



FEDERATION OF ONTARIO  
LAW ASSOCIATIONS

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DU BARREAU DE L'ONTARIO

## **FOLA Legal Aid Report for November 2020 Plenary**

What a year 2020 has become!

Looking back, one year, and reading the November 2019 FOLA's Legal Aid Plenary Report, we find a brief referencing of the April 11, 2019 Queen's Park release of the Ontario Budget resulting in an unanticipated and unprecedented 133-million-dollar reduction in the Legal Aid Ontario (LAO) budget for the 2019-2020 year and the further announced budget cut of 164-million- dollars in the 2020-2021 year.

We saw FOLA respond by striking an official Legal Aid Committee consisting of criminal law lawyer Nathan Baker and family law counsel Sam Misheal. I, of course, continued as Chair (bringing with me over 25 years of criminal defence experience) and FOLA's current Treasurer and long-time past LAO Chair, Jane Robertson joined too (bringing with her over 30 plus/plus years of Family Law experience). Katie Robinette, FOLA's Executive Director, rounded out the committee with active engagement in virtually all committee meetings, ASLA meetings and extended behind the scenes work.

With FOLA's immediate identification of the need for increased monitoring of the LAO funding situation, back in the spring of 2019, I am happy to report that, this team has had an enhanced active participatory role not only in monitoring and reporting the crisis but also with increased participation with the Alliance for the Sustainability of Legal Aid (ASLA)\* and lobbying the federal and provincial governments.

Any FOLA member, with a Legal Aid Certificate law practice or a LAO Clinic engagement knows, as old news, that the government did not follow through with the 2020-2021 LAO budget cuts in the spring of 2020.

Although this was a relief, by the early summer of 2020 LAO predicted a funding shortfall in the operating budget identifying a root cause linked to the Law Foundation of Ontario (LFO) reduced transfer of funds. This was projected to be to the tune of a loss of 61 million dollars\*\*.

It was a dire situation, with an exhaustion of funds by December 2020 and months of January, February and March 2021 being contemplated as completely devoid of funding.

In brief, to explain how this system works, the LFO receives interest earned on lawyer and paralegal trust fund balances. Thus, this income source for LAO is dependent on real estate activity and interest rates and are subject to fluctuation. For instance, in May 2020, the Bank of Canada cut the key interest rate to 0.25 percent.

At the outset of the pandemic, LAO was projecting a deficit by early 2021 which led ASLA and other stakeholder groups to respond with the launch of a letter writing campaign. Acting on the concerns raised by LAO, and the general information available on the topic, ASLA sent correspondence to the Minister of Justice and Attorney General of Canada. Other stake holders, including FOLA, also wrote to the Honourable Justice David Lametti.

With the provincial government 2019-2020 Budget having eliminated provincial funding for refugee law within LAO and appreciating that Criminal Law and immigration/refugee law fall within the Federal scope of responsibility a concerted effort to lobby the Federal government was launched. This was also done in support of the Provincial government efforts to call for an increase in Federal funds.

ASLA also continued to liaise closely with the Attorney General for the Province of Ontario, Minister Doug Downey. Together the Province and the various stakeholders actively encouraged increased Federal funding.

What LAO failed to predict were the effects that COVID-19 would have in demand in services and the lingering impact on the entire judicial system.

Courts were closed for trials and most other matters and reduced operations helped to minimize in-person attendances. Initially, all cases were being adjourned. Presumptive ten-week adjournments, followed by another presumptive ten-week adjournment time frame with another five-week time frame and a further five-week presumptive remand brings us to date for criminal court COVID-19 adjournments, for out of custody accused. This has become the repeated norm. Bench warrants with discretion to maintain jurisdiction, in Criminal Courts, have drastically reduced the number of matters being heard. Family court cases, unless deemed an emergency, were traversed. Only cases identified by administrators as Child Protection matters and urgent issues relating to mobility, and parenting time were allowed on to Family Court dockets. Other courts, like Small Claims Court and Civil Courts, were suspended.

The Province of Ontario engaged in modernization of the Courts through technological solutions with Zoom and audio court attendances becoming the norm.

Crown policy changed and adapted to the need to process the large volume of cases adjourned: enhanced diversions and withdrawals as contrary to the public interest were applied. Police charging practices were curtailed.

Police approaches to release, with the serendipitous Federal amendments to the Criminal Code (timing out perfectly for the Pandemic) resulted in releases for accused and corresponding decreased need for formal in Court bail hearings. Along with changes in Crown exercise of discretion to release accused. The Bench also adjusted and increased releases while jails granted increased releases of inmates through the Temporary Absence Program.

Without getting into the specific areas by practice subject, the overall cumulative effect has been a reduced draw on LAO funding. The predicted dire straits for the end of 2020 and early 2021 proved false.

This is the good news!!

However, the funding crisis for LAO still looms in the future.

