

## **The system is broken' Criminal lawyers boycott legal aid**

**By Robert Todd | Publication Date: Monday, 08 June 2009  
Law Times**

Criminal defence lawyers in Toronto say they are sick of propping up the province's legal aid system by accepting rates that barely cover their overhead costs, and will boycott homicide and guns-and-gangs cases until the tariff is boosted.

Criminal Lawyers' Association president Frank Addario says over 200 lawyers have committed to the indefinite boycott, which was hatched through a resolution at the CLA's May executive board meeting.

"By taking these certificates and acting as if they were sufficient compensation for the complexity and seriousness of the cases we were drawing a curtain in front of the problem," says Addario.

"The strong sentiment of the board was that we should no longer cover up for the government, or paper over the problem. That we should reveal it for all to see." Addario says he submitted a business plan to Attorney General Chris Bentley in March, outlining a roadmap to a tariff hike that would be revenue neutral for complex cases with senior lawyers.

When he received no response to that proposal, Addario sent a letter to Bentley in April outlining the CLA's ongoing concern about the tariff. The boycott was announced after Bentley failed to respond to that letter by the association's May 30 meeting, as Addario had requested.

Addario says he was "overwhelmed by the intensity of the resolution [at the executive meeting] and in my conversations with lawyers since then. I think there's a pretty firm belief throughout the bar that the time has come to bring this issue out.

And I'd emphasize that it's not as if anybody can make the system any worse than it is. The system is broken. It doesn't deliver on its primary promise, which is equal access to justice for everyone."

The CLA does not have a specific amount to which it wants the tariff increased before ending the boycott, says Addario.

"It's a dynamic process and there are a number of considerations that both we and the government need to take into account, including the current economic situation. We are realistic," he says.

The current top legal aid rate of \$98 per hour “would cause most lawyers with overhead in a downtown office and with staff to giggle,” says Addario. He notes that lawyers who work on legal aid cases end up donating many hours due to Legal Aid Ontario’s “very limited” yearly budget.

The province gave judges of the Ontario Court of Justice 83 per cent in raises from 1997 to 2007, and Crown lawyers 57 per cent more compensation over that period. But since 1987 legal aid rates for lawyers acting on behalf of the poor have grown by only 15 per cent.

Attorney General Chris Bentley says the province’s 15 per cent in increases to the tariff over the past five years “doesn’t make up for the 15 and a half years before of cuts and freezes.”

“I understand some of the frustrations,” Bentley tells Law Times in an interview.

“We really do need to find a way to renew legal aid. That’s what I’ve been working very hard on — to make sure that those who need the service can get the service in the way they need it, and those who do the work are supported in the work that they do.”

Bentley suggests the experience he brings to the AG’s office — 25 years working on legal aid cases — will help him strengthen the system.

“We will most likely be able to renew legal aid if we continue to work together on finding the right path for that, and that I’m able to do the work that I’m doing in finding the right way to renew it,” he says.

“If anything about achieving the goal we all share was particularly easy, then it probably would have been done a long time ago,” he says, also noting that the recession has delayed progress on the issue. “But I share the passion of those who are expressing a frustration.”

Addario reacts to Bentley’s comments with the following remarks: “I don’t doubt the sincerity of his commitment. We know his appreciation of what defence counsel do is not feigned. But his government does not share the sense of urgency that the bar feels. The program has lost its credibility with its best service providers. Real change is required to bring them back. And the timing of that is in the government’s hands.”

The AG has received three reports — November 2008’s LeSage-Code report on major criminal cases, October 2008’s Goudge report on pediatric forensic pathology, and July 2008’s Trebilcock report on legal aid — urging improvements to the legal aid system.

In their report, former Superior Court chief justice Patrick LeSage and then-law professor Michael Code concluded that a higher tariff rate would bring efficiencies to the system by attracting more experienced defence lawyers to big

cases.

The report noted that 55 per cent of matters under the big-case management scheme are being handled by defence lawyers with less than 10 years of experience. About 28 per cent of cases are being tackled by those with less than four years of experience.

“We appear to be trapped in a vicious circle: the longer criminal trials become, the less likely it is that leading counsel will agree to conduct them on a legal aid certificate; and yet having leading counsel conduct the defence in these cases is one of the solutions to the overly long trial, as it is these counsel who are most likely to conduct the trial in an efficient and focused manner,” stated the report.

Criminal defence lawyer Joseph Neuberger, who is participating in the boycott, says he and other lawyers are not looking for an “astronomical” legal aid rate.

“But there needs to be some adjustment up in both the rate and hours allotted to these cases, in order that lawyers are properly funded and can have offices that have the resources necessary in order to effectively defend people and make full answer in defence of charges. Because that’s in the interest of the justice system.”

Neuberger admits that lawyers have a couple of hurdles in this campaign. He says the “optics” of the boycott are poor, and it’s unlikely that the government would win big political points by increasing pay to people who defend those accused of crimes.

“But I think the message that has to get out, not only to the legal community but to the community at large, is that defence lawyers play an integral role in the overall criminal justice system,” says Neuberger.

Defence lawyer Paul Copeland, who is currently acting as a special advocate and notes that his participation in the boycott is largely symbolic, says he thought it was important for lawyers like him to lend support to the effort.

Copeland sat with Bentley on a Law Society of Upper Canada legal aid tariff reform subcommittee, when the law society still ran the legal aid program. “He was at that point very supportive of trying to get a better system in place, and trying to get it functioning properly,” says Copeland.

He says, “There has been an overall pathetic response to the need to keep the tariff in pace with what was there . . . Every increase that’s been gotten has generally been by way of a war.”

Defense lawyer Clayton Ruby has also signed on to the boycott. He says, “It’s humiliating that Ontario provides second-rate legal services for the poor. It’s

outrageous that criminal lawyers should be donating the money necessary to keep criminal defence going to the province.”

Says Addario: “I liken it to the government building a hospital and promising that it will serve all members of the community and then underfunding it to an extent that the nurses, orderlies, and doctors are required to pay to operate it. That’s basically what’s happened with the legal aid program for the last 20 years.

“Successive provincial governments have underfunded it to a point where without the generous donated services of criminal lawyers, it wouldn’t be able to operate.”

Addario says the government needs to “declare itself” on the legal aid program. “Is it behind legal aid, and is it willing to do what is required so that it can say there’s access to justice for everyone? Or is it in favour of a two-tier system? If it’s in favour of a two-tier system, then come out and say it.”