taken by senior police officers in charge of the investigations in these cases. They noted that they pay the price for all the unnecessarily long trials because they become caught in court for months and years instead of being allowed to investigate new cases. Police chiefs told us that they will lose two senior detectives for as long as a year, once a major homicide trial begins.

In short, there is a broad consensus that is worthwhile to invest in a strong and capable defence. We agree with this view. It makes sense to pay the best lawyers appropriately because the return on the investment is a shorter trial that saves costs in all parts of the justice system. We do not believe that there is a sound fiscal argument for paying the defence at uneconomical rates as it often contributes to overly long trials

BACKGROUND:

There have been numerous independent and expert reviews that have consistently recognized the critical and urgent need for substantial increases in the legal aid tariff. In particular:

- In 1974, the Osler Task Force recommended substantial increases. There was no adjustment until 1979 and, even then, the adjustment was significantly less than what had been recommended.
- In 1982, the Law Society recommended a 30% tariff increase to reflect an increase of 31.7 percent in the CPI between 1979 and 1982. The tariff was adjusted by only 5% effective July, 1982, and a further 5% for certificates issued after July 1, 1983.
- In 1983, the Law Society and an All Party Standing Committee of the Legislature recommended that the tariff be significantly increased to reflect the fact that, between 1967 (when the Plan was introduced) and 1981, the average weekly wage rose by some 350%, the CPI by 225%, while Legal Aid fees rose by only 50%. However, this resulted only in a further 5% increase to the tariff in 1984.
- In 1985, Graeme McKechnie, a government-appointed fact finder, concluded that the tariff had failed to keep pace with any objective economic, professional income and cost indicators, and that the tariff was inadequate to meet the purposes of the legal aid system in Ontario. McKechnie recommended a significant increase to the tariff. The Government responded to the fact finder's report by making some adjustments to the tariff albeit significantly more modest than McKechnie recommended.
- Beginning in 1992, notwithstanding these recommendations, a series of unilateral reductions and adjustments were made to the criminal tariff, including a 5% reduction in the hourly rate, and caps and reductions on total fee payments to individual lawyers.
- In 1994 to 1996 there were a series of substantial criminal law tariff cuts, maximum hourly caps and service reductions made to the criminal legal aid system.
- In 1998, minor adjustments were made to service coverage but hourly rates were not re-adjusted.
- In 2000, the Holden and Kaufman's Tariff Review Task Force Report did a comprehensive examination of various benchmark comparisons (e.g. cost of living,

effective maximum fees, the declining number of lawyers paid by legal aid, the incomes of legal professionals, income paid to other professionals, and a market research survey of fees charged by legal professionals). It recommended that to prevent continued erosion in the quality and accessibility of services the tariff's hourly rate should range from \$105 to \$140 (based on the level of the lawyer's experience). Adjusted for inflation, the tariff rate today would be \$120 to \$160.

- In 2002, 2004 and 2007, 5% across-the-board increases were implemented by the provincial government. These increases however left the legal aid tariff at less than half the rate paid by Ontario to outside counsel in routine matters (\$77, \$87 and \$97)
- In 2008, the Trebilcock Report was released documenting the flight of senior counsel from the program and identified a return of those counsel as a high government priority. He noted that if the base rate of \$67 set in 1987 had been adjusted for inflation, it would have been \$97 in 2002 and \$110 in 2007. He pointed out that the rates recommended by Holden and Kaufman were more consistent with a true market rate for public law services but concluded that this was not politically feasible.
- In 2008, the Goudge Report recommended that compensation for lawyers who accept certificates in criminal paediatric homicide cases be "significantly increased".
- In 2008, the Code and Lesage Report recommended a tariff increase for lawyers taking on serious complex cases. This increase was recommended because Code and Lesage properly concluded that due to the low legal aid tariff, many senior experienced counsel have stopped taking on legal aid work. The result is that junior, inexperienced lawyers are handling the vast majority of the long complex trials. Junior lawyers do not have the experience or knowledge required to defend a complex case in a cost effective way making cases last far longer than they would otherwise take had a more experienced counsel conducted the trial. In order to reduce delay and increase productivity, Code and Lesage recommended increasing the legal aid tariff for long complex cases as a way to induce senior, experienced counsel to take on these difficult cases.
- In 2009, the CDLPA Report on criminal law delivery models in Ontario not only recommended limiting the use of Criminal Law Offices due to costs, but also recommended that the legal aid tariff be increased as it has "remained relatively unchanged for 20 years".

