

**SUBMISSIONS OF THE
CRIMINAL LAWYERS' ASSOCIATION
TO THE LEGAL AID REVIEW, 2007**

...[T]he current legal aid tariff is wholly inadequate: young lawyers shy away from legal aid work; older lawyers search, often in vain, for ways to reduce their overhead; potential clients run the risk of not finding lawyers prepared to accept certificates; and those who do find counsel frequently feel (though not necessarily correctly) that they are less well treated than clients who can afford to pay. The picture is bleak, and without major changes it will likely get worse. In short, this is a crisis in the making.

Tariff Review Task Force Report, November 2000

1. The Criminal Lawyers' Association

1. Founded in 1971, the Ontario Criminal Lawyers' Association (CLA) is one of the largest specialty legal organizations in Canada, comprised of more than 1,000 members, including associate members from across Canada. CLA is a strong voice for criminal lawyers and everyone concerned with the quality of criminal justice, and regularly consults with all levels of government and the judiciary on all issues relating to the legislation and administration of criminal justice in Ontario and throughout the country. CLA strives to assist its members in every aspect of the practice of criminal litigation.

2. CLA is governed by an executive and board of directors elected by the members. Eight directors are elected from the Metropolitan Toronto area and 17 others are elected or appointed in 17 regions throughout the Ontario. CLA takes advantage of the expertise of its membership through a strong committee structure, including a Legal Aid Committee. The objectives of CLA are:

- To foster and represent a strong and independent criminal defence bar and to preserve and defend the adversarial system of criminal justice;
- To honour and safeguard the legal rights enshrined in the *Canadian Charter of Rights and Freedoms*;
- To encourage study and research in the field of criminal defence practice;
- To disseminate by lectures, seminars and publications, any theories, techniques and technologies that support or promote the practice of criminal defence law;

- To sponsor meetings of members of the criminal defence bar and others concerned with the quality of criminal justice, to provide a forum for the exchange of ideas and information regarding the administration of criminal justice;
- To represent the interests of the criminal defence bar before the executive, legislative and judicial bodies which determine or influence criminal justice policy for the various levels of government.

2. Background

3. In 1996, the Government of Ontario established an independent task force, the Ontario Legal Aid Review, to undertake a comprehensive review of Ontario's legal aid system and make recommendations regarding its future direction. The task force, chaired by Professor John McCamus, issued its final report in September 1997.¹ In 2007, the Government appointed Professor McCamus to update his report and, in particular, to review the administration of the legal aid system and examine alternatives to the current tariff process. Most significantly, the terms of reference include examining **“methods of ensuring regular reviews to set and adjust the hourly rate paid to lawyers doing legal aid work.”** When Professor McCamus was subsequently appointed chair of Legal Aid Ontario, Professor Michael Trebilcock was appointed to continue the Review.

4. While CLA welcomes this opportunity to make recommendations to the 2007 Legal Aid Review, it notes that, in addition to the 1997 *McCamus Report* on the legal aid system, an independent analysis of the rate and structure of the legal aid tariff was carried out in 2000 by Robert L. Holden and the Honourable Fred Kaufmann, Q.C., leading to the *Tariff Review Task Force Report*.² **It is CLA's hope that the time for studies will soon be over and that the Government will take positive and decisive action to avert the burgeoning crisis in Ontario's legal aid system.**

¹ Report of the Ontario Legal Aid Review: a blueprint for publicly funded legal services, August 2007 [*“McCamus Report”*]

² R. Holden and The Hon. F. Kaufman, *Tariff Review Task Force Report*, November 30, 2000

3. The need for change

5. As described in the 1997 *McCamus Report*, legal aid is vitally important to maintaining the integrity of the criminal justice system.³ Low-income people, and some of society's most vulnerable groups, such as aboriginal peoples and people with mental illnesses, are heavily represented in the criminal justice system. These are the people who end up unrepresented or under-represented as a result of a chronically under-funded legal aid system.

6. Criminal law is procedurally and technically complex, and legal representation at the earliest stages of a criminal proceeding can affect the ultimate disposition of a case. Most people do not know how to navigate their way through the various stages of a criminal proceeding and, when unrepresented, cannot deal effectively with Crown counsel, do not understand the consequences that may flow from various decisions that must be made along the way, and cannot effectively represent themselves in pre-trial motions, trials and sentencing hearings. The prosecution, on the other hand, is always represented by a lawyer specializing in criminal law who, in turn, benefits from the expertise and resources of the police and, in some cases, expert witnesses. When accused persons are unrepresented, they may be more apt to plead guilty, even if they have a legitimate defence, just to bring the proceedings to an end. There may also be a greater risk of wrongful convictions.⁴ As Legal Aid Ontario has observed:⁵

Wrongful convictions, mistaken decisions (e.g. child apprehensions) and abuse of power by police, prosecutors and other enforcement and administrative agencies are inherent, recognized risks in any system of law enforcement. A justice system unbalanced in favour of the state's enforcement agencies increases the risk of these injustices. **An adequately funded "legal aid bar" is an appropriate and necessary check and balance on the power of the state over impoverished individuals otherwise unable to exercise their constitutional rights to legal self-defence.** [emphasis added]

³ *McCamus Report*, pp. 60-61

⁴ *McCamus Report*, pp. 59-61. See also Legal Aid Ontario, *Legal Aid Tariff Reform: Business Case*, November 2001, pp. 8-9

⁵ Legal Aid Ontario, *Legal Aid Tariff Reform: Business Case*, November 2001, p. 9

7. It is no mystery that the success of the legal aid system depends on attracting a sufficient number and quality of lawyers to provide services. This, in turn, depends to a large extent on setting an appropriate level of compensation under the tariff. However, as discussed more fully below, the legal aid system has been under-funded for many years and there has been significant decline in the real effective hourly rate paid under the tariff. As a result, the tariff is no longer sufficient to cover lawyers' overhead, allow them to give their legal aid cases adequate time and attention and provide an appropriate modest income.⁶ At the same time, compensation paid to lawyers in private practice, and to other participants in the criminal justice system, has significantly increased.

