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SUBMISSIONS TO THE LEGISLATIVE ASSEMBLY

**BY: ALAN R. REGEL
THOMAS BOYD**

1. These submissions are provided on behalf of the undersigned. We are on the legal panel and consulted with many other lawyers in preparing these submissions. We have reviewed the Beatty report as it pertains to Legal Aid and have a number of comments to make. We agree with the report that increased costs are due to a number of factors external to legal aid including a higher number of charges being laid. This has resulted in more Crown Attorneys and more judges being hired which necessarily requires the defence bar to respond to the increased case load. At times the court requests that 2 defence lawyers be assigned to a circuit.

2. The report proposes a number of ways in which costs can be limited. Some of these procedures, contrary to the assumption in the report, are already in force. The executive director very diligently taxes accounts. As a matter of course any telephone call or letter taking more than .1 or .2 hours is taxed down unless there is an explanation in the account as to the nature and purpose of the telephone call or correspondence. Taxing an account down means that the full amount claimed is not paid. This requires a greater amount of time to be spent reporting and accounting. The additional time is not charged to the Legal Services Board.

3. When the executive director perceives that fees for a given case are higher than the norm, they are taxed down in the absence of an acceptable explanation. The taxing policy contains a number of factors which are considered. We enclose, as Appendix 1, a copy of the policy statement provided to counsel in this regard. We note that although the policy provides for taxing accounts down, in other words, for paying lawyers less than the number of hours than they work, it does not permit success billing. In other words, lawyers who use their time extremely efficiently and obtain a very good result cannot increase their charges beyond the number of

hours multiplied by the hourly rate. Lawyers should not get a bonus. They should, however, get paid for the work they do. Nothing more and nothing less.

4. Pre-printed forms are used by counsel in reporting to Legal Aid. They have been used for a number of years. Recently counsel were requested to provide extended reports at appropriate stages in proceedings so that the executive director can better assess whether or not there is merit to the means of proceeding being proposed. In addition, prior to making any unusual applications or embarking on appeals an express opinion letter must be provided assessing and advising of the merits. These opinion letters are often required to be supported by case law and contain an analysis of the cases referred to.

5. Legal Aid is not, as a matter of course, granted to persons charged with summary conviction offences unless there is a substantial likelihood of jail being imposed upon conviction.

6. We agree with the report that the use of experts is not being abused by defence counsel and note that in most, if not all, cases where experts are used by the defence the result is either admissions of fact being made that reduce the length of the trial or the achievement of a better result for the client.

7. We question whether some of the proposals for saving money would in fact result in as great a saving as is suggested. First of all, would it really only cost \$120,000.00 to hire a staff lawyer. The lawyer's salary we expect would be at least on par with that of other Government of the Northwest Territories lawyers. We understand with housing and benefits the starting salary is approximately \$60,000.00. As the report notes, the hours are long

and the conditions are poor. Criminal lawyers must be on call 24 hours per day, and if anything, should receive a premium above what is paid to other Government lawyers.

8. If 2 staff lawyers are hired to service the Yellowknife area one must surely consider whether they could even service the number of cases now dealt with by the 30-35 lawyers on the Legal Aid panel. Surely they could not devote the same amount of time to each of the files which come in.

9. We believe that if the current system is replaced by a staff lawyer system there will be a drop in the quality of services. We believe there are simply far too many cases arising in Yellowknife to be adequately dealt with by 2 lawyers as is suggested by the Beatty report. We note that most often in Yellowknife there are at least 1 or 2, and sometimes 3 criminal courts in progress. Most of these cases involve "Legally Aided clients". If the lawyers are in court almost all the time how will they be able to prepare and interview clients which is often the most time consuming part of a file.

10. We accept that costs could be substantially reduced by freezing and capping fees or having block fees. We agree as well with the report that the amount saved will depend on how far the government wishes to go in this regard. Naturally the greatest saving would be a complete elimination of the Legal Aid program.

11. Block fees have the advantage of allowing those in control of finances to predict with some level of certainty how much will be paid out. The problem is, if one gets paid the same amount whether one works 2 or 4 hours there is less incentive to put the additional time in. The same comment applies equally to caps on

fees. The risk is that where 10 hours of work is required but only 4 hours are permitted, the work will simply not be done but merely 1/2 done.

