



The Advocates' Society La Société des plaideurs

July 9, 2023

VIA EMAIL

Steve Pengelly
Chair of the Board of Directors
Legal Aid Ontario
Atrium on Bay
20 Dundas Street West, Suite 730
Toronto, Ontario M5G 2H1

Dear Mr. Pengelly:

RE: Legal Aid Ontario Tariff Reform

The Advocates' Society writes this letter to respond to Legal Aid Ontario's consultation on proposed tariff reforms.

Established in 1963, The Advocates' Society is a not-for-profit organization representing approximately 5,500 diverse lawyers and students across the country, including approximately 4,500 in Ontario—unified in their calling as advocates. As the leading national association of litigation counsel in Canada, The Advocates' Society and its members are dedicated to promoting a fair and accessible system of justice, excellence in advocacy, and a strong, independent, and courageous bar. A core part of our mission is to provide policymakers with the views of legal advocates on matters that affect access to justice, the administration of justice, the independence of the bar and the judiciary, the practice of law by advocates, and equity, diversity, inclusion, and reconciliation with Indigenous peoples in the justice system and legal profession.

A number of The Advocates' Society's members do legal aid work, and we are a longstanding member of the Ontario Alliance for Sustainable Legal Aid. In The Advocates' Society's view, a well-funded, sustainable, and effective legal aid system is indispensable to ensuring access to justice for low-income and marginalized Ontarians. The Advocates' Society believes that legal aid clients are entitled to high-quality service from private bar lawyers, who are paid via legal aid certificates; The Advocates' Society also recognizes that Legal Aid Ontario ("LAO") must be prudent in its expenditure of public funds to fulfil its mandate. We provide the following comments with both of these priorities in mind.

I. Support of Proposed Increases

The Advocates' Society strongly supports and appreciates the proposed increases to the hourly rates for roster lawyers, the amounts paid for block fees, the number of hours that roster members can bill for proceedings under the tariff, and allowing *per diem* duty counsel to bill according to their respective tier rates.

Inflation has been steadily eroding the value of current tariff rates since 2015. The increasing complexity of legal matters before courts and administrative decision makers has also meant that in order to provide high-quality representation to clients, lawyers who accept legal aid certificates must routinely spend many more hours than are authorized – unpaid. The Advocates’ Society therefore expects that the proposed increases to the hourly rates, block fees, and allocated hours under the tariff will assist in attracting and retaining lawyers to perform legal aid work. Further, the proposed adjustments will assist the courts and the efficient administration of justice, as parties who benefit from legal representation generally take up less court time and fewer resources. This investment is also a good first step toward ensuring the equity and operational effectiveness of the criminal justice system following investments in policing and Crown prosecutors.

II. Recommendations

The Advocates’ Society recommends two additional cost-effective measures be included in the current tariff reform:

- 1) We recommend that LAO’s tariff allocate 10 hours for lawyers to prepare for and attend family law mediations where appropriate, as this may resolve cases, reduce ongoing costs to Legal Aid, and ease the burden on court resources. The reform proposes to provide lawyers with 5 hours for preparing for and attending each case conference under Rule 17 of the *Family Law Rules* and each LAO settlement conference (Table 9, proposed item 11). The Advocates’ Society recommends also allowing lawyers to attend and be paid for attending mediations, which typically take an entire day plus preparation. The *Divorce Act* and *Children’s Law Reform Act* specifically encourage parties to pursue alternative dispute resolution. In addition, there are regional practice directions that allow parties to advance to a combined case conference/settlement conference if they have previously mediated or attended an LAO settlement conference.
- 2) The Advocates’ Society recommends that the rules provide for roster lawyers’ ability to request retroactive authorization for certain urgent family law motions. The reform proposes to provide for one 8-hour authorization to cover select complex family law motions, for which authorization must be requested in writing from LAO (Table 9, proposed item 19.1). However, some of the eligible motions are urgent motions for which seeking advance authorization is not always realistic (in particular, non-dissipation or non-depletion (preservation) orders; restraining orders; abduction or threat of removal of child from the jurisdiction matters). The availability of retroactive authorization for urgent motions would address this issue.