8. Consequently, fewer and fewer lawyers are willing to accept legal aid certificates or duty counsel assignments. In 2000, the *Tariff Review Task Force Report* found that the per capita number of lawyers paid under legal aid over the previous 20 years had decreased, even though the total per capita number of LSUC members had increased significantly. Similarly, although there had been an increase in the per capita number of practising criminal lawyers in Ontario since 1994, there had been a decline in the number of criminal lawyers willing to take on legal aid work.⁷ Legal Aid Ontario has described some of the consequences of this trend:⁸

The risk is growing of a shortage of lawyers available to provide legal aid services to low-income Ontarians. This places the integrity and effectiveness of the justice system at risk. A smaller and underpaid "legal aid bar" means elevated risks of:

- failure to meet provincial constitutional and legal obligations to ensure legal representation to low-income people in certain proceedings;
- judicial action, such as staying criminal proceedings against poor persons unable to afford or obtain legal counsel in serious matters;
- rising numbers of unrepresented persons in court – generating delays and facing an elevated threat of having their legal rights violated;

⁶ *Tariff Review Task Force Report*, p. 183

⁷ *Tariff Review Task Force Report*, pp. 118-123

⁸ Legal Aid Ontario, *Legal Aid Tariff Reform: Business Case*, November 2001, p. 2

- vulnerable people and victims being unable to assert their legal rights and remedies ...
- inability to implement quality assurance standards for legal aid services as it becomes harder to find *anyone* to take cases and as service provider morale drops.

9. Notwithstanding the various reports and reviews that have warned of the approaching crisis in legal aid, the Government has taken an *ad hoc*, piecemeal approach to legal aid funding. As a result, the problems created by chronic under-funding have only grown worse. At this point, fundamental changes are required in order to make sure that Ontario's legal aid system fulfils its statutory mandate to provide high quality services to some of society's most vulnerable members.

4. Submissions

10. In these submissions, CLA will address three issues:

- (a) The need for immediate increases to the tariff's hourly rates;
- (b) The need for immediate increases to the tariff's maximum hourly limits; and
- (c) The pressing need for a binding tariff review process to resolve future disputes over future adjustments in the tariff's hourly rate and hourly limits.

A. An immediate, significant increase in the tariff's hourly rates is warranted

11. As noted, in 2000, Robert Holden and the Honourable Fred Kaufman, Q.C. were appointed by Legal Aid Ontario to conduct an independent analysis of the tariff and make recommendations on the quality and accessibility of legal aid services in Ontario, the tariff's structure and alternative billing methods, and modifications to improve tariff administration. The authors concluded that a significant increase to the hourly rate as well as a number of other improvements to the tariff were both justified and required in order to prevent the ongoing erosion of the legal aid system.

12. Ontario Regulation 107/99, made under the *Legal Aid Services Act, 1998*, states that “this Schedule is a legal aid tariff reflecting fees customarily paid by a client of modest means...”⁹ However, as Holden and Kaufman accepted, the tariff has not, in fact, reflected the fees customarily paid by a client of modest means since 1973.¹⁰ While the tariff was nevertheless sufficient to allow legal aid lawyers to cover their overhead, give their cases adequate time and still make a modest profit, by 2000 this was no longer the case. The effective inflation-adjusted hourly legal aid tariff rate had been declining since 1986 and, notwithstanding the various adjustments that were made from time to time, the effective hourly rate had never been restored to pre-1974 levels when inflation was taken into account.¹¹

13. The steady erosion of the tariff is to be contrasted with the compensation rates of other comparable professionals, whose income significantly increased over the same period. In particular, Holden and Kaufman found, *inter alia*, that:¹²

- the average net income of self-employed lawyers in Ontario had significantly and steadily increased over the period 1980 to 1997;
- the inflation-adjusted gross salaries of federal superior court judges had seen significant increases over the period 1980 to 2000;
- the inflation-adjusted gross salaries of provincially appointed judges in Ontario had also increased significantly in the periods 1988 to 1991 and 1997 to 2000; and
- the inflation-adjusted salaries of government lawyers with the designation “Crown Counsel 4” had significantly increased from 1987 to 1992. Although the salaries then decreased due to inflation in the period 1992 to the end of 1998, they

⁹ Ontario Regulation 107/99, Schedule 1, Fees in Criminal Matters, section C.

¹⁰ *Tariff Review Task Force Report*, pp. 9-10, 187-188

¹¹ *Tariff Review Task Force Report*, p. 144, 183.

¹² *Tariff Review Task Force Report*, pp. 128-134

were then due to dramatically increase as of January 1, 1999 as a result of a binding interest arbitration award.

14. Holden and Kaufman concluded that the tariff was “wholly inadequate”, that the hourly rates set out in the tariff were “clearly too low” and that, without major changes, the situation would likely get worse.¹³

15. Notwithstanding this clarion call, the tariff has only eroded further in the seven years since Holden and Kaufman issued their report. While some modest increases have been implemented, these increases fail to even remotely reflect the increased cost of practicing law, the increased compensation paid to other participants in the justice system, or even modest inflationary indexes. In other words, the patently inadequate compensation for legal aid work that Holden and Kaufman found in 2000 has gotten substantially worse.

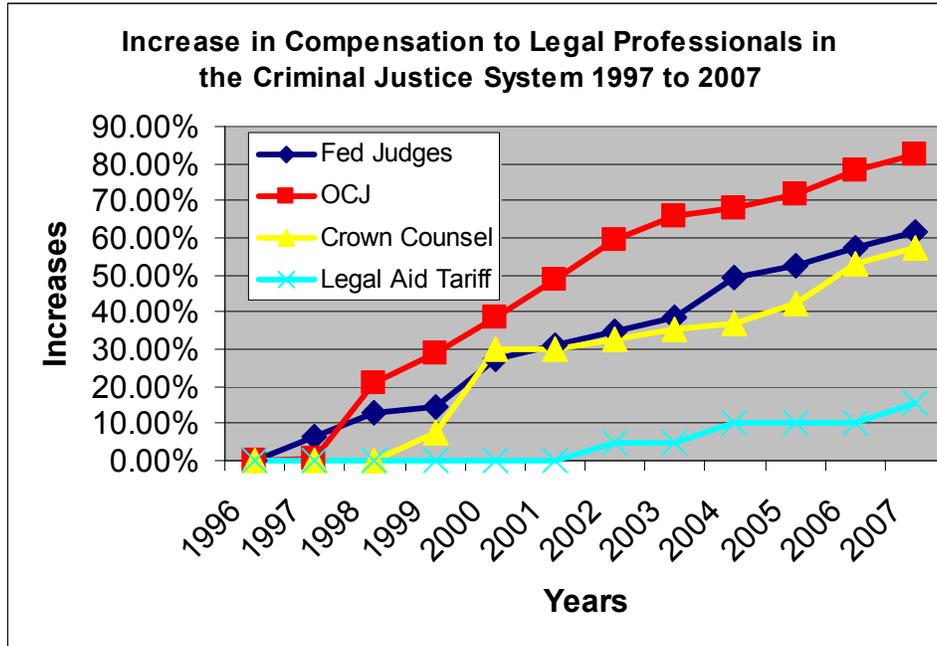
16. According to the Legal Aid Ontario website, the tariff has been increased by **only 10%** since 1987, while inflation increased by 60% in the same period.¹⁴ Over the ten-year period from 1997 to 2007, Ontario provincial court judges received an approximately **83%** increase in their compensation.¹⁵ The compensation of federally-appointed judges increased by approximately **61%**. The compensation of Crown lawyers in Ontario increased by approximately **57%** in the same period.

