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Justice denied

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Early in their careers, many criminal lawyers rely on legal aid cases to build their practices. But can they afford to take them? For criminal defence lawyers like Sean Robichaud, a low hourly rate threatens to unravel our most cherished ideas of justice

Rattlesnake Point is a rich canopy of woodland perched atop 91 metres of blue-grey cliff. The ancient sedimentary rock appears to rise out of nowhere, a particularly striking outcropping of the Niagara Escarpment that zigzags through southern Ontario for 725 km. Here in Halton Region, about 40 km west of Toronto, the massive ridge towers above surrounding meadowland dotted with barns, grain silos and houses.

This striking landscape is visible from the third floor waiting room of the courthouse in nearby Milton, the fastest growing community in Canada. It lends a measure of calm to the souls sitting — or pacing — outside the courtrooms. Criminal cases are heard here and what happens just beyond the double doors is too often the difference between a life interrupted and a second chance.

A hard look out the window to the left shows what the stakes are. There, delineated by vicious-looking razor wire, the Maplehurst Correctional Complex stretches across 41 hectares of fertile southern Ontario soil. At full capacity, the medium- to maximum-security complex, which includes the Vanier Centre for Women, can house nearly 1,700 prisoners.

Sean Robichaud couldn't tell you how many times he's looked out these windows. Hundreds of times? A thousand? Today is the first time the Toronto lawyer can recall actually noticing the striking panorama beyond the super-prison. As a criminal defence lawyer and sole practitioner, Robichaud represents clients in courthouses all over southern Ontario. Taking time to enjoy the scenery is a luxury he rarely affords himself. It's just one of the things he's sacrificed to do the work he loves.

Robichaud's practice is thriving. Nearly five years after being called to the bar, most of his cases are clients who have retained him privately — and he's busy. But that hasn't always been the case. His climb through the ranks is the result of years spent in the trenches of Ontario's criminal justice system — several of those years lean ones. Like many of his peers, Robichaud built his practice by accepting certificates from legal aid clients. For the aspiring criminal defence lawyer, the shortest distance from A (little experience and no clients) to B (an earned reputation and a practice to show for it) is almost always legal aid work. They're not the best-paid cases, but they can account for the majority of a defence lawyer's criminal cases and the work can be very fulfilling.

"Legal aid cases are often the most interesting and deeply gratifying cases to work on," says Robichaud. "It also feels like you're serving a greater good, helping people who would otherwise have no recourse to justice."

The mandate of Legal Aid Ontario is to "promote access to justice throughout Ontario for low-income individuals," something lawyers like



Robichaud take very seriously. As a necessary check against wrongful conviction and unfair punitive measures, a strong legal aid system is central to Canadians' most cherished ideas of justice.

Even as his practice grew increasingly successful, Robichaud never stopped taking these sorts of cases. That is, until the boycott.

On June 1, 80 of Toronto's criminal lawyers stopped taking legal aid certificates for homicide, and guns and gang cases. That number ballooned to 500 over the summer to include nearly half of all criminal lawyers practicing in Ontario. The tactic has also drawn support from several legal associations, including the Ontario Crown Attorney's Association, and a coalition of more than 40 law professors.

The move was not taken lightly. Many lawyers consider legal aid cases a vocational duty. But over the last 15 years that duty has become an untenable burden.

In April, Frank Addario, president of the Criminal Lawyers' Association, sent a letter to Chris Bentley, the Attorney General of Ontario. In it, Addario laid out the concerns of the CLA membership and the issues that had been plaguing the province's legal aid system for two decades — issues that would eventually precipitate the boycott.

The letter explained how the tariff paid to lawyers taking legal aid cases was catastrophically low and how the lack of progress in improving the tariff was fueling impatience and anger in the defence bar.

It went on to compare increases to the salaries of judges and Crown attorneys — 83 percent and 57 percent respectively between 1997 and 2007 — to that of the Legal Aid tariff — only 15 percent since 1987. (In fact, that increase was the sum of several small increases between 2001 and 2006. From 1987 to 2001, there was no change to the rate.)

Each assertion was irrefutably supported by three reports the Ministry of the Attorney General itself had commissioned. The *Trebilcock*, *Code and Lesage*, and *Goudge* reports all highlight the tenuous state of the legal aid system and the resulting threat to a fair execution of justice. *Trebilcock* further notes that as a result of the low rates, fewer lawyers were willing to do legal aid work.

(Although not spelled out in the letter, the CLA is asking that the tariff be increased from its current rate of \$77.56-\$96.95 an hour to \$120-\$160 an hour — a rate that still leaves a huge burden on the defence lawyer.)

Addario's letter summed up the situation with a succinct, "The legal aid program has only been able to operate for the last two decades through the donated services of defence counsel."

Robichaud, who has turned down both a homicide and a guns and gangs case since the boycott began, agrees. "If this system seems to be working reasonably well, it's largely because it's being subsidized by lawyers acting for the greater good.

"I can't be too specific because of privilege," he continues. "But hypothetically, let's say I have a case of a man who started firing a gun into a public place. I have to review all the disclosure, meet with my client several times, go to court appearances, meet with the families and the Crown, review maybe 20 officers' notes and watch 27 DVDs of CCTV footage — all before I even go to preliminary hearings. If it's a legal aid case, I'm allotted 16 hours for preparation unless I apply for a big case management exception. The actual work would take two, three, maybe even four times as long."

