

Who are they kidding? Lawyers love legal aid

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The criminal defence bar and the journalism profession have something in common: Members of both are forever claiming public interest and public good as the end goal, while rarely declaring up front their naked commercial interest.

We in my business do it all the time when we thunder about freedom of expression and the public's right to know. These are cherished rights to be sure, and we are correct to fight for them (and often the only ones who bother), but infrequently acknowledged is that when exercised to the fullest, those rights also provide us with juicy stories which in turn help pay newspaper bills and wages.

Ditto criminal defence lawyers, many of whom in Toronto are now boycotting Legal Aid Ontario and refusing to take on new homicides or guns-and-gangs cases as a protest against the lousy pay.

Last I checked on the Criminal Lawyers Association website, there were 270 names on the list, including a few alleged luminaries of the bar who aren't regularly in the rough-and-tumble courts and many more of the enormously capable workhorses who are rarely out of them.

That legal-aid rates haven't kept pace with either the cost of living or the salaries paid to the other key justice system participants, Crown attorneys and judges, is undeniably true. To put it impolitely, the defence bar is getting screwed, and various reports, reviews and experts have been saying so for decades to little effect.

Salaries for judges and prosecutors have risen respectively 83 per cent since 1997 and 57 per cent in the past decade.

Yet lawyers acting on legal aid certificates have seen only a 15 per cent hike in their hourly rates since 1987. And lawyers in private practice have costs (overhead, which with secretarial help, can eat up as much as half of that \$98-an-hour maximum rate) that prosecutors and judges don't, and prosecutors and judges have benefits (pensions, job security) that private lawyers don't.

There are other serious inequities too, such as the fact that prosecutors, with the resources of the state behind them, can pay the going rate for expert witnesses such as psychiatrists, but defence lawyers working on a legal-aid ticket can pay only half that, with the result that it's becoming more difficult for them to find willing experts.

So they have a real case, the lawyers do, and something ought to be done.

Yet since the boycott began at the start of the week, the conversation about it has touched only upon the nobility of the defence bar in accepting legal-aid cases in the first place and the righteousness of their cause. It is righteous, but like us journalists when we piss and moan about freedom of expression, the lawyers also have a commercial interest at stake here.

When, for instance, I e-mailed Frank Addario, the president of the CLA, on Tuesday, I noted that with his members seeking what amounts to wage parity with prosecutors (or at least a big pay hike, with the CLA suggesting an hourly range of \$125 to \$165 depending on experience and \$250 an hour for "substantially long or complex cases" for senior counsel), how then did they feel about public accountability?

Legal Aid Ontario is primarily financed from the public purse (to the tune of \$309-million in 2006), as are the salaries of prosecutors and judges. The salaries of prosecutors and judges are disclosed publicly, I said, so how about defence lawyers agreeing to disclose what they're paid for a particular case?

Like other reporters, at the end of a major trial, where legal-aid costs may have been hiked if the defence was considered a so-called "big case" (and therefore more richly funded) or where pretrial motions came by the bushel and the trial was a "runaway" one, or where the lawyering on either side was of dubious quality, I've often tried to establish what the taxpayers paid.

Almost always, the only completely opaque cost is the cost of legal aid: LAO will provide only the cost of an average trial, not a specific one, and lawyers oppose such disclosure on the grounds that it will violate solicitor-client privilege – even though the law in Ontario, thanks to a case Mr. Addario himself argued two summers ago (and which in fairness he pointed out to me), appears to say that so long as only total fees are revealed, not account details that might show

defence strategies, the privilege isn't violated.

All I ever want to know, at the end of any specific trial, is how much did the defence cost? I can get reasonable estimates for the other players.

Mr. Addario was a bit stung by my first note, and interpreted my plea for transparency as an allegation of widespread fraud, which isn't what I meant. "Is there, in your view, that much defence fraud, over-billing or inefficiency that it eclipses all the other proof of imbalance in the system?" he wrote. "We perform an important public service and we do it with energy and dignity."

This the defence bar does, but it ain't *all noblesse oblige*, suffering and good deeds.

Providing legal services to the poor was born of the profession's assumption it ought to make a charitable contribution to society, which is why, in its first form in Ontario, the statute specified lawyers ought to be paid an amount equal to three-quarters of the private rate. That 25-per-cent fee discount was reduced to 5 per cent in 1986 and abandoned 12 years later, and an annual levy on all Ontario lawyers aimed at helping finance legal aid was badly received by the profession and eliminated. As Robert Holden and the Honourable Fred Kaufman noted in their 2000 report on the legal-aid tariff, "It is not clear to what extent this sense of obligation continues to exist."

And there's something else, too: Lawyers working on legal-aid tickets often get some of the most interesting, high-profile cases.

They get attention; their names become known in various jailhouses; they get their faces on the tube and their pictures in the paper. Many of the major publicly funded cases over the past two decades in Toronto were handled by well-known senior lawyers, or by lawyers who went on to become well-known, at least a couple of whom went on to be appointed to the bench. They appeared to eke out a living; they appeared to be enjoying themselves; indeed, damned if they didn't seem to be having fun.

In other words, if this boycott persists, they're going to miss legal aid as much as legal aid will miss them.