12. With respect to freezing the current tariff, this too has some difficulties. As costs of providing services increase so must the receipts. Even now the fees and normal hourly rates are often less than 1/2 of the lawyer's normal hourly rates. Attached as Appendix 2 is a copy of the an Ontario legal aid study suggesting the median hourly overhead of criminal lawyers in that province exceeds \$87.00. Surely in the Northwest Territories the overhead is at least as high. Legal Aid work is not lucrative and probably never will be, but it must at least be worth while to maintain the interest of the private bar.

13. We take a great deal of pride in our work and will not take files on if we will not get paid for the work we do, or if although we are paid for the work we do we are not able to expend sufficient time to do a competent and professional job. Rather than accept files where we know we will have to either work without adequate remuneration or not do as much work as is necessary to do an adequate job, we will simply not accept files. We expect any competent staff lawyer hired would take the same approach and there would be an ever increasing backlog of cases before the court.

14. There are some lawyers in Yellowknife who are on the Legal Aid panel out of a sense of duty and responsibility to society. There are other lawyers in Yellowknife who, notwithstanding responsibilities and duties, simply cannot afford to participate in the Legal Aid system.

15. If there are block fees, caps on fees, and frozen hourly rates, more of the private bar will simply refuse to allow their name to stand on the Legal Aid panel. Naturally, the lawyers in this group are the more senior and experienced counsel resulting in

those providing legal services being more junior and less experienced. One might reasonably infer that the quality of service will be reduced accordingly.

16. Although \$550.00 per day may sound like a lot at first blush, for lawyers who are on circuit this reflects less than six hours of work at the rates which are already 1/2 of the normal rates. Lawyers often work on circuit 12 to 14 hours and sometimes even far more than that. Although there is provision for a discretionary increase for hours in excess of 8 hours worked in a day, this is not guaranteed. In addition, one is entitled to claim, at most, the equivalent of 1 per diem per week of circuit. It is rare that one works only an additional 6 hours during the course of a week long circuit.

17. The greatest injustice may arise in homicide cases which usually involve considerable time being expended. Is it fair to those charged with homicide and other very serious cases, including sexual assaults, to be defended by staff lawyers who may well be very overworked? If there is choice of counsel for these cases and the fees are capped, there are block fees, or fees are frozen at the current rates, it is unlikely there would be much interest in the private bar in doing these cases. In the event that such restrictions do not apply to homicide and other serious cases and if salaried lawyers are providing the bulk of the services, the lawyers who might be chosen as counsel will not likely be on top of the issues and will have to spend additional time as they would not likely be doing criminal work on a daily basis.

18. There are a number of alternatives which might be considered to providing legal services by staff lawyers. It may or may not result in a saving to hire staff lawyers to do some of the work that is normally done by the private bar. Some jurisdictions have staff lawyers, referred to as duty counsel, who conduct initial interviews and bail hearings. Once these steps are complete the

client is given a choice of counsel. The client has the choice of using the lawyer initially seen or any other lawyer who is prepared to accept the retainer at Legal Aid rates.

19. Additional savings might be attained if the focus is at the cause of the problem for increased expenditures. In particular, if community diversion programs were instituted for certain crimes such as family violence and if greater emphasis were put on crime prevention as opposed to crime punishment.

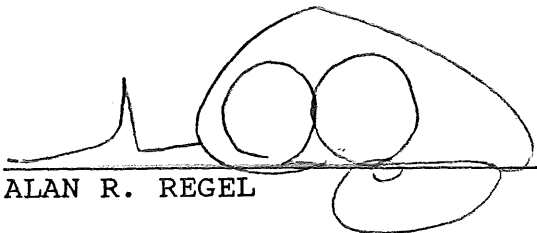
20. Our concern is not that we will be loosing money if the recommendations are implemented. We can make more money doing more lucrative work. Our concern is for those persons caught in the system. With the increasing number of charges and increased number of courts and Crowns to deal with them, there must be an increased capacity in the defence bar to defend those charged if they are to be fairly dealt with. While it is possible to save substantial sums of money implementing the provisions of the Beatty report the quality of service will drop a proportionate amount.

21. Many of our aboriginal peoples are involved in the criminal justice system as complainants or accuseds. The legislature must decide whether these people deserve to be fully and fairly represented by competent counsel in a system which may be foreign to them. If the provisions of the Beatty report are implemented we run an increased risk of persons being convicted when they should not be. There will be a greater number of appeals and new trials. Complainants may go through the experience of testifying even more times.

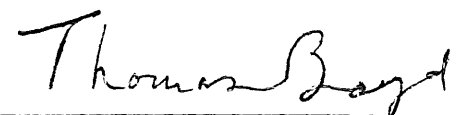
22. One must consider whether the even substantial financial savings are worth it if even one person is wrongfully convicted like Donald Marshall was. Mr. Marshall was a aboriginal person who spent a number of years in jail for a murder he did not commit because he was not fully represented in a system foreign to him.