COMPARATIVE ANALYSIS

The legal aid program in Ontario has failed to keep pace with all relevant indicia including the cost of living, overhead costs, the market hourly rate for legal services, and the significant compensation increases received by all other participants in the criminal justice system:

- the hourly legal aid tariff has been increased by **15%** since 1987 (comprised of only three increases of 5% each over the period 2002 to 2007), while inflation alone has increased by over **75%** in the same period.
- over the ten-year period from 1997 to 2007, Ontario provincial court judges received an approximately **83%** increase in their compensation;
- over the same ten year period, the compensation of federally-appointed judges increased by approximately **61%**;
- over the same period (1997-2007), the compensation of Crown lawyers in Ontario increased by approximately **57%**;
- The province's rate for outside counsel is \$195 per hour. When defence counsel needs a psychiatrist, the LAO rate is \$131 per hour, while the Crown rate is \$200 and up. The LAO rate for testimony is \$600, while the Crown rate is \$900.00

Not only has there been a striking increase in the salary of both the judiciary and crown counsel over the last decade, and a recognition that to retain private counsel a reasonable rate must be paid, there has also been a similarly dramatic increase in the number of crowns and judges in the Ontario court system.

RECOMMENDATIONS TO SUPPORT FAIR PAY AND REDUCE DELAY

1. Increase Tariff Rates for Criminal Legal Aid Cases

There are at least two financial issues that need to be addressed. First, there must be an adjustment to the base-rate of the tariff to compensate for 20 years of neglect (e.g. bring the legal aid hourly tariff up to the range of \$125 to \$165 dollars per hour, depending on years of experience). This is the range recommended by Holden and Kaufman, adjusted for 2008 dollars. The total cost of funding this increase is approximately \$120 million. This represents a 60% increase to the certificate budget. It could have been achieved with a mere 2.5-3% increase compounded annually over the last 20 years. After three years, this would put the tariff back at 1987 rates adjusted for inflation.

Second, the tariff must be improved substantially for long or complex cases so that experienced senior counsel will accept legal aid certificates. Based on consultations with the senior members of the criminal bar (who have fled the legal aid program in recent years), the rate must be set at \$250.00 per hour. With such an increase, a Complex Case Management system should also be put in place by Legal Aid (modelled in part on the complex case reforms successfully done in B.C.). The increased hourly rate, available under certain conditions and to approved counsel, would be revenue-neutral for legal aid as experienced counsel would streamline the pre-trial and trial process. Experienced counsel typically make more effective use of limited resources and run more efficient trials. The proposal to allocate money to

attract senior counsel back to legal aid cases is supported by both the Crown and senior police officials. This alone should encourage the Government to act. In addition to streamlining trials, ensuring that only experienced counsel take on the serious complex cases will mean a substantially reduced risk of wrongful convictions and the inevitable costly inquiry and appeals that follow. The best insurance against wrongful convictions is competent defence counsel.

2. Enhance Accountability of Certificate Funding Program at Legal Aid

The defence bar accepts that an increase in funding should be accompanied by a commitment by LAO to scrutinize accounts for quality control and to prevent fraud. The accountability measures taken by LAO could include:

- Hiring a full time auditor to carry out effective reviews (pre- and post-completion of case)
- As in the BC model, serious and complex cases should have intensive budget scrutiny before the budget is set. Motions and/or arguments which are not approved should not be paid without further review.
- In the post-trial review of accounts, appropriate measures should be put in place to audit for overbilling or abuse of the self-reporting system.
- Legal Aid should have the authority to impose the ultimate penalty of removing counsel from the legal aid panel where an egregious abuse of Legal Aid funds has occurred, of course, removal from the panel could only occur after a fair review process that includes at least one defence counsel as a representative on any decision-making body.

3. Develop a Mechanism for Ongoing Tariff Reviews

An ongoing tariff review mechanism should be put in place, to minimize the disruption to service that may arise if adjustments to funding are not regularly secured.

For example, a “wise person” review panel could be struck to report and make recommendations on the appropriate tariff level, the appropriate budget of the certificate program as a whole, and a description of the services to be covered by the plan. The Review Panel would be required to report back every three years, and would be composed of members of the community, the government and the Bar. The Bar would appoint its own nominees to the Review Panel. In order to promote public accountability, the recommendations would be placed before the Legislature, which would be free to accept, reject or modify them.

As with other arms-length organizations that set compensation levels on an ongoing basis with government, the Review Panel’s recommendations would be guided by such objective economic factors as changes to the CPI and per capita GDP, the growth in provincial revenues and other relevant factors, including:

- i. an analysis of the effect of changes in the criminal law, rules of practice and government enforcement and other policies;
- ii. the economics of practice, including overhead, and private sector lawyer market rates for comparable legal services provided to clients of modest means;
- iii. the need to recruit and retain an appropriate balance of new and experienced private lawyers to provide legal aid services; and
- iv. the compensation rates and adjustments provided to others paid out of the public purse, particularly other professionals.