17. The graph below illustrates the percentage increases obtained over the past 10 years by provincial and federally appointed judges and Crown counsel in Ontario as compared to the increase to the tariff:

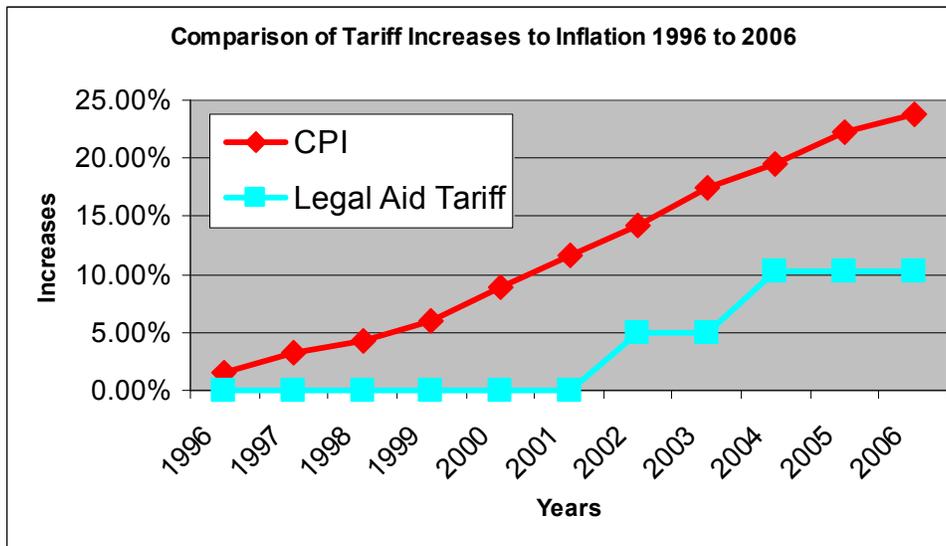
¹³ *Tariff Review Task Force Report*, p. 183-191

¹⁴ Legal Aid Ontario website: http://www.legalaid.on.ca/en/news/Lawyers_Fees.asp [date accessed, October 24, 2007]

¹⁵ This figure is subject to further increase upon the release of the Report of the 2004 Triennial Provincial Judges' Remuneration Commission.



18. Even compared to modest inflationary measures such as the Consumer Price Index (CPI), the value of the tariff continues to erode. While the tariff increased by only 10% between 1996 and 2006, the CPI increased by about 25% during the same period:¹⁶



¹⁶ This chart does not account for the 2007 increase to the tariff, nor does it account for the 2007 CPI increase which show a 2.3% increase from September 2006 to September 2007.

19. CLA also notes that the disparity between increases in compensation to lawyers in the broader legal community, as compared to increases to the tariff, is equally stark. In 2000, Holden and Kaufman found that the average hourly rate for criminal lawyers ranged from \$155 (1-5 years) to \$182 (6-10 years) to \$205 (11 years +), as compared to the \$67.00, \$75.38 and \$83.75 rates under the tariff.¹⁷

20. Short of duplicating the survey conducted by *Tariff Review Task Force*, there is no publicly available data which provides a complete "apples to apples" comparison over time. However, in 2005, Canadian Lawyer published a survey of legal fees across the country, which does allow for some comparison. For example, Holden and Kaufman found that for a lawyer with 5 to 9 years experience, the average typical fee for an uncomplicated assault charge where the accused intends to plead guilty was \$881.¹⁸ The 2005 Canadian Lawyer survey found that the average fee for a summary conviction offence guilty plea was \$1,500. By comparison, the maximum fee payable to such a lawyer under the tariff, based on a 6 hour limit, was \$452 in 2000, \$499 in 2005, and \$524 in 2007. In other words, while lawyers could earn on average 95% more income representing fee-paying clients as compared to legal aid recipients in 2000, the Canadian Lawyer survey suggests that this disparity had grown to 200% by 2005:

	Average Typical Fee	Maximum Payable Under Tariff	% Difference
2000	\$881	\$452	95%
2005	\$1500	\$499	200%

21. Another source of data with respect to the incomes of lawyers more broadly are the various commissions which establish judicial compensation, which have for several years reviewed comprehensive private sector lawyer income data for Ontario available through the Canada Customs and Revenue Agency ("CCRA"). The comparison of lawyers' incomes to judicial compensation is one of the factors considered in setting judicial compensation. The most recent report of such a commission is the 2004 report of the federal Judicial Compensation and

¹⁷ *Tariff Review Task Force Report*, pp. 179-180

¹⁸ *Tariff Review Task Force Report*, p. 170, Table 6.5

Benefits Commission, chaired by Roderick A. McLennan, Q.C., which relied on CCRA data from the year 2000 (the last year for which it found reliable data was available at the time of the report). The commission found that the increase in average income for lawyers in private practice in Ontario was 26.3% for the period of 1997 to 2000 alone. If one assumes that lawyer incomes increased at even half that rate for the remainder of the 10 year period, lawyers' incomes in the broader field of private practice have increased by approximately 57% (which corresponds to the increases in Crown counsel compensation). Clearly, increases in the income of practicing lawyers have outpaced inflation by a very substantial margin, more closely approximating the increases to judicial and Crown compensation than the more modest inflationary increases.

22. The widening gulf between levels of compensation paid to legal aid lawyers as opposed to the other essential participants in the criminal justice system is insupportable for a number of reasons. First, there can be no dispute that criminal defence lawyers perform work that is every bit as difficult, valuable and essential to the functioning of the criminal justice system as Crown counsel and judges. There is no principled basis upon which the compensation paid to defence counsel should be so far below that paid to other participants in the justice system, much less that this gap should continue to increase. Defence counsel are not second class participants in the justice system, and the value of their work should be reflected in a reasonable hourly rate that keeps pace with other essential participants in the justice system over time.¹⁹

23. Second, the priority paid to Crown counsel and judges over the criminal defence bar speaks volumes about the kind of society in which we live, and raises questions about the kind of society we seek to create. The legal aid bar represents the poorest, most vulnerable and most marginalized members of society, in what are often the most difficult circumstances of their lives. In the criminal law context, they have to face the vast resources of the state and the

¹⁹ Indeed, in *Ontario v. Figueroa* [2003], O.J. No. 1783 at para 22, the Court of Appeal expressed concern at the discrepancy between the legal aid rates paid to defence counsel and the rate to be paid to an independent prosecutor (\$250 per hour). Both defence counsel and the independent prosecutor were expected to perform important functions, the Court noted, concluding that the answer was "not to reduce the rate for the latter to a rate which even the Crown acknowledges to be inadequate to the task." It seems that the courts tacitly understand the poverty of the legal aid tariff, as does the government when it needs to retain outside counsel.

expertise of the police and the Crown. Ours is an adversarial system of justice and accused persons cannot be expected to competently or adequately represent themselves. Defence counsel provide some measure of balance in the system. Without a sufficient number of qualified lawyers to represent criminal defendants, the fairness and integrity of the criminal justice system will be undermined.