23. Even in terms of costs. Even one inquiry in the nature of that leading to Donald Marshall's release will consume years and years of savings.

Respectfully submitted to this Legislative Assembly this 13th day of December, 1991.



ALAN R. REGEL



THOMAS BOYD

APPENDIX 1

Northwest Territories Legal Aid
Legal Services Board of the N.W.T.

P.O. Box 1320 Yellowknife, N.W.T. X1A 2L9

(403) 873-7450

DATE: JULY 12, 1991
TO: MEMBERS OF THE LEGAL AID PANEL
FROM: DOUGLAS MILLER
EXECUTIVE DIRECTOR
LEGAL SERVICES BOARD

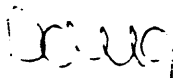
RE: LEGAL AID ACCOUNTS

As you are aware, I only allow 0.1 hours for telephone calls and correspondence on Legal Aid accounts unless there is substantiation for an increase in the amount of time spent on these items.

Recently, our office has received accounts which are claiming more than the allowable amount by using the distinctions "lengthy, conference, discussion and attendance". Please note, however, these words do not provide substantiation and it has been left to us to make the determination, based on their use, as to whether more time should be allowed for these items.

Therefore, if you are claiming an increase over the aforementioned amount, please add a few words to substantiate that it is warranted. Otherwise, the amount being claimed will be reduced to 0.1 hours.

Thank you for your cooperation in this regard. If you have any questions, please contact me.



Douglas Miller, B.A., LL.B.

DM/sah

Northwest Territories Legal Aid Legal Services Board of the N.W.T.

P O Box 1320 Yellowknife, N.W.T. X1A 2L9

DATE: JULY 26, 1991

TO: MEMBERS OF THE LEGAL AID PANEL

FROM: DOUGLAS MILLER
EXECUTIVE DIRECTOR
LEGAL SERVICES BOARD

RE: LEGAL AID ACCOUNTS

The Board of Directors of the Legal Services Board has directed me to monitor the work on ongoing criminal files. In this respect, work on such files will be reviewed on a step by step basis to ensure that the time spent is warranted in the circumstances. As such, you are requested to provide me with progress reports from time to time on the conduct of your cases. The reports should contain information about the charge, the course of action being followed, and an estimate of the amount of time it will take to complete the matter.

Please provide me with such reports in all cases where preliminary hearings have been scheduled. Where a Legal Aid recipient is committed to trial, provide me with a further report at that time so I may determine the financial commitments required to pay for the cost of the trial, as well as review the amount of time spent on the file to date. Thank you for your cooperation in this regard.

As well, I have been directed to be more aggressive in the taxation of accounts. In this respect, I have been asked to review accounts to determine whether the Board is receiving value for the fees it pays. In this respect, I intend to employ general taxing principles in determining the value of accounts in both civil and criminal matters.

Please note that in this regard, consideration will be given to the amount of time expended; the legal complexity of the case; the degree of responsibility assumed by the lawyer; monetary value of matters in issue; importance of the matters to the client; degree of skill and competence demonstrated by the lawyer; results achieved; and, the ability of the client to make a contribution in whole or part toward the cost

July 26, 1992
Members of the Legal Aid panel
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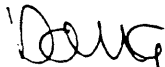
of legal services provided by Legal Aid. Included in this consideration will be specific reference to preparation time and whether it was warranted in the circumstances.

In the event you are not satisfied with my taxation of an account, you are invited to speak to me about it to see if an adjustment is warranted. If we cannot agree on such an adjustment and you wish to appeal my decision in this regard, the matter will be referred to the Board of Directors of the Legal Services Board under the provision of the Legal Services Act. Please note that the policy of paying accounts at the reduced amount as soon as possible after receipt of the account will continue.

The Board has instructed me to take such action because it is concerned about increasing costs for legal fees. Fees and Payments increased 25 to 30 percent for both of 1988/89 to 1989/90 and 1989/90 to 1990/91.

While the Board understands and recognizes that the quantity of Legal Aid work is driven by other parts of the justice system, it is its responsibility to ensure that accounts for the services for which it is paying are fair, and that it can show that it has adopted measures to control these costs. At the same time, the Board wants to assure the government funders that it is taking action in this regard. Otherwise, there may be dramatic changes to the tariff structure which is essentially open ended on cases where an hourly rate is being used.

