

FAMILY LAWYERS ASSOCIATION
PRESENTATION TO
LEGAL AID ONTARIO BOARD OF DIRECTORS

Introduction

The Family Lawyers Association was formed in 1994 in response to a Legal Aid crisis. Legal Aid issues remain a major concern to our membership and advocating for improvements to the Legal Aid Plan constitute a large part of the Family Lawyers Association's work.

As the Family Lawyers Association has grown, we have branched out to dealing with several other issues, notably the Motherisk Commission, the Provincial Budget Consultations in which we have presented submissions in support of improvements to the Legal Aid Plan, the court system and advocated for our clients in receipt of ODSP and Ontario Works to be able to keep child support payments for the benefit of the children.

The Family Lawyers Association provides information and education to our membership through regular news letters, our website which includes a Lawyer's Tool Kit for members only (with Justice Sherr's Bench Book). We have also undertaken educational programs such as the "Everything Legal Aid Conference" in January 2013 and "Everything You Always Wanted to Know About Child Protection" small group seminar in April 2016.

The Family Lawyers Association has also undertaken some social activities, including an annual social event and smaller gatherings around the Annual General Meeting, young lawyers' pub nights and attending sports events.

While our activities have greatly expanded in recent years, Legal Aid remains a top priority for our membership. In a survey of our members that we did to assist in setting priorities for the Board for 2015/2016, the members told us:

- 90% of members who responded said that advocating for changes and improvements in the tariff was important or very important to them.

- 75% said improvements in administrative issues at LAO was important or very important to them.
- Of the issues that we had worked on in the two previous years, the most important for members were financial eligibility (84%) and LAO child protection tariff hours (62.5%).

We also asked about the education that members wanted from the FLA and 62% wanted education on Legal Aid issues.

Submissions to Legal Aid Ontario by the Family Lawyers Association

A. Discretion Guidelines and Tariff Reform and Tariff Reform

When LAO proposed Discretion Guidelines in 2012, they consulted with the Family Lawyers Association, amongst other groups. We felt that the guidelines were far too restrictive and we prepared a position paper on behalf of the Board, attended meetings with Legal Aid Representatives and organized our membership to attend meetings. While we still feel the Discretion Guidelines are far too restrictive, there were significant improvements made, including:

- Two new factors were added to the complexity criteria in domestic files: sexual abuse or serious physical abuse allegations and Hague Convention matters.
- Several “other relevant factors” were added, including extensive disclosure, multiple parties, a well funded litigant on the other side and the timeliness and/or reduction in appearances through a mediated or negotiated settlement.

It is the Family Lawyers Association’s position, however, that we should have an adequate tariff and not need to rely on discretion to be paid for competent and necessary work. We then turned our attention to improving the tariff.

Our position paper on Tariff Reform in both child protection and domestic matters was approved by the Board in January 2013 and sent to Legal Aid Ontario Policy staff and to the then Attorney General, John Garretson. (See Tab A)

B. Child Protection Tariff Reform

i) Basic Allotment

The Family Lawyers Association made several submissions to Legal Aid Ontario staff and the Ministry of the Attorney General concerning the inadequacy of the child protection tariff and made recommendations for improvement.

In June 2014, we did a survey of our members and asked them to indicate the number of hours spent on two important steps in a child protection matter, i.e. Motions to increase access or move to unsupervised access, and Temporary Care and Custody Motions. At the time, the tariff provided 19 hours in total for Society Wardship and 22 hours for a Crown Wardship Application, and an additional 6 hours for a Temporary Care and Custody Hearing. There were no additional hours for Access Motions.

We received data with respect to a total of 48 Access Motions and the counsel who provided the data ranged from fairly new calls to child protection lawyers with over 20 years' experience. The average number of hours was 18.1 and ranged from a low of 7 to a high of 32.8 hours.

For Temporary Care and Custody Hearings, we receive data on a total of 49 cases, and the average number of hours spent was 21.4. It ranged from a low of 9 hours to a high of 40.5 hours. These statistics were provided to Legal Aid Ontario staff.