24. Third, and flowing directly from the first two points, the tariff must be adequate to ensure the recruitment and retention of excellent defence counsel. One of the objectives of the *Legal Aid Services Act, 1998* is “to promote access to justice throughout Ontario for low-income individuals” by “providing consistently high quality legal aid services in a cost-effective and efficient manner to low-income individuals throughout Ontario”. As Legal Aid Ontario has noted many of the most capable and experienced lawyers are no longer interested in most legal aid cases since the remuneration is not worth their time. High quality services “cannot be assured if a shrinking pool of lawyers willing to accept legal aid certificates forces [Legal Aid Ontario] to accept lawyers who may have limited or no experience in the relevant area of law onto panels in order to provide clients with at least *some* representation”.²⁰ Moreover, as Holden and Kaufman found, the decline in effective hourly rates has made legal aid work increasingly unattractive for new lawyers, even as a means of gaining experience.²¹

25. CLA submits that the factors taken into account by Holden and Kaufman in considering an appropriate hourly rate for the tariff apply with even more force today. In this regard, they were influenced by both a fairness perspective and an efficiency perspective. From a fairness point of view, they concluded that it is unfair for current and prospective providers of legal aid services to receive an hourly rate for their services that has declined over time while the compensation levels for lawyers in private practice, federally and provincially appointed judges,

²⁰ Legal Aid Ontario, *Legal Aid Tariff Reform: Business Case*, November 2001, p. 30

²¹ *Tariff Review Task Force Report*, p. 128. Indeed, as the cost of attending law school continues to increase, and students graduate with larger and larger student loan debts, many students who might otherwise choose to take on legal aid work will likely be forced to seek work in more lucrative areas of law: see Legal Aid Ontario, *Legal Aid Tariff Reform: Business Case*, November 2001, pp. 19-20

Crown lawyers and other government lawyers have increased. In this regard, the lawyers who allocate a significant portion of their practices to some of the least advantaged members of society are being asked to make financial sacrifices that most other lawyers and judges are not required to make.²²

26. From an efficiency perspective, they observed that the short and long-run incentive effects of under-compensation of legal aid lawyers relative to lawyers pursuing other kinds of practices or non-private practice careers would be likely to affect the career choices of both lawyers currently providing legal aid services and existing or future lawyers who might provide such services in the future. They concluded:²³

...[O]ver time, the stated objective of the legal aid tariff of ensuring approximately the same range of choice and quality of lawyers to legal aid clients as are available to fee-paying clients of modest means will increasingly diverge from reality and become largely empty rhetoric if the level of the legal aid tariff diverges significantly from compensation levels of lawyers serving clients of modest means in areas of practice covered by the legal aid plan or engaged in other areas of practice or legal employment in the public sector.

27. For these reasons, Holden and Kaufman selected the 1973 tariff as a base and adjusted the hourly rates to reflect inflation, the increase in the average net professional hourly income of lawyers, the discount that lawyers provide to fee-paying clients of modest means and the absence of a bad-debt problem with legal aid accounts. Their recommendation, in 2000 dollars, was that the hourly tariff rates for both certificate and duty counsel work should be the range of \$105 to \$140, depending on the level of experience.²⁴

28. CLA submits that, for all of the reasons set out in the *Tariff Review Task Force Report* and for all of the reasons set out above, the hourly tariff rates should be set at the same level as

²² *Tariff Review Task Force Report*, p. 184

²³ *Tariff Review Task Force Report*, pp. 184-187

²⁴ *Tariff Review Task Force Report*, pp. 187-191

recommended by Holden and Kaufman, adjusted to 2007 dollars, which produces a range of approximately \$120 to \$160, depending on level of experience.

Recommendation # 1:

The legal aid tariff hourly rate should range from \$120 to \$160, depending on the level of experience. These rates should apply to both certificate and duty counsel work.

B. Immediate increases to the tariff's maximum hourly limits are warranted

29. The tariff also caps the number of hours that a lawyer may bill for particular services. While these caps have been modified from time to time, as the Ontario Bar Association notes in its submissions to this Review, they appear to be set using outdated means that fail to take into account changing rules of procedure and substantive law requirements.²⁵ The average number of hours spent by criminal lawyers at all levels of experience on particular services generally exceeds the maximum number of hours allowed under the tariff.²⁶ Legal aid lawyers are faced with the choice of having to subsidize legal aid even further, by working hours that will not be paid, or compromising their professional standards (and the *Legal Aid Services Act's* objective of providing consistently high quality legal aid services). Legal Aid Ontario has noted that quality may be compromised when lawyers feel they must strictly conserve time to avoid too much unpaid work.²⁷

30. In its submission to this Review, the Defence Counsel Association of Ottawa (DCAO) recommends a number of changes to the caps.²⁸ CLA agrees with and adopts the submissions made by DCAO and makes the following additional points.

²⁵ OBA Submission to the Legal Aid Review, September 24, 2007, p. 10

²⁶ *Tariff Review Task Force Report*, pp. 169-171

²⁷ Legal Aid Ontario, *Legal Aid Tariff Reform: Business Case*, November 2001, p. 30

²⁸ Submissions by the Defence Counsel Association of Ottawa to the Legal Aid Review, July 2007

31. *Charter Motions:* The Rules of Practice require defence counsel to file certain material in support of Charter motions, including a notice of motion and supporting affidavit. In addition, witnesses must be interviewed and cross-examinations must be prepared and judges are more and more frequently asking that facta be filed as well. As a result, the current maximum hours allowed under the tariff are insufficient.

32. *Bail Hearings:* As set out in the McCamus Report, the importance of bail to an accused cannot be overstated. Release on bail allows an accused the opportunity to better prepare for the next stages of the proceeding and reduces the chance that an accused person will enter an inappropriate guilty plea with serious consequences for them. Legal representation plays a significant role in a person's ability to secure release.²⁹ In addition, it has long been recognized that persons who are held in custody pending trial are more likely to be found guilty. In his influential study, *Detention Before Trial*, Professor Martin Friedland found that pre-trial custody is prejudicial to the outcome of a case. He concluded that “a scheme of legal aid, properly conceived and providing adequate representation for all indigent persons, is imperative.”³⁰ Furthermore, it would clearly be more cost effective to provide funding for a lawyer to act for an accused in the initial bail hearing before a justice of the peace, rather than restricting counsel to obtaining a certificate to conduct a more costly bail review before a Superior Court judge.