4. Revise legal aid tariff to provide incentives for counsel to reduce pre-trial appearances and to promote early resolution.

In the 1980s and early 1990s, many legal aid cases were paid by block fees. These block fees provided an incentive for lawyers to resolve cases quickly and without numerous appearances in court. Using the block fee model, a lawyer would be paid the same for a guilty plea whether it occurs with one court appearance or five court appearances thus providing a financial incentive for lawyers to resolve quickly. Re-instating block fees is one possible option for resolving some of the present tariff issues. The CLA will develop additional options in consultation with LAO and the MAG, if requested.

5. Implement a charge screening regime

Experienced and resolution-oriented Crown Attorney's should be involved in pre-charge screening for, at minimum, all indictable offences. Alternatively, seasoned Crown counsel must get involved in screening prior to the first appearance. With senior Crown counsel oriented towards proper screening and early resolution, cases which often take five or six appearances to resolve could be resolved with only one or two appearances in court. Resolution skills should be taught and passed on to young Crown counsel, rather than treated as a subjective talent of a few "soft" Crown counsel.

6. Expedite Intake Process at Legal Aid for Criminal Certificates

The court process is often delayed because of delays at Legal Aid. These delays arise when the certificate is being issued or when someone is seeking a change of solicitor. The number of court appearances could be reduced if the initial application approval time and appeal process was streamlined. Reducing the wait time for approval for experts and other related disbursements would also reduce delays in setting trial dates and reduce the number of court appearances.

7. Implement a Comprehensive Interlock Ignition Program

An expanded Interlock Ignition program should be put in place to reduce the number of Impaired/Over .80 cases that go to trial solely to avoid the “employment-killing” licence suspension. Impaired/Over .80 cases use a lot of judicial resources. Many jurisdictions will not set a trial date on an impaired case without a Judicial pre-trial first and many of the trials themselves often take a day or more of court time. When these cases go to trial, the litigation often focuses on *Charter* issues and technical defences -- - some of which are sufficiently tenuous that with proper incentive, the matter could be resolved by way of a guilty plea. As long as there is a mandatory licence suspension for all purposes following conviction for the offence, these cases will continue to go to trial and consume judicial resources. Implementing an expanded interlock ignition program will assist in providing the necessary incentive to encourage early resolution of these cases. I believe the numbers will show that a disproportionate amount of the trial court time set and used in the Ontario Court of Justice is for Impaired or Over .80 cases

8. Introduce a Province-Wide Model Disclosure Brief System

As recognized by Code and Lesage in their recent report, one of the major causes of delay relates to disclosure. Code and Lesage recommended a uniform model disclosure brief that would be available shortly after a person is charged. We strongly believe that the argument for doing so in non-complex cases is compelling. This model will reduce delay and the amount of litigation surrounding disclosure that presently takes place. If implemented, additional streamlining measures could be built on this model disclosure process. They could include running the intake court by electronic certification of disclosure completion and counsel readiness. There is room here for a significant amount of creativity. However, it would have to be initiated by a well-managed electronic disclosure regime.

9. Create a Judge- Run Disclosure Court for Non-Primary Disclosure

Even if a province-wide model disclosure brief system was implemented, disclosure issues are still likely to arise. Setting up a court in each region to address disclosure issues could assist in ensuring that these issues were dealt with in a timely and cost effective fashion. Judges presiding in these courts could assist in mediating the disclosure issues and thereby avoid the need for costly and lengthy hearings. It will only be in the rare case that a full disclosure hearing will be necessary, at which point it will be a short focussed hearing. This kind of specialty Court would be a cost saving measure in that it will serve to reduce delay, the number of appearances necessary before a trial date is set and will also substantially reduce the number of trial dates that are adjourned because of outstanding disclosure issues.

11. Schedule Sufficient Plea Courts to Meet Demand

In some jurisdictions, lawyers attend court with their clients to enter a plea of guilty but the plea court is so back logged that the guilty plea must be adjourned. This adds additional cost to the system. Every time a matter is needlessly adjourned, the judicial system incurs unnecessary costs. In order to ensure that such unnecessary adjournments do not occur, every jurisdiction should have sufficient plea courts to meet the demand of the jurisdiction. In larger jurisdictions, a second plea court might be necessary to ensure that potential guilty pleas are not adjourned. In order to be effective a second plea court does not have to be busy all day. If it gets as few as three to five pleas that would otherwise have a date set, it is equivalent to a trial court which collapses. In many jurisdictions, this will not even require an additional judge—the plea court can be run from 9:00-10:30 and then converted into a trial court.

