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June 21, 2019

Terry L. Brandon
FOLA LAO Chair
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Dear Terry,

Re: FOLA's Request for Input Regarding Legal Aid Budget Cuts

The County of Carleton Law Association (CCLA) is deeply concerned about the Ontario Government's reduction in funding to Legal Aid Ontario. We have over 1700 members, many of whom accept legal aid certificates in family law, immigration, refugee, criminal, and mental health matters.

We understand that the Alliance for the Sustainability of Legal Aid (ASLA) is holding a meeting on June 25, 2019, and that you will be attending as the FOLA LAO chair, as may your Executive Director Katie Robinette.

Family, immigration, and criminal lawyers already provide significant *pro bono* services to their clients. These cuts will increase costs overall - not decrease them. The cuts will lead to substantially less efficiency, not more.

I. Criminal Law

In the area of criminal law specifically, there appears to be a fundamental misunderstanding about whether practising criminal law is lucrative. It is not. Criminal lawyers often cannot afford to have secretaries or legal assistants. Government lawyers and staff duty counsel generally make far more money than private defence lawyers, and they are provided with staff, benefits, offices, and pensions. Many duty counsel are on the Sunshine List because they make over \$100,000 a year. The reductions to the tariff will reduce certificates by about 20% and potentially drive lawyers out of business. While criminal lawyers were previously guaranteed a small 1/2 hour fee for administrative work in handling certificate cases, even that was cut.



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It is not the answer to say that duty counsel will take up the slack: there is no slack in Ottawa, as private duty counsel are already hired every day to handle our busy bail courts. Ottawa now has a population of over one million people and only one courthouse and one intake bail court. We hear that the staff duty counsel's own numbers are to be reduced by attrition.

Recruitment and retention will become a problem. *Per diem* duty counsel are also being subjected to cuts of \$40 to \$80 a shift. A *per diem* duty counsel might only be paid \$106, despite setting aside a day and driving to a distant court. Lawyers being paid that low of a rate will decline shifts, leading to having unrepresented people in the courts, and backlogs.

The changes announced on June 12, 2019 include directing almost all bail hearings to duty counsel. This change to how bail services are provided is not in the public interest. It is not realistic to shift more bail work to duty counsel, as resources are already stretched due to chronic underfunding and a lack of capacity. We anticipate it will result in overcrowded jails, and more people incarcerated for longer periods of time as they await assistance from duty counsel for their bail hearings. There will be more pressure on the courts. Trials will be delayed in a post-*Jordan* environment, thereby resulting in acquittals due to the Supreme Court of Canada imposed deadlines.

The economic justifications for the changes to legal aid for bail hearings simply do not outweigh the social harms caused by the reform. The present legal aid certificate fee for bail hearings is \$303.88. This fee already represents a drastically reduced rate for lawyers. It rarely covers the work involved, as it includes seeking instructions, obtaining initial disclosure, meeting with sureties, drafting affidavits, and appearing in court on a hearing that will itself often take more than one day. The Province of Ontario, and the taxpayer in turn, are the direct beneficiaries of this reduced rate. It is well below market and, as noted above, does not require the Province to fund the benefits, vacation, or sick leave of staff lawyers.

The Vulnerable Client fees are also being cut, with the Mental Health enhancement being halved, and the fee in *Gladue* matters being reduced by 2/5^{ths}. In Ottawa, these matters proceed in special courts. Counsel are already providing *pro bono* assistance in these time-consuming matters, because of the structure of the existing tariff. Cutting services in these areas will adversely affect Ontario's most vulnerable citizens and residents thereby causing further Court delays.

Individuals are presumed to be innocent and these cuts will likely have a direct impact on their liberty - a Charter protected right. A person presumed to be innocent will now spend more time



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in custody while awaiting representation to assist with a bail hearing. They may lose their employment.

II. Legal Clinic System

The cuts to the legal clinic system will further jeopardize those who have no access to justice. Legal Clinics play a crucial role in providing services to vulnerable individuals who cannot afford legal assistance and/or are intimidated by the justice system. Aside from providing assistance in criminal matters, legal clinics can provide much needed assistance to tenants, ensuring that there are fewer homeless families in the Province. They assist those who are in need of advice for their family proceedings. All of these services are geared towards the most critical of matters and towards those that need help the most.

Clinic lawyers work tirelessly to advance the interest of these individuals, and when an already underfunded clinic system has a cut of 16%, one can only assume that fewer lawyers can be maintained. This would result in the lawyers either taking on fewer cases or becoming overworked and unable to handle their caseloads thereby negatively affecting the quality of service. Those already disadvantaged become further so.