33. *Bail Reviews:* In a typical bail review, counsel will file an application and three or four supporting affidavits (from the client and from the sureties). In addition, counsel must prepare the witnesses for court and legal argument on the error of law made by the justice of the peace who denied bail. The current maximums under the tariff are insufficient to cover this labour intensive preparation.

²⁹ *McCamus Report*, p. 60

³⁰ Friedland, M., *Detention Before Trial: A study of criminal cases tried in the Toronto magistrates' courts* (Toronto: University of Toronto Press, 1965), at pp. 110-125. See also John Howard Society of Ontario, Fact Sheet # 17, *Doing “Dead Time”: Custody Before Trial*, (January 2002), at p. 4: <http://www.johnhoward.on.ca/Library/Fctsheets/17/fctsh-17.pdf>

34. *Crown pre-trials:* Crown pre-trials are now mandatory. Defence counsel cannot set a trial date or resolve a case without one. Preparation is necessary, particularly in cases where counsel is attempting to resolve the matter.

35. For these reasons and for all the reasons set out in the submissions of the DCAO, CLA adopts the recommendations of the DCAO in respect of the tariff's caps:

Recommendation # 2:

The following amendments to the tariff's caps proposed by the Defence Counsel Association of Ottawa should be adopted:

- (a) Six hours should be allowed to prepare Charter applications;***
- (b) Trial continuations, whether summary or indictable, should allow for at least four hours of preparation per day;***
- (c) Six hours should be allowed for bail hearings;***
- (d) Four hours should be allowed for bail variations;***
- (e) Ten hours should be allowed for bail reviews;***
- (f) Each judicial pre-trial should be allotted two hours;***
- (g) Two hours should be allotted for one counsel pre-trial per case;***
- (h) Where counsel is resolving a large number of charges for one client (e.g. 10 or more charges) an additional six hours should be permitted to allow counsel to review the disclosure and obtain instructions;***
- (i) Five additional hours should be allowed for special needs clients;***
- (j) Counsel should be paid for one day of each five days of "fall-throughs"; and***
- (k) Five additional hours should be allowed for appeals.***

C. Setting the tariff in the future: The pressing need for a binding process

(a) Absence of a binding process undermines the right to legal aid

36. The seminal Report of the Joint Committee on Legal Aid in 1965, which set out the foundation for the subsequent development of the legal aid tariff system, emphasized the overriding principle that “the provision of legal aid should be considered a right, not a charitable gift.” It followed, if legal aid was to be considered a right, and not charity, that “lawyers providing legal aid services should be reasonably compensated to ensure that recipients of legal aid would have their choice of counsel, and that senior lawyers participate in the Plan.” In other words, reasonable compensation for lawyers providing legal aid was to serve as the cornerstone for the transformation of legal aid from a charitable privilege to a legal right.³¹

37. However, as documented in the *Tariff Review Task Force Report*, the history and treatment of compensation adjustments for the tariff can, at its most charitable, be described as one of benign neglect on the part of the provincial government. Viewed objectively, there has been a consistent and systematic failure on the part of a succession of provincial governments to ensure that the tariff is regularly, objectively and fairly adjusted, whether in response to such factors as changes in the legal services market, changes in the complexity and demands of practice, increases in the compensation provided to other key players in the justice system, and the critical need to ensure adequate recruitment and retention of both new and experienced legal counsel.

38. This has resulted in a tariff that is not only out of step with any objective markers, but more importantly in the loss of experienced counsel, the very real risk of the loss of the future lawyers needed to keep the system functioning, and unfairness to the dedicated and committed lawyers who continue to provide legal aid out of a strong sense of commitment and social justice. There is also a corresponding unfairness to the clients the criminal legal aid system is intended to serve, whose lawyers are constrained by the limitations imposed on them in comparison with other components of the criminal justice system.

³¹ *McCamus Report*, pp. 10-12

39. If there is a single lesson to be learned from the forty years since the *Legal Aid Act, 1967* was introduced, it is that without an independent, objective, fair and binding tariff review mechanism, the objectives of the legal aid system will not and cannot be met. Below, we provide a summary review of the history of tariff reform, from 1967 to the present, focussing on the treatment of the hourly rate. However, as noted above, and in several submissions already submitted to this Review, there has been a corresponding failure on the part of the provincial government to implement recommended, necessary and critical adjustments to tariff service limits and restrictions. Both the hourly rate and service limits and restrictions are integral aspects of the system of compensation for the criminal legal aid bar, and as the history below demonstrates, the need for a binding mechanism applies equally to both.

(b) Systemic failure to increase tariff despite a history of non-binding recommendations

(i) The period 1967 to 2000

40. The inadequacy of the tariff has been, as recounted in chapter II of Holden and Kaufman's *Tariff Review Task Force Report*, a persistent and enduring feature of the legal aid system. Despite a series of non-binding reviews and studies, and consistent findings that the tariff did not adequately compensate lawyers who provide services to clients under the Plan, the tariff has steadily declined. In particular:

- there were no increases in the tariff from 1967 to 1973;³²
- despite the Osler Task Forces' 1974 recommendations, there was no adjustment until 1979 and, even then, the adjustment was significantly less than what had been recommended;³³
- there were then no adjustments in the tariff until January 1983 when, despite a 1982 recommendation from the Law Society that the tariff be increased 30

³² *Tariff Review Task Force Report*, pp. 8-9

³³ *Tariff Review Task Force Report*, pp. 10-11

percent to reflect an increase of 31.7 percent in the CPI between 1979 and 1982, the tariff was adjusted by only 5% effective July, 1982 and a further 5% for certificates issued after July 1, 1983;³⁴

- in November and December 1983, the Law Society and an All Party Standing Committee of the Legislature recommended that the tariff be significantly increased to reflect the fact that, between 1967 (when the Plan was introduced) and 1981, the average weekly wage rose by some 350 percent, the CPI by 225 percent, while Legal Aid fees rose by only 50 percent). However, this resulted only in a further 5% increase to the tariff in 1984;³⁵
- in 1985, a government-appointed Fact Finder concluded that the tariff had failed to keep pace with any objective economic, professional income and cost indicators, and that the tariff was inadequate to meet the purposes of the legal aid system in Ontario. As recounted in the *Tariff Review Task Force Report*, the Fact-Finder concluded that “an inadequate tariff threatens the basic principle of freedom of choice underlying legal aid in Ontario; and .. that the quality of legal aid services may be impaired as a result of the disincentive created for senior lawyers to take legal aid cases.” Accordingly, the Fact-Finder recommended a significant increase to the tariff. Most significantly for the purpose of these submissions, the Fact-Finder also recommended that a regular review of the tariff should be guaranteed, and that future disputes should be resolved by fact finding and arbitration;³⁶
- while the Government responded to the Fact-Finder’s report by making some adjustments to the tariff (including more modest increases to the hourly rate than