12. Encourage Police to Use Station-Based Release Option, Rather than Show Cause Hearings

The police should be encouraged to use station-based release rather than insisting on show/cause hearings. This would create an enormous saving to the administration of justice for all of the players in the system. The *Criminal Code* has been amended to specifically give the police all of the tools they need to release from the station in appropriate cases. Too many consent releases are being sent to the bail courts, causing egregious delays and increasing the number of adjournments.

13. Enhance Continuing Legal Education Opportunities for Defence Counsel

Given the low legal aid tariff and the absence of inexpensive education opportunities for defence counsel, many lawyers have to take time from work to train. Thus, unlike Crown counsel, judges and the police they do not get paid and they pay conference fees to attend educational programs. Continuing legal education should be accessible and to be accessible, it must be affordable. Practical legal education means smarter litigation by counsel who have been trained by the best in their field. This is a cost-saving measure because it promotes “best practices” learning at an early career stage.

14. Develop a Sustainable Mentoring Model for Junior Members of the Criminal Defence Bar

Without adequate mentoring, junior lawyers will not learn the skills necessary to defend a case in a cost effective and responsible fashion. Twenty years ago junior members of the bar were mentored by the more senior lawyers either by being hired on as associates or by junioring on law complex cases. With the present legal aid rates, many lawyers can no longer afford to hire associates. Moreover, LAO does not authorize

funding for junior counsel frequently enough. When such funding *is* authorized, it is at such a reduced rate that many lawyers cannot agree to take on the case even though they want the experience. A new model for mentoring is an investment in the long-term future of the administration of justice

15. Increase communication between the Ontario Court of Justice and the Superior Court of Justice on scheduling issues

After being committed to stand trial, a date is set for every matter to be spoken to in the Superior Court of Justice -- often up to six weeks later. It is only at the first appearance in the Superior Court of Justice that a Judicial pre-trial is set and the matter is adjourned so that the mandatory pre-trial can be conducted. It would be more efficient and cost effective if the Judicial pre-trial was arranged and conducted prior to the first appearance in the Superior Court of Justice. This would save up to six weeks in time and at least one appearance in the Superior Court of Justice.

16. Increasing telephone communication at pre-trials

Allowing both crown and judicial pre-trials to take place by teleconference is less expensive and more time effective than requiring in person pre-trials for both the Court and for defence counsel. This also allows for more flexibility in setting up the pre-trial and uses less judicial resources. It also eliminates travel time costs associated with the pre-trials.

17. Increase mechanisms to address issues outside of court

Many courts across Ontario have started implementing a process whereby simple bail variations can be done in writing, hence obviating the need for an additional court appearance. This should be instituted in all courts across the province. The Crown's office should consider other issues that could be dealt with in this fashion.

Each of the proposals listed above can and should be costed. The direct expenses associated with unnecessary court appearance is capable of calculation. The immediate expenses associated with under-resourced defence counsel can also be measured. The long term effect is not yet known. However, the Goudge, Trebilcock, and Code-Lesage reports all point in the direction of a significant problem that is not going to go away with patchwork measures.

Risk for Government of Inaction

Professor Trebilcock described the risk of inaction as "further attenuating the already tenuous and diminishing commitment of the private bar to the legal aid system." He also refers to the current situation of under-represented and unrepresented accused persons as an "impending service delivery crisis". To this, I would add that competent and experienced counsel will increasingly refuse to accept legal aid certificates without

both a substantial equilibrium adjustment and an ongoing review mechanism. The savings and efficiencies identified in this business case can be redistributed to help to rebuild and ensure an experienced, ethical and talented legal aid defence bar.

A final note: it seems to be taken as an article of proven faith that it is politically unfeasible to explain publicly why lawyers should be paid more to take legal aid cases. Although certain members of the public and of the media are immune to the logic laid out in this business case, the reality is that editorialists, opposition politicians and the wider public are all concerned about the quality of the justice system. They have seen high profile failures and understand that there is an identifiable cause. There is ample ammunition in the Code-Lesage and Goudge reports to enable a motivated politician to explain that he is fixing the administration of justice to prevent miscarriages and runaway trials. This is not an argument that can be left solely to members of the legal community who are perceived to be self-interested. There is a history of dynamic politicians making the abstract vision of “justice” a comprehensible reality for the wider community. It needs to be done on this topic.