

Ontario legal aid boycott gains momentum

Additional funding seen as 'an incomplete solution' to the problem

CHRISTOPHER GULY OTTAWA

Whether there will soon be an end to a province-wide boycott of legal aid cases involving serious criminal charges is ultimately a decision Ontario Attorney General Chris Bentley will have to

make, according to an Ottawa criminal defence lawyer.

"It may be that the attorney general felt that criminal lawyers are not in a union and they're not going to hold this together. But every indication is that it's being held together," said Michael Davies, a partner with Foord Davies Murray and the Ottawa director of the Criminal Lawyers' Association (CLA).

"For the attorney general, it's coming up to crunch time where there's going to be a series of these cases with no counsel involved."

The boycott began on June 1, when the CLA's executive board called on senior Toronto members not to accept legal aid certificates in homicide and "guns and gangs" cases. It has now spread across the province and expanded to include duty counsel representing or assisting inmates with their appeals and, in some jurisdictions, lawyers handling dangerous offender applications, said Davies, who expects the boycott to further increase in scope in the near future — and there are signs that it is

moving in that direction.

In cases where *Fisher* applications (named after the 1997 Saskatchewan Court of Queen's Bench decision in *R. v. Fisher*) are brought forward, a few Ontario lawyers have asked the court to order a set rate for fees and disbursements before they agree to representation, said Davies, who pointed out that the hourly rate paid to defence counsel is controlled by the attorney general's office and not Legal Aid Ontario (LAO).

"Ultimately, defence lawyers

want to be paid in a way that allows them to do their jobs, so they can have sufficient money to have proper secretarial and student support and not be scrambling about — to put them in a position where they feel that they are equal and opposite advocates to Crown attorneys and not just some afterthought."

In early October, the Ontario government announced that Justice Sidney Linden, former board chair of LAO and the province's current conflict of interest commissioner,

See **Boycott** Page 14

FOCUS ON LEGAL AID & PRO BONO LAW

Current cash injection represents 20 percent increase in funding

Boycott

Continued From Page 13

would serve as a facilitator to five legal aid advisory groups. Consisting of representatives from such organizations as the CLA and the Law Society of Upper Canada, these groups will focus on poverty law, family law, immigration and refugee issues, standard criminal cases and large criminal case management, and they will examine how the government's recent funding announcement "can best support the most vulnerable Ontarians and help drive significant reforms in our courts," according to a news release.

A month before, the provincial government unveiled \$150 million in new money over the next four years for LAO, which currently has an annual operating budget of about \$360 million and which will receive an additional \$60 million yearly by 2012.

"It is the biggest funding increase in the history of legal aid at a time when the province is in the worst recession since the '30s and when there is no money for so many things," said Bentley in an interview. "The only comparable time was in 1987 when [then-

attorney general] Ian Scott made some changes — [particularly] the elimination of the statutory deduction which used to apply to all lawyers' accounts in legal aid."

He explained that in "the previous challenging economic times" in the early '90s, there were cuts to legal aid. But the current cash injection represents a 20 percent increase in funding and is a "pretty strong statement of commitment by the government to access to justice for the poorest Ontarians."

"This is going to leverage not only improvements in service but a 20 percent increase in remuneration for lawyers," Bentley said.

However, the CLA points out that the new money announced will be allocated in \$15-million annual increments. (Add \$15 million in year one; \$30 million total by year two; \$45 million by year three; and \$60 million by year four together and the total is \$150 million.)

Defence lawyers believe \$120 million is needed every year for the certificate side of the program to restore some balance to the system. If divided equally between criminal, family, refugee and civil cases, the government's new funding would lead to about a 20 percent increase to

the criminal-certificate program. But, as the CLA states, the government has not committed to proportionate distribution.

The government's plan for extra funding is based on a series of assumptions, said CLA president Frank Addario. "It doesn't factor in such things as Legal Aid's deficit, estimated to be in excess of \$50 million this year, as well as population growth, new laws or police charging practices, continued recession and higher unemployment leading to increased demand on the system."



Addario

The CLA argues that the additional funding "is an incomplete solution to the two decade-long erosion of access to justice." The organization, which represents more than 1,000 members across Canada, says that compensation to Ontario lawyers for legal aid work has risen by only 15 percent over the last 22 years, against a 75 percent increase of the consumer price index.

Meanwhile, judges received an 83 percent pay increase between

1997 and 2007, and Crown attorneys obtained a 57 percent salary hike during the same period.

For his part, Bentley recalled that "there were very few sunny days" when he practised criminal law for almost a quarter-century and handled legal aid cases. However, he said that since the Liberals came to power in 2003, the provincial government has supported the increase of the tariff by 15 percent and has "put the largest funding increase in history on the table."

"That's quite a change from the years when I practised," explained the attorney general, who pointed out that criminal defence lawyers have never been "exclusive contractors" for legal aid cases. "What we're committed to doing is to make sure that those who choose to do the work are better supported."

However, Addario told *The Lawyers Weekly* that government officials "have put some energy into trying to persuade us that refusing to end the boycott will lead to the creation of a public defender's office with lawyers on staff. Frankly, the threat is a hollow one... It would be an enormous waste of taxpayers' money. The government's own audits show that the cheapest way

to deliver legal services to poor people is by renting lawyers on a case-by-case basis."

He said that having public defenders on staff would automatically raise the issue of salary parity with their counterparts on the prosecution side, and that would mean that the costs would double.

Addario explained that such an arrangement would result in either an office staffed by inexperienced lawyers, if there was no salary parity with Crown attorneys, or an "extremely expensive" office with experienced defence lawyers.

"There is no sound fiscal argument for creating a public defender system. It's a tactic used not to deliver better or more cost-efficient services, but to persuade criminal lawyers to stop telling the public that the existing legal aid plan is inadequate and underfunded," he said.

Bentley explained that the proposed large case management office would provide "better accountability and transparency" for the system. "What else happens in the future really depends in large measure on whether lawyers are prepared to do the cases," he said. "I'm really hoping that the criminal lawyers will work with us."