³⁴ *Tariff Review Task Force Report*, pp. 11-12

³⁵ *Tariff Review Task Force Report*, pp. 12-13

³⁶ *Tariff Review Task Force Report*, pp. 14-15

the Fact-Finder recommended and reducing the 25% reduction to 5%), no increase had been made to the hourly rate since 1987;³⁷

- beginning in 1992, a series of unilateral reductions and adjustments were made to the criminal tariff, including a 5% reduction in the hourly rate and caps and reductions on total fee payments to individual lawyers;³⁸
- from 1994 to 1996 there followed a series of substantial criminal law tariff cuts, maximum hourly caps and service reductions under the Memorandum of Understanding between the Government and the Law Society. These were partially offset by some 1998 adjustments (but no increase to the hourly rate) in view of the Legal Aid Plan surplus.³⁹

(ii) The period 2000 to the present

41. In 2000, Holden and Kaufman's *Tariff Review Task Force Report* comprehensively reviewed various benchmarking comparisons (cost of living, effective maximum fees, the declining number of lawyers paid by legal aid, the incomes of legal professionals, and income paid to other professionals, and a market research survey of fees charged by legal professionals). It recommended that, in order to prevent continued erosion in the quality and accessibility of legal aid services, the tariff's hourly rate should range from \$105 to \$140, depending on the level of the lawyer's experience. As noted above, this was intended to account both for inflation and for the increases in lawyers' hourly incomes that had occurred since the introduction of the 1973 tariff, which was generally accepted as reflecting fees customarily paid by clients of modest means.

42. How did the provincial government respond to the *Tariff Review Task Force Report*? As in the past, it did nothing.

³⁷ *Tariff Review Task Force Report*, pp. 15-16. Subsequently, there were 5% increases in 2002, 2004 and 2007.

³⁸ *Tariff Review Task Force Report*, pp. 16-19

³⁹ *Tariff Review Task Force Report*, pp. 20-30

43. In 2001, in the context of the failure to increase the tariff's hourly rates since 1987, despite multiple recommendations supporting a significant increase, Legal Aid Ontario prepared a *Legal Aid Tariff Reform: Business Case*. It is worth quoting some of its findings, since matters have only deteriorated in the last six years since 2001:⁴⁰

1. **The number of lawyers willing to accept legal aid certificates or duty counsel assignments is dropping**, while demand for legal aid certificates is rising. **Lawyers who continue to take legal aid cases are reducing their legal aid caseload or refusing to accept certificates for specific types of proceedings.** Many lawyers are threatening organized certificate boycotts, duty counsel walkouts or other action.

2. **The risk is growing of a shortage of lawyers available to provide legal aid services to low-income Ontarians. This places the integrity and effectiveness of the justice system at risk.** A smaller and underpaid “legal aid bar” means **elevated risks of:**
 - **failure to meet provincial constitutional and legal obligations** to ensure legal representation to low-income people in certain proceedings;
 - **judicial action, such as staying criminal proceedings** against poor persons unable to afford or obtain legal counsel in serious matters;
 - **rising numbers of unrepresented persons in court** – generating delays and facing an elevated threat of having their legal rights violated;
 - vulnerable people and victims being unable to assert their legal rights and remedies (e.g. single moms seeking to avoid welfare by getting child support from deadbeat dads);
 - inability to implement quality assurance standards for legal aid services **as it becomes harder to find anyone to take cases and as service provider morale drops.**

Recent, major provincial investments in more police, child protection workers, Crowns and CAS lawyers are creating an unbalanced system in which **the “legal aid bar” cannot fulfil its vital role as a necessary**

⁴⁰ Legal Aid Ontario, *Legal Aid Tariff Reform: Business Case*, November 2001, pp. 2-3

check and balance on the power of the state over individuals. This increases the risk of miscarriages of justice and abuses of power inherent in any system. It is time for the province to complete its investment in the justice system by ensuring an adequate legal aid tariff.

3. **Lawyers' flight from legal aid work is explicitly and directly linked to the low legal aid tariff. Hourly rates for legal aid work were last changed in 1987. Inflation has eroded the real-dollar value by 32% since then, while lawyers' overhead costs have continued to rise. LAO research and consultations indicate that the rates paid under the current legal aid tariff are making it uneconomical and unaffordable for lawyers to perform enough legal aid work to support the growing demand for legal aid services.** In addition, legal aid lawyers are expressing **tremendous frustration and a sense of unfairness** at the low tariff level and **at the fact that other lawyers in the justice system such as Crowns and Children's Aid counsel have received significant improvements to their compensation.**
4. Member organizations of the Legal Aid Tariff Working Group, including the Ontario Bar Association, County & District Law Presidents Association, and the Criminal, Family and Refugee Lawyers Associations, are asking for an increase of the tariff to \$100-\$125 per hour. This request is consistent with the historical relationship between typical commercial rates for clients of modest means and the tariff – a relationship cited in the regulation. It is the same as the recent request made by Ontario Children's Lawyer panellists.
5. Increases to the hourly rate(s) paid to lawyers providing legal aid services and to the billable hours permitted for specific classes of matters are needed to prevent erosion of the LAO program's ability to ensure access to justice for low-income and disadvantaged Ontarians. **Failure to address the tariff issue will accelerate the current trend of lawyers quitting legal aid or reducing legal aid caseloads.** [bold emphases added]

44. Moreover, with specific reference to the need for a legal aid tariff review process, Legal Aid Ontario stated that the "lack of a regular review process results in pent-up pressure for change, threats of service disruptions by disgruntled service providers and the need for major increases and new resources all at once – in short, crisis situations....A regular review process

would provide orderly, reasonable and managed adjustments to the tariff, with no disruptions to service.”⁴¹

45. Legal Aid Ontario also outlined the extent to which the hourly tariff rate failed to reflect market rates for clients of modest means, which it concluded were in the range of \$100 at the lowest end to \$165. It also observed that there had been a 41.2% decrease in the effective hourly tariff since legal aid was introduced in 1967. Legal Aid Ontario was also aware, of course, of the reasoned recommendations of the 2000 *Tariff Review Task Force Report*.⁴²

46. Nonetheless, Legal Aid Ontario modestly proposed increasing the then current hourly rate of for certificate lawyers by about 26%, to a range of \$85 to \$105, to be phased in over three years. This adjustment was only intended to roughly reflect the rate of inflation since the last change in 1987 (with a deduction to reflect elimination of holdbacks on fees in 1998).⁴³

47. While Legal Aid Ontario believed that a significantly higher increase was warranted, it is important to note that it expressly justified its more modest approach on the basis of its recommendation that there be “the development of a tariff review process”, so that lawyers would be encouraged by the prospect of “further increases without a 14-year wait.”⁴⁴

48. How did the provincial government respond to Legal Aid Ontario’s objective and dispassionate analysis of the legal aid crisis facing the criminal justice system, and its modest recommendation for tariff increases, advanced once again through the vehicle of yet another non-binding recommendation? It ignored the recommendations and provided for only two increases of 5% (in 2002 and 2004) to the hourly tariff, demonstrating yet again that, without a binding

⁴¹ Legal Aid Ontario, *Legal Aid Tariff Reform: Business Case*, November 2001, p. 4

⁴² Legal Aid Ontario, *Legal Aid Tariff Reform: Business Case*, November 2001, pp. 19-23

⁴³ Legal Aid Ontario, *Legal Aid Tariff Reform: Business Case*, November 2001, p. 39

⁴⁴ Legal Aid Ontario, *Legal Aid Tariff Reform: Business Case*, November 2001, pp. 43-45, 50

process, the provincial government will continue to ignore the evidence and the need for necessary and appropriate adjustments to the tariff.