III. Immigration/Refugee Legal Aid Cuts

Legal aid funding in the area of immigration and refugee law is limited. It helps people with an annual income of less than \$17,000 and only until they can work and pay for their case. Out of a total budget of \$460 million, legal aid certificates were issued for 13,687 immigration and refugee matters at a cost of approximately \$25 million during the last fiscal year. This resulted in an average cost per hearing of \$2,400.00. Yet, the pay-off is significant for the following reasons:

- Refugee claimants who require legal aid are among the most vulnerable people in our society. They often arrive in Canada with nothing and do not have the ability to represent themselves in Canada's refugee determination system. They often do not speak English and can be traumatized, yet they are immediately faced with a complex legal system.
- When refugee claimants do not have adequate legal representation, many face life-threatening consequences, including detention, torture, and possibly even death after deportation to the places from which they fled. The consequences are irreversible.



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- Providing proper legal representation for refugees also ensures that our refugee determination system functions more efficiently so to ensure that people do not flee and that money is not wasted in the redress process.

Failing to provide legal aid funding will have several impacts to immigrants and refugees:

- A wrong decision on their case could result in failed refugee claimants choosing to remain in Ontario without legal status due to serious fear of return to their country of origin;
- A wrong decision could result in a claimant returning to a country where they are at a severe risk of harm;
- Refugee claimants will seek alternative ways to pay for counsel and are at risk of exploitation from employers or the black market;
- Refugee claimants may have to prioritize legal costs over their own basic needs. This will force already vulnerable claimants to depend more on shelters, food banks, and other services such as emergency shelters which will increase costs to other government departments.

It is imperative that FOLA and ASLA call on the Government of Ontario to guarantee that Immigration and Refugee Law services will be funded and to ensure that it makes every effort to secure a greater Federal contribution to legal aid funding in immigration and refugee matters.

IV. Family Law Legal Aid Cuts

The CCLA and the Ottawa Family Law Bar are concerned that the reduction in certificates will leave some of the most disadvantaged members of our society without access to resources to secure the financial support they and their children are entitled to in family law matters.

Our Family Law Bar is concerned that the removing funding for certificates for Motions to Change except in cases of alleged domestic violence will lead to more allegations of domestic violence in order to secure a certificate. This will not promote the resolution of disputes, which should be relatively straightforward in Motions to Change. There is already an issue with “over-reporting” to get certificates, because of higher financial eligibility threshold; this may entice people to be less than truthful about allegations of domestic violence.



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Duty counsel are already overburdened. Variations or Motions to Change are an important part of the system, and simply saying that duty counsel will perform these services does not guarantee that clients will be serviced. Using duty counsel means there is no follow-up, nor establishment of a true solicitor-client relationship.

As certificates for Independent Legal Advice will not be issued, LAO facilitated mediation will not take place, which will eventually increase LAO costs as opposed to reducing them. Even more people will be representing themselves, meaning a more backlogged court system. Extended appearance times will result because self-represented individuals are unsure how to proceed. The Integrated Legal Services Office (ILSO) already affects the right to select counsel of choice, and is costly.

We have two Masters in Ottawa who facilitate resolution at the case conference stage, but usually only after several "returns" before the Master. These resolutions will no longer take place if coverage is limited to two case conferences. The parties would be forced to move to a settlement conference, even though a relationship had already been formed with the Master who had connected with and made progress with the clients.

Finally, these cuts punish already disenfranchised members of our society, who are truly in need of competent representation.

V. Impact of Legal Aid Cuts to Civil Litigation System and Court Delays

Since the Supreme Court ruling in *R. v. Jordan*, delays have caused the courts to prioritize criminal matters. As such, the civil trial list has experienced significant delays. This will be exacerbated with an increased number of self-represented litigants in family court. Keeping criminal matters on track so that they will be heard within 30 months has meant that longer civil matters in Ottawa are now being scheduled in 2022. That delay will only increase.

Delays in the civil system result in commercial uncertainty. Commercial parties need to know that they will have access to a legal system to resolve disputes or else they will elect to invest elsewhere. The Italian court system is notorious on this point. Part of being "Open for Business" includes funding a robust legal system.

Conclusion

We are asking FOLA and ASLA to remind the government that the Legal Aid Plan was created by the Conservative government in 1967 to address a pressing need. It was a way to



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encourage the free market provision of service whereby the Province and, ultimately, the taxpayer benefit by getting high-quality legal advice at below market rates, as to ensure the efficient and timely administration of justice. Until that time, lawyers simply acted *pro bono* in serious trials for penurious clients. In our post-*Charter* age, legal services are a human right; specifically, there is a legal right not to be denied reasonable bail without just cause. An independent bar that already works at below market rates is fundamental to a democratic society. When liberty is at stake, counsel of choice should be covered by the Legal Aid system.

Sincerely,

Ted Mann
President