This is a big part of the problem. The types of cases being boycotted are those specifically taken on by a specially qualified set of lawyers. For one of these lawyers to take on a complex serious crimes case and dedicate not only their own time, but also that of articling students, clerks and junior counsel, \$96.95 an hour is simply not a feasible way to run a business.

Attorney General Bentley, himself a criminal defence lawyer by vocation, agrees that the legal aid system has its share of problems. "But to be clear, I believe the tactics [of the boycott] are actually hindering the objective we all share — a strengthened legal aid system," Bentley told *Precedent*. And while he acknowledges that the 15-per-cent increase over the last five and a half years does not fully address the issues arising from the 14 years of cuts and freezes preceding them "it does show a lot of good faith and determination."

Addario doesn't see what else the CLA could have done. In the 16 months before he sent the letter, he met with the attorney general several times to discuss reforms to the legal aid system — ones designed to bring back senior lawyers and provide better prospects for young lawyers joining the criminal bar to stay in the program.

Not one of the recommended measures has been adopted.

Even the system's most obvious inequalities — such as the fact that the Ministry authorizes the Crown to pay expert witnesses up to double the fee that Legal Aid Ontario authorizes defence lawyers to pay such witnesses — remain unaddressed.

When Patrice Band, now a defence lawyer in Toronto, was an assistant Crown attorney he was well aware of the disparity between himself and lawyers toiling for LAO. "In a serious case, there would often be two Crown counsel, the police who investigated the case were available to assist and experts would be retained as needed.

"Then I'd look across the aisle and see a defence lawyer working a case alone."

But it was only when he became a defence lawyer himself, Band says, that he experienced the full extent of the inequality. "I'm dealing with my second gang case and the disclosure alone is extremely voluminous," he says. "There are months of wiretaps to review, lengthy affidavits — I just received 1,600 pages of new material. The caps just don't account for that."

Nevertheless, Band has no regrets about becoming a defence lawyer. “I understand the role of the Crown and the police, but the victories, so to speak, as defence counsel are just more satisfying than the convictions as a Crown,” he says. But he also acknowledges that it would have been much more difficult if he’d ventured out as a defence lawyer from the outset.

As bad as the situation is for experienced lawyers, it’s even worse for new lawyers. Because there is no money to pay lawyers for articling, the opportunities to article under senior defence lawyers are very limited. “I cannot recommend that a young lawyer join the criminal bar at this point unless they can find a salaried job,” Addario said in an interview. “The economics for a sole practitioner opening a fresh practice are not there.”

This has not stopped some young lawyers from exploring exactly that option. Like many of their peers, Graeme Hamilton and Ha Luu are attracted to defence work because they have a passion for social justice. Even so, these promising young prospects face a more difficult decision than either expected.

Hamilton, who will complete graduate law studies at Harvard next May, was leaning toward corporate law after articling at Torys. “If it comes to a choice between criminal defence, corporate law or an academic route, the legal aid funding scheme makes criminal defence a more financially risky path,” he says.

He is now “edging towards criminal law with some trepidation.” Hamilton has already applied to the LAO and, if accepted, will be able to handle lower tier criminal cases. He’s spent time shadowing Robichaud, picking up as much as he can about defence work. Under optimal circumstances, he wouldn’t be hesitant to make his final decision, but if his time with Robichaud has taught him anything it’s that the circumstances will be far from optimal.



“The question is how do you navigate through the system in a way where you can survive as a lawyer *and* do well in representing your clients?” Hamilton asks. “Right now, I can’t see how to do that.”

Ha Luu has a similar story. Despite a rewarding stint articling with the Crown in Barrie, Ont., she felt compelled to explore her options in defence work and, like Hamilton, spent time shadowing Robichaud. But she can’t see how to overcome the hardships of that choice so early in her career. Of particular concern is the amount of time she would have to dedicate to learning how to run a practice as a sole practitioner.

“With the Crown, you don’t have to go out and get clients, you don’t have to bill hours,” Luu says. “It’s a salaried position. And as a woman, there’s always the issue of wanting to start a family at some point. There’s no provision for maternity leave as a sole practitioner.”

Robichaud has tried to help both Hamilton and Luu with their efforts, but admits that the situation is depressing. “Here you have two extremely well-qualified young lawyers, both of whom have a passion for defending people, and yet they are being driven away from the work by the way the system is set up,” Robichaud says.

“If the system can’t support the people working within it, then the system must be broken. But that’s just not something the province is willing to concede to yet. And if they can’t do that, we’re still a long way from solving the problem.”

When *Precedent* went to press, the Ministry of the Attorney General and the CLA were still in a standoff. At the same time, the legal aid funding crisis appeared to be worsening. In mid-August, *The Globe and Mail* revealed that the LAO is facing a \$56-million budget shortfall that could result in cuts to the legal aid system. Given this financial reality, an increased hourly rate for defence counsel seems more remote than ever.

At the Milton Court House, Robichaud has secured the conditional discharge of a young man accused of mischief and “theft under.” It’s not a legal aid case, but if it had been, his travel time, and the cost of having an agent cover a matter at another courthouse while he waited four hours for the case to be called would not have been billable.

Looking out at the Escarpment, Robichaud muses, “You know, we get things wrong all the time. The system only works if we accept that and make all the parts of it strong enough to keep all the other parts in check. That’s the only way it works as a whole.

“Otherwise, it just topples over.”

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