(c) Towards a binding process for setting the legal aid tariff

(i) What does the absence of binding tariff review mean today?

49. As the Ontario Bar Association has summarized in its submission to this Review, as of 2007:⁴⁵

...While the Tariff Rates have risen only 10 percent, inflation has risen 60 percent. To put this in perspective the Legal Aid Tariff Rate for a young lawyer is \$77.56/hour, the provincial average market rate for the same lawyer is almost double that at \$150/hour. This gap only widens the longer a lawyer is in practice. By the time a lawyer has practised 10 years the market rate (\$260/hour) is almost three times the Tariff Rate (\$96.96/hour).

When one factors in the costs of mandatory practice insurance, Law Society fees, office costs, professional development and staffing, **the Tariff becomes unsustainable as a source of professional income.**

With an hourly rate that is so far behind colleagues working for market rates, it is no surprise that fewer and fewer lawyers are able to take on legal aid work. Add to this the rising cost of obtaining a degree and it becomes increasingly clear why the number of recent law school graduates taking on legal aid work is marginal.

Fewer young lawyers being prepared to take on legal aid work means reduced access to justice for many Ontarians, particularly in larger urban centres. [emphases added]

50. Given the history outlined above, the time has come to recognize that, without a binding process to set the tariff, the widely acknowledged crisis in the criminal justice legal aid system will only further deteriorate.

51. Over the past forty years, we have witnessed a series of non-binding studies, reviews and recommendations, almost always ignored and disregarded by the government of the day. The

⁴⁵ OBA Submission to the Legal Aid Review, September 24, 2007, p. 10

problem has not so much been the absence or regularity of review, but the lack of any teeth to the recommendations themselves. The provincial government will continue to ignore the need for meaningful adjustment to the tariff, confident that, at election time, the constituency of legal aid lawyers and criminal accused will not affect the outcome.

52. Similarly, it is CLA's understanding that non-binding models, introduced in other provinces (including B.C. and Alberta), where multi-party tariff review or advisory committees have been established to make advisory recommendations to government, have met with similar results, i.e. provincial governments have remained free to ignore the outcome and recommendations of these processes, and the non-binding process has not been effective in achieving the level of necessary increases to the tariff.

(ii) Other participants in the Ontario criminal justice system have access to a binding process

53. Significantly, most other essential participants in the criminal justice system who are paid from the public purse – ranging from police, to Crown lawyers, to provincially appointed judges – have some system of fair, independent and binding adjudication to determine their levels of compensation. Police have binding arbitration, Crown lawyers received their needed increases in the late 1990s as a result of binding arbitration and continue to have access to a final offer selection process that is binding when certain conditions are met, and judges have their salaries determined by a binding Commission process.

54. Only criminal defence lawyers are denied this fundamental measure of protection that could ensure that the compensation they receive under the legal aid tariff is fair and appropriate. More importantly, accused persons are, and will continue to be, denied access to quality legal representation if a binding tariff review mechanism is not implemented.

55. One objection that might be raised in respect of CLA's request for a binding process is that, if lawyers are dissatisfied with the amount of the tariff, they should engage in some form of withdrawal of services or job action. However, criminal lawyers have obvious concerns about depriving people of their right to legal counsel and their own professional obligations in this

regard, and it would be inappropriate to allow government to take advantage of those concerns in refusing to pay a fair and reasonable tariff rate. Moreover, the services provided by lawyers to criminal accused are no less essential than those provided by hospital workers, firefighters and the police, all of whom have a binding process to determine compensation. Lawyers, too, should have such a process when it comes to setting the cost of representing and upholding the constitutional rights of criminal accused.

(iii) What should a binding process look like?

56. In its 2001 business case, LAO set out its view that “a regular, binding process could be designed” which would.⁴⁶

- ✓ avoid future tariff crises by ensuring regular adjustments;
- ✓ provide a transparent, objective and well-managed process for assessing tariff needs that earns credibility with taxpayers, service providers and government;
- ✓ use terms of reference to ensure reasonable and empirical criteria for tariff reform recommendations, meeting provincial accountability concerns;
- ✓ ensure fair service provider input and support or acceptance of results –critical to the success of this private-public service delivery partnership, especially as legal aid certificate lawyers become more organized on this issue.

57. CLA wholeheartedly agrees with this description of the advantages of and the need for a binding process. Given the tariff’s history, it is clear that a binding model, under which the recommendations of the process would be binding on both Legal Aid Ontario and the Government, is the only model that carries the prospect of ensuring fair and objective tariff adjustments. An advisory model in which either Legal Aid Ontario or the Government could reject recommended tariff adjustments -- would very likely leave legal aid lawyers and criminal accused with a repetition of the same history of neglect summarized above. More importantly it would fail to redress and respond to the crisis facing the legal aid system.

⁴⁶ Legal Aid Ontario, *Legal Aid Tariff Reform: Business Case*, November 2001, p. 43

58. CLA has considered other options, including recommending that tariff adjustments become binding unless rejected by the Legislature within a defined time period, or restrictions on the grounds or quality of reasons which may be given for rejecting tariff review recommendations reviewable, perhaps, in the courts. However, in our view, given the risk of failure of a non-binding process (in light of the history of tariff review in Ontario), the lack of credibility of a non-binding process for the key stakeholders, and the ongoing damage to the criminal justice system which would result from a continuing failure to implement tariff review recommendations, the time has come to implement a binding tariff review process.

59. CLA believes that a binding tariff review process should, at a minimum, include adjustments to the hourly rate and other fees (including appearance fees and travel rates, as well as adjustments to the maximum allotments of billable hours). CLA envisions a binding process taking place in three or four year cycles. In “off-years”, as is the case with other mechanisms for determining compensation in the justice sector in Ontario and elsewhere, annual adjustments to the hourly rate and other fees could be tied to an external economic index such as the CPI or the Ontario industrial aggregate wage (AIW). These annual adjustments would minimize the risk of the tariff lagging significantly behind other parties in the justice system and in the public sector more generally.