I trust you will understand and appreciate the Board's concerns and action in this matter. If you have any questions or comments, please contact me.



Douglas Miller, B.A., LL.B.

DM/km

LEGAL AID BULLETIN



LEGAL AID BULLETIN IS SENT TO MEMBERS OF THE LAW SOCIETY OF UPPER CANADA BY THE ONTARIO LEGAL AID PLAN

NUMBER 67

SUITE 200, 481 UNIVERSITY AVENUE, TORONTO, M5G 2G1. (416) 979-1446.

JUNE 1991

TARIFF MESSAGE

The Plan is pleased to have heard from Attorney General Howard Hampton that there will be a tariff increase this year. Negotiations are continuing between the Government and the Plan on the details of its implementation.

We hope to be able to announce details of the increase within the next month.

**Tom Bastedo, Chair
Legal Aid Committee**

LAWYERS' OVERHEAD COSTS \$60/HOUR SURVEY SHOWS

To enable the Sub-Committee reviewing the civil tariff to make more informed recommendations, the Plan hired Price Waterhouse in late 1990 to conduct a survey of lawyers' overhead costs. The survey was restricted to those who had billed the Plan recently for work performed under a legal aid certificate.

The median total cost per hour for the survey database, covering lawyers from across Ontario, was \$59.94. For those practising criminal law, the median was \$58.53 per hour. For family law it was \$65.52 and for non-family civil litigation it was \$64.67.

When regional breakdowns were examined, they showed a median hourly overhead cost of \$87.96 for the Northern Ontario lawyers who responded. Lawyers from across the province, but excluding Metro Toronto, showed a median hourly cost of \$63.41, while Metro Toronto lawyers indicated an hourly overhead of \$55.10.

Price Waterhouse included in hourly costs not only cash expenses but also non-cash expenses such as amortization and depreciation, but the latter did not have a significant effect on the cost profiles.

DEMAND INCREASES FOR LEGAL AID

The Plan recorded a 17.2% increase in demand for service through its Area Offices during the fiscal year ended March 31, 1991. In the year, 384,282 people received summary legal advice, were referred to another agency or made an application for legal aid. That figure compares with 327,791 during the previous year.

The number of people applying for legal aid rose 21% during the year, from 164,503 to 198,934.

A total of 166,114 legal aid certificates were issued - up 25.4% from the 132,439 approved last year.

Duty Counsel, both salaried and fee-for-service, recorded an increase of 7% in the number of people assisted in the province's criminal, family and youth courts. During the fiscal year, 341,077 individuals were helped compared with 318,718 last year. In addition, telephone advice was provided to 15,892 people.

APPLICANT JAILED FOR 42 MONTHS

A legal aid applicant who threatened Area Director Peter MacDonald with death and who lied on three legal aid applications by concealing ownership of property worth about \$130,000, has been sentenced to 42 months in penitentiary.

John Bricker, 62, of Port Elgin, received 2 years on the threatening charge and 18 months on the three perjury charges. His case was heard before Mr. Justice J. Ian McKay with a jury in Walkerton.

The court noted that Bricker, who has an extensive criminal record dating to 1979, had been convicted previously of a number of threatening offences.

On three separate occasions in 1986, 1987 and 1988 he applied for legal aid, and concealed his ownership of property. When his ownership came to light, he was refused any further assistance through the Plan and subsequently telephoned Mr. MacDonald at his home, saying, in part, "I'm going to knock you off." Crown Attorney Brian Farmer said tapes of the conversation showed it to be crude, vulgar and vicious.

COMMITTEE APPOINTMENTS

Toronto criminal lawyer and Chair of the CBAO criminal justice section Michelle Fuerst has been appointed a non-Bencher member of the Legal Aid Committee as has Osgoode Hall Law School student Lea Weir.

JACQUI GREATBATCH, LL.M.

The plan records with sadness the death on May 13 of Jacqui Greatbatch, 35, of breast cancer. Jacqui was a major force in the legal clinic movement. Her husband, Marcus Pratt, of the Legal Aid Research Facility, cared for her tirelessly during her illness.

PAYMENT OF ACCOUNTS

During April, the Legal Accounts Department processed 2,921 final accounts. Of that number, 99.4% were paid within 60 days.

Of criminal standard form accounts, 98.5% were paid within 30 days, while 98.7% of civil standard form accounts were paid within the same period.

Of non-standard form accounts requiring examination and settlement, 99.1% of the criminal accounts were paid within 60 days and 98% of civil accounts were paid within the same time frame.