

July 7, 2023

Legal Aid Ontario
20 Dundas Street West, Suite 730
Toronto, Ontario
M5G 2H1

Via email: consultation@lao.on.ca

RE: PROPOSED AMENDMENTS TO LAO TARIFF

I am writing to you on behalf of the Toronto Lawyers' Association ("TLA") in response to the consultation by Legal Aid Ontario ("LAO") on proposed amendments to the fees private bar lawyers are paid for doing publicly aided work.

The TLA represents the interests of more than 3,700 members who practice law in all disciplines across the Greater Toronto Area. Our membership, and our Board of Directors, represents the full diversity of our profession in Ontario. Included among our members are many lawyers who practice criminal law and accept Legal Aid Ontario certificates in a variety of matters.

The TLA wholeheartedly endorses the proposed increases to the hourly and block fee rates to be paid to roster members, as well as the various reforms being suggested to the tariffs. A strong and adequately funded defence bar is critical to maintaining a balanced and fair justice system.

Having reviewed the proposed changes, we wish to provide brief input on six areas for your consideration:

- a. Eligibility for the "mental health block" and "mental health enhancer";
- b. Eligibility for mid-level case management;
- c. Billing judicial pre-trials;
- d. Eligibility for the global resolution authorization;
- e. Coverage for a *Myers* review; and
- f. Clarification of the change to the '64 hour rule'.

A. Eligibility for the "mental health block" and "mental health enhancer"

The TLA is pleased that LAO is proposing adding a "mental health block" or "mental health enhancer". Clients with a known or suspected mental illness often require more of counsel's time than other clients. It is appropriate that counsel are remunerated for this time.

However, the TLA is concerned with the eligibility threshold. The draft amendments define the block or enhancer as authorized when the accused "has an identifiable history of mental health

issues". This threshold is problematic. It is limited to those with an "identifiable history" of mental health issues. This threshold excludes accused persons who have newly presenting mental health issues. It also excludes those whose mental health history may not be "identifiable". Many clients experiencing mental illness do not actively seek out diagnosis or treatment such that they do not have an "identifiable history" of illness.

The TLA recommends that the "mental health block" be available in circumstances where the client, in counsel's opinion, is experiencing a mental health issue. To ensure the block is not misused, counsel should be required to provide LAO with the facts grounding their opinion.

B. Eligibility for mid-level case management

The TLA welcomes the expansion of mid-level case management. LAO's Case management is an effective tool that provides counsel with financial clarity in more complex matters rather than being required to litigate a case on the hope that a discretionary increase is later provided (after the work has been performed).

As it stands, the proposed changes indicate that there will be an "expansion of [the] list of offences eligible for mid-level case management". The TLA recommends that, in addition to a list of offences, eligibility should also be available by way of a financial threshold (for example, cases where total cost is expected to exceed \$5,000). The complexity and financial realities of a case are not generally determined by reference to the charge alone.

C. Billing judicial pre-trials

Judicial case management is a widely used tool of the judiciary to ensure that cases progress effectively through the justice system. LAO coverage for judicial pre-trials ("JPT") is currently limited to one JPT at each 'stage' of a matter (one prior to setting a matter down for a hearing, one after a matter has been set down in the Ontario Court of Justice, and one in the Superior Court of Justice).

However, complex matters may sometimes require several JPTs prior to resolution. These are often not optional for counsel; they are mandated judicial case-management. Attendances at multiple JPTs can overwhelm a block fee. The TLA recommends the creation of a special block or tariff for further JPTs when ordered by the court. This is something counsel have no control over, and in fairness there should be a mechanism for compensation.

D. Eligibility for the global resolution authorization

LAO proposes adding a new authorization for global resolutions where the offences subject to the resolution are covered by a certificate and they appear on separate Informations (currently, only one resolution payment is available). However, 'administrative offences' are excluded. The TLA recommends that the new authorization apply to 'administrative offences'. Further, the TLA recommends an enhanced authorization where multiple cases are resolved together.

Global resolutions benefit the criminal justice system. They offer finality to the case at hand, and they free up time for other cases. They can also take extensive work. They require review of disclosure for each file, discussions with the client about their prospects for each file, and negotiations with the Crown about resolving each case. Sometimes, one file out of many may become a 'sticking point' during negotiation, leading to increased work to negotiate a resolution. This work is all required whether the underlying charges involve 'administrative offences' or not.

LAO inherently recognizes the added work that comes with global resolutions by proposing the global resolution authorization. Excluding 'administrative offences' from additional authorization is unreasonable. Counsel retained on 'administrative offences' – which are criminal charges often posing the risk of jail, even for first offenders – still work on those matters. Their efforts should be compensated.

Further, the proposed authorization (for example, \$287.16 summary conviction matters on a block fee) is quite low. There is a significant difference between resolving two or three sets of charges compared to ten or more. The TLA recommends that an enhanced or tiered authorization apply depending upon the numbers of matters resolved.

E. Coverage for a *Myers* review

The TLA is pleased that LAO is maintaining and enhancing coverage for *Myers* detention reviews that proceed under s. 525 of the *Criminal Code*.

The TLA seeks clarification as to when and to what extent a *Myers* review is payable under the tariff. It is not clear from the tariff whether the fees outlined are payable after the s. 525 application is received or only if the application proceeds on its merits. As it stands, the tariff indicates that the fees are payable "for all services" for the application. Contrast this with the stipulation for bail reviews that the fees are payable if the bail review proceeds or if the Crown consents after the materials are prepared.

If the *Myers* review fees are only payable if the review proceeds on its merits, the TLA recommends that a modest fee (1-2 hours or a similar block fee) be payable upon receipt of the application. When notified of a s. 525 application, counsel are required to meet with their clients to obtain instructions. This takes time, and counsel should be compensated.

F. Clarification of the change to the '64 hour rule'

LAO proposes eliminating the '64 hour rule', which currently caps all preparation time (subject to exclusions) under the tariff to 64 hours. The result of this change would be that counsel need not seek discretion when their total preparation time is within the tariff maximums but exceeds 64 hours.

The TLA supports this reform. A generic 'cap' for all services cannot be justified when the tariff itself authorizes those services. Removing the cap reduces the administrative burden on counsel (and on LAO staff reviewing discretion requests).

The TLA's understanding is that counsel will still be able to seek discretion if their billables exceed the tariff allotments.

G. Conclusion

The TLA supports the proposed reforms by LAO to the rates and tariffs payable to private counsel. The proposed reforms constitute significant investments into the defence bar. Properly funded defence counsel, as the adversary to well-funded state counsel, is crucial to maintaining an effective and fair criminal justice system.

The TLA recommends creation of an ongoing review mechanism for hourly rates and the tariff. The last major review was completed in 2015, although before that there was no review for some time. Regular reviews ensure that the hourly rates and tariffs remain appropriate based on current circumstances and service needs. The TLA would be pleased to participate in such a process.

Thank you for considering these comments. Our Executive Committee would be pleased to discuss these comments at your convenience, should you find additional consultation beneficial.

Yours very truly,

A handwritten signature in black ink, appearing to read 'Ian Kasper', with a long horizontal flourish extending to the right.

Ian Kasper Co-Chair, TLA Criminal Law Committee
Toronto Lawyers' Association