60. In addition to this annual indexed wage adjustment, there would be a binding triennial or quadrennial review, which would assess and determine the adequacy of the hourly rate, as well as maximum allotments of billable hours, taking into account a broader range of factors.

61. In terms of possible criteria to be considered in this triennial/quadrennial review, CLA does not have any difficulty with the broad range of factors affecting the adequacy of the tariff identified by Legal Aid Ontario, including:

- an analysis of changes in law, rules of practice and government enforcement and other policies to determine their impacts on billable hour allotments;

- the economics of practice, including overhead, and private sector lawyer market rates for comparable legal services provided to clients of modest means;
- rates offered to lawyers by broader public sector agencies operating in Ontario;
- assessment of client needs, including identifying areas where extra incentives might be warranted; and
- assessment of options for alternative forms of compensation.

62. CLA would add that explicit consideration ought also be given to including the following criteria:

- the need to recruit and retain an appropriate balance of new and experienced private lawyers to provide legal aid services;
- the need to attract lawyers through fair and reasonable compensation in light of prevailing economic conditions and the overall state of the economy;
- overall competitiveness of legal aid rates with relevant comparators, and
- the compensation rates and adjustments provided to others paid out of the public purse, particularly other professionals.

63. One option for design of the process which CLA would favour would be to build into the review a process of good faith multi-party discussion/negotiation, involving the government, Legal Aid Ontario, and organizations representing the legal aid bar. While a binding dispute resolution review process would be available to determine any outstanding issues, the very existence of a binding process would help all parties to arrive at a mutually agreeable outcome.

64. This good faith discussion/negotiation process could be facilitated by a mediator /fact-finder, who could be provided with resources to assist the parties in costings and other research, and who might also be empowered to make recommendations to the parties on tariff revisions.

65. However, in the absence of agreement on tariff adjustments, those matters remaining in dispute would ultimately be submitted to an independent third party decision-maker. While CLA sees merit in the decision-making body being comprised of a panel with a neutral chair and nominees from the interested parties, in view of the multiple interests at stake in the tariff review process, the simplest and most efficient model may well be one in which a single independent chair is appointed to hear submissions from interested parties, and determine the appropriate tariff. However, given the obvious financial interest that the Government and Legal Aid Ontario have in the outcome, this individual should be appointed by a neutral agency, perhaps the Chief Justice of Ontario or another neutral person or body.

66. Finally, CLA wishes to be clear that it is not proposing that the binding process go beyond determining tariff issues. In other words, CLA accepts that ultimately it is for the government to decide what level of funding will be allocated to the legal aid system as a whole. This is no different than the right of government to make funding allocation decisions in respect of hospitals or other institutions in the health care system, or to municipalities including police and fire services, or to the university and college sector.

67. However, within that overall funding decision-making framework, just as it is neither fair nor reasonable to expect providers or employees in other sectors to have their compensation unilaterally determined by government or by their employers, neither is it fair or reasonable to expect that lawyers providing legal aid should have their tariff unilaterally determined.

68. More importantly, in the context of legal aid, the interests at stake in access to justice and in compliance with constitutional norms and requirements are of the utmost significance to the fundamental values of our society. This makes it all the more critical that the determination of the legal aid tariff be made in a manner that is responsive to and reflective of these societal and constitutional values.

69. We have all seen the results to the legal aid system of leaving the government with the unilateral authority to reject non-binding recommendations. Under the binding approach proposed by CLA, government would still have authority to determine the overall funding level

for legal aid. If it concluded that the objective determination of an adequate tariff would result in too much expenditure on legal aid, it would be free to make that determination. However, this would be a transparent and open decision for which it would be publicly accountable, and which would be the subject of public debate. In CLA's submission, such a transparent and open process is to be preferred to the current system, in which political accountability is diluted, as the government continues to attempt to rely on the eroding willingness of Ontario's legal aid bar to provide essential legal services at a substandard compensation level. This is not only unsustainable, but will result in a demonstrable and inevitable deterioration in accessibility to and quality of all legal aid services in the criminal justice system and elsewhere.

Recommendation # 3

A binding review process, which would review the tariff at regular intervals, should be designed and implemented.

5. Conclusion

70. The Attorney General of Ontario is reported to have recognized that "tariff increases have been sporadic, at best" and that the legal aid system should not have to depend on the whims of cabinet funding.⁴⁷ For all of the reasons set out above, CLA submits that immediate and significant increases in both the tariff's hourly rates and its maximum hours are necessary to avoid a breakdown of the legal aid system. CLA hopes that the recommendations arising from this Review will seek to restore the tariff to a level that will reflect fees customarily paid by a client of modest means, and that, in turn, the Government will accept and implement those recommendations.

71. The Attorney General is also reportedly of the view that "an arm's-length funding scenario" with an "automatic tariff review system" would alleviate the problem and permit Legal Aid Ontario to increase legal aid rates should they fall below a certain baseline.⁴⁸ CLA reiterates that, any process designed to review the tariff's structure and rates in the future must, in addition

⁴⁷ Globe and Mail, September 21, 2006, p. A7

⁴⁸ Globe and Mail, September 21, 2006, p. A7

to being “automatic” (by which the CLA presumes the Minister means that it will take place on a regular basis), also be independent and have some teeth. Otherwise, as the past 40 years have shown, the Government will continue down the path of erratic under-funding and the legal aid system will continue to lurch from crisis to crisis.

Summary of Recommendations

Recommendation # 1:

The legal aid tariff hourly rate should range from \$120 to \$160, depending on the level of experience. These rates should apply to both certificate and duty counsel work.

Recommendation # 2:

The following amendments to the tariff's caps proposed by the Defence Counsel Association of Ottawa should be adopted:

- (a) Six hours should be allowed to prepare Charter applications;*
- (b) Trial continuations, whether summary or indictable, should allow for at least four hours of preparation per day;*
- (c) Six hours should be allowed for bail hearings;*
- (d) Four hours should be allowed for bail variations;*
- (e) Ten hours should be allowed for bail reviews;*
- (f) Each judicial pre-trial should be allotted two hours;*
- (g) Two hours should be allotted for one counsel pre-trial per case;*
- (h) Where counsel is resolving a large number of charges for one client (e.g. 10 or more charges) an additional six hours should be permitted to allow counsel to review the disclosure and obtain instructions;*
- (i) Five additional hours should be allowed for special needs clients;*
- (j) Counsel should be paid for one day of each five days of "fall-throughs"; and*
- (k) Five additional hours should be allowed for appeals.*

Recommendation #3

A binding review process, which would review the tariff at regular intervals, should be designed and implemented.