III. Additional Considerations

The Advocates’ Society suggests that LAO keep the following matters in mind when considering future adjustments to the remuneration of private bar lawyers who do legal aid work, to ensure that lawyers are not pushed out of legal aid work and into fields of practice where remuneration is more predictable and stable.

First, it is important to ensure that the rates paid to roster lawyers regularly keep pace with inflation and the rising costs of running a legal practice. Many lawyers who accept legal aid certificates are small business owners. They have significant overhead costs, employees to pay, and benefits to cover. In the absence of predictable and consistent adjustments to hourly rates that match actual inflation rates, it will be difficult for lawyers to run their businesses and retain their staff.

Second, the number of hours that roster members can bill for specific types of proceedings must reflect the work done by a competent lawyer taking all reasonable steps to ensure the full and proper representation of their client's case. Lawyers have regulatory and ethical obligations to represent their clients competently, which they must discharge whether or not they are paid for their work.

In some cases, the proposed reforms to the number of hours permitted by the tariff demonstrate progress towards the goal of paying lawyers for the work they do. In other cases, however, the number of hours allocated remain significantly lower than the hours a competent lawyer would spend on the proceeding. We provide two notable examples to illustrate this point:

- 1) The current tariff for immigration and refugee matters allows a lawyer to bill a maximum of 16 hours for applications for permanent residence on humanitarian and compassionate grounds where no opinion certificate was granted (Table 9, item 104(a)). The proposed reform does not alter this amount, although it would allow for an additional 10 hours for representation after first-stage approval (Table 9, proposed item 104(c)). However, this adjustment does not take into account the amount of work that goes into the first-stage application. The Advocates' Society received feedback from our members that a first-stage application on humanitarian grounds can take an average of 30 hours for a single applicant, and 60 hours for a family. Requests for discretionary funding are either not routinely approved by LAO, or are approved at a small fraction of the additional time requested. As such, many roster lawyers have stopped accepting legal aid certificates for these types of applications.
- 2) The current tariff for criminal matters allows a lawyer to bill a maximum of 37 hours to prepare for appeals to the Court of Appeal from conviction or from conviction and sentence (Table 7, item 7(a)). No adjustment is proposed in the current reform. However, properly preparing an appeal to the Court of Appeal involves significantly more than 37 hours of work. While discretionary requests for more hours are often approved, approval is not guaranteed and requires significant extra administrative work for the lawyer.

We recommend that LAO consider these types of proceedings, and others based upon feedback from stakeholders, for future reform, to ensure that LAO's remuneration of private bar lawyers reflects the amount of work they need to do to ensure access to justice for their clients.

Thank you for the opportunity to participate in this consultation. We reiterate our appreciation of the proposed increases to the tariff. We would be pleased to answer any questions you may have about our recommendations.

Yours sincerely,



Dominique T. Hussey
President

CC: David Field, President & CEO, Legal Aid Ontario
Lenny Abramowicz, Chair, Alliance for Sustainable Legal Aid
Vicki White, Chief Executive Officer, The Advocates' Society

The Advocates Society's Task Force on Legal Aid Tariff Reform

Lisa Baupal, *Baupal Law*

Theresa Donkor, *Rudnicki and Company*

James Foy, *Savard Foy LLP*

Richard Glennie, *Beaton Burke Young LLP*

Najma Jamaldin, *Barrister & Solicitor*

Anthony Moustacalis, *Anthony Moustacalis & Associate* (chair)

Eric Neubauer, *Neubauer Law*

Nastaran Roushan, *Barrister & Solicitor*

Kirsten Van Drunen, *Van Drunen Criminal Defence*