The Family Lawyers Association also provided our paper with recommendations for child protection tariff enhancements on September 8, 2014. A copy of our paper and the survey results are attached. (Tab B)

Legal Aid Ontario discussed its proposals for increasing the Child Protection Tariff with us and we made some recommendations, some of which were accepted. In the end result, the base allotment was increased to 45 hours where the Society had removed the child from the home and was seeking either a Society (temporary) or Crown Wardship Order. This has had a very positive affect on our ability to defend a client against the most serious of family cases, where the State is removing children from their parents. Although not adequate in every case, the number of cases that exceed the tariff and where discretion needs to be sought have decreased considerably.

ii) Summary Judgment Motions

In the past year, however, we have wrestled with another inadequacy in the Child Protection Tariff, being the hours allotted for a Summary Judgment Motion. The current tariff provided for 8 hours and that has not changed since a major change to Rule 16, which greatly expands the judge's powers on a Summary Judgment Motion, following the *Hryniak* Decision. Judges may assess credibility, make findings of fact and determine what, if any issues, require a viva voce trial. Its use is no longer limited to the clearest of cases. Many cases which previously would have required a trial or a longer trial, are now being dealt with in whole or in part on a Summary Judgment Motion. The Societies are bringing Summary Judgment Motions in far more cases and they entail far more work than they did pre- *Hryniak* and the Rule 16 amendment.

The Society's materials are often approaching what they would be filing at a trial. There are several lengthy Affidavits, volumes of police, medical and other records and Society counsel is usually required to prepare a Factum. Parents' counsel, at least in Toronto, is often not required to file a Factum as the Bench is cognizant of the limited legal aid hours we have, but we often have a difficult choice as this may place our clients at a disadvantage to not have our own summary of the facts and law to counter what the Society has presented.

To gather concrete evidence of the number of hours actually required to defend a Summary Judgment Motion, the Family Lawyers Association did a survey in August/September 2006 in which we asked lawyers who have done Summary Judgment Motions since the rule change to indicate how many hours it took to complete various steps, the volume of material they received from the Society and the volume and type of material they prepared. As we expected, the results show that the number of hours required has increased significantly since the rule change. The total hours for all work, including attending on the Motion, range from 14.5 hours to 100 hours, with 39.3 hours being the average. A copy of the spreadsheet with the answers from 29 respondents is attached. (Tab B)

C. Domestic Tariff

The Rule change regarding Summary Judgment Motions also effects domestic cases, but there have been several other changes to the Rules and court procedures that make the current tariff both inadequate and contraindicated for what the Ministry of the Attorney General is trying to incentivise.

The amendment to the Rules in Rule 1.(7.1) gives a judge broad powers to control the trial process, with a view to shortening trials and freeing up scarce resources. Much more work is now done outside of the court room as evidence-in-chief by way of Affidavit is becoming much more common. Some judges are also using this rule to limit the amount of cross examination and the number of witnesses.

While this may greatly shorten the trial, it increases the amount of trial preparation time. The current tariff encourages longer trials. Indeed, the number of days of trial is the only item in the tariff that is unlimited, certainly not what we should be incentivising.

The Rules also provide for a number of steps that could be taken that would shorten the trial or in many cases, avoid them entirely. The current tariff allows an infinite number of Case and Settlement Conferences, for example, but no additional

hours allotment for Motions. In some files, there comes a time where continuing to conference is not productive and a Motion needs to be brought. There are cases that continue to drag through the court from one conference to another, however, because the lawyers have no legal aid hours left to bring a Motion. This is a matter that we have been discussing with Legal Aid Policy Staff extensively.

It is relatively rare to see counsel using Requests for Information or Requests to Admit, both of which can be very helpful in moving a case forward by getting disclosure and by narrowing issues. Again, there are no additional hours allotments for these steps and therefore there is a disincentive to do them.

In July/August 2015 we surveyed our membership about the adequacy of the domestic tariff. Firstly, it should be noted that 40% of the people who responded were retained on Legal Aid Certificates on more than 75% of their files and an additional 23.5% were retained on Legal Aid Certificates in 50% to 75% of their files.

Over 55% of respondents indicated that they either require discretion or write off some of their time in more than 75% of their legal aid domestic files. We are aware that these statistics differ considerably from Legal Aid Ontario's own statistics where a much smaller percentage of people request discretion. Many lawyers have given up on requesting discretion, particularly since the implementation of the Discretion Guidelines, however, because it is viewed as futile.

We appreciate that the legal eligibility criteria was expanded when new monies were given to Legal Aid Ontario so that more types of cases were covered, but it is still only the most complex where a certificate is generally available. It is trite to say that where there are complex legal issues or a client has special needs such a mental health issues, more time is going to be required to handle the case. As a result, 92% of our respondents said that the existing tariff was a factor in considering whether or not to accept a retainer in these circumstances.

Over 80% said that the tariff was a factor in deciding whether or not to bring a Motion for interim relief and 86% said that it was a factor in considering whether to use interim steps under Rule 20 or Rule 22.

Our paper on Domestic Tariff Reform, the survey results and our further submission to LAO staff are at Tab C.

D. Mid-Level Case Management, Second Chair, Mentorship Program and other Innovations

The Family Lawyers Association has welcomed these new innovations and have participated in developing and improving on them. Our biggest concern has been that the programs are not as well known amongst the profession as they should be and are therefore not utilized as well as they could be.

The Family Lawyers Association was asked for feedback about the "Information for Lawyers" section of the LAO website by LAO policy staff in the fall of 2015, and we did a survey of our membership to get a broader perspective on what the profession found helpful and where improvement was needed. We found that the majority of respondents were not aware of programs such as Mid-Level Case Management and the Mentorship Program and there was little difference between lawyers with many years of experience and new calls. The majority had either not heard of the program at all or had heard of it but had no information about how to access it. We have been working with LAO staff to develop ideas about promoting this amongst the profession.

The Mentorship Program has been promoted by the Family Lawyers Association and as a result, we have more mentor counsel signed up than the other three areas combined. We also advocated for LAO to put the names of senior counsel who had been approved as mentors on the website so that junior lawyers looking for a mentor would be able to find us.

There has been greater uptake in the Mid-Level Case Management Program in recent months, but one of the difficulties that lawyers have with the program is the lengthy and complex assessment form. Again, LAO staff has been open to revising this and we have participated in making suggestions to them to simplify the form.

Our survey and submissions with respect to the "Information for Lawyers" section is at Tab "D".

E. Financial Eligibility and Expanded Eligibility for Services

The Family Lawyers Association has long promoted an increase in the Financial Eligibility Guidelines and we were very pleased to see the government's commitment to increase funding so that the guidelines could be raised. We made submissions on this issue and continue to make submissions, at the Annual Budget Consultations preceding the Provincial Budget. While the increases have certainly helped a large number of family law clients, there is still a considerable gap between the income where people are no longer eligible for a legal aid certificate and the income where they can actually afford to retain a lawyer privately.

The Family Lawyers Association has also been advocating for an expansion for the legal services that would be covered by legal aid certificates and were pleased that some of the new funding was used to do so. We were asked to make submissions with respect to some proposals from Legal Aid Ontario and we did comment on some of the proposals, with a recommendation to expand them further. We were particularly concerned about expanding services in child protection to cover prelitigation services where a parent was being asked to sign a Voluntary Service Agreement or there was an indication that a baby might be apprehended at birth. We also endorsed having certificates available to third parties who wished to present a Kin Plan or seek access to maintain an important familial relationship.

We do not have data with respect to the number of prelitigation certificates issued, but can say antidotally that this has been of great benefits to clients with the wherewithal to seek legal advice before their child is apprehended. In some cases it

has led to a Voluntary Service Agreement and in others allowed counsel to be ready to defend an against an apprehension at the First Appearance, which by law must be done within four business days.

Our brief submissions on the expansion of legal services is at Tab "E".

Conclusion

The Family Lawyers Association thanks the Board for this opportunity to present the issues that concern us. We look forward to continuing to work with LAO staff to improve services available under the Certificate Program and we are always open to consultation.

Submitted on behalf of the Family Lawyers Association

Jean Hyndman
Chair – Legal Aid Committee
Family Lawyers Association