The current funding model remains premised on a flexible/variable funding source (LFO) and continues to set up LAO for a funding crisis in 2021. The LAO operating budget should not be rooted in this income stream. A change in the funding infrastructure is required to stabilize LAO. Sustainability is at issue.

FOLA is actively engaged, at present, with the Toronto Lawyer's Association in lobbying members of Parliament through Zoom attendances. Meetings with MPs have included Judy Sgro, MP (October 1<sup>st</sup>) and Julie Dabrusin, MP (November 10<sup>th</sup>).

On behalf of the LAO Committee, I thank the Associations who have sent letters to the government. We encourage the Associations to be aware of the future budget issues for LAO. The crisis has only been temporarily averted. It is real and as the Courts get back to functioning at full capacity, the draw on the system will reach critical levels. It is only a matter of when.

FOLA encourages our Members to bring these concerns back to your Boards and your membership at large. Communicate with your local MP and MPP. A change in the LAO funding model is required. The government is modernizing the archaic Court Operations and now is the time to look to improvements within LAO.

FOLA has also fielded concerns raised by membership regarding LAO operational adjustments implemented in response to COVID-19 with some appearing to be directly in contradiction of LAO written Policy & Procedures. We have recently sent

correspondence to inquire about these concerns and to request a committee consultation.

One major area of concern rests with the prohibition placed on duty counsel to assist Certificate Lawyers in the Case Management / Remand Courts. The lack of a corresponding tariff increase to allow Certificate Lawyers to engage another agent with compensation is problematic as it means Agent Lawyers must appear as a favour, to the Counsel of Record, or with payment made by the lawyer but without any corresponding ability to recover the extra monies needed from LAO.

This lack of Duty Counsel agency services in the Case Management Courts also means counsel doing Certificate work must invest time in Court for remands while the current LAO Procedures continue to outline and direct that Certificate Lawyers send instructions to Duty Counsel for agency assistance rather than attending personally. This is a conflict of procedures mandated and those offered by LAO through Duty Counsel.

In short, Counsel of Record must now manage these court attendances by personally attending or sending an agent but with no increased tariff. These court appearances by counsel are mandatory and increased appearances lead to increased time worked by the Lawyer which in turn often leads to accounts submitted for payment to LAO based on time invested being over tariff and resulting in no compensation for hours worked. This is said, as these court appearances do not have increased tariff coverage and are not seen as extraordinary for discretionary increase bill payment. This means that Lawyers are expected to go to Court and work for free at times. At the time of writing this Report a reply from LAO is outstanding.

By way of update to the review and amendment of Legal Aid legislation, I can advise that the new Legal Aid Services Act, 2020 received Royal assent with the passing of Bill 161, the Smarter and Stronger Justice Act, 2020 by the Ontario Legislature. Some fear that these changes threaten an already fragile Legal Aid system in Ontario. However, Charles Harnick, LAO Chair, has gone on record as stating that these legislative changes are necessary in a time of modernization and that the changes will permit legal aid service providers (meaning LAO Administration) to develop policies in a more expedited manner to better serve the clients. FOLA views this as a time of great transition for LAO service providers (Certificate Lawyers and LAO Staff Lawyers) both in terms of the LAO operational service model and the continued looming funding crisis.

In the meanwhile, ASLA continues to stress "that adequate and stable funding for legal aid is essential and must remain a priority." FOLA concurs one hundred percent and remains in your service to advocate same.

I regret that due to a personal commitment conflicting with the November Plenary schedule, I am not available to attend the Plenary and to personally address you. But I hope that this summary helps you to appreciate Legal Aid Ontario's recent current status and FOLA's ongoing efforts to reach a solution.

As I always say:

Your voice matters and FOLA welcomes your input.

To that end, please, DELETE [terrylbrandon@sympatico.ca](mailto:terrylbrandon@sympatico.ca) from your contacts, if applicable, and add: [terrylbrandon@acriminaldefence.ca](mailto:terrylbrandon@acriminaldefence.ca). I would be most happy to hear from any member about their concerns, questions, and/or suggestions.

As said in the past:

Membership in your local Law Association carries membership in the Federation of Ontario Law Associations, which, through the 47 Law Associations, represents over 12,000 members of the practicing Bar. As such, FOLA has an excellent voice within ASLA, with the Ontario and federal governments, and with all other stakeholders.

I thank each and every one of you, as members of the Federation of Law Associations, for placing your trust in me and I look forward to continuing to serve FOLA in the year to come.

Terry L. Brandon, LAO Chair & Southwest Regional Representative



**\* ASLA Membership**

The Federation of Ontario Law Associations  
Association of Community Legal Clinics of Ontario  
Criminal Lawyers' Association  
Family Lawyer's Association  
Law Society of Ontario  
Ontario Bar Association  
Refugee Lawyers  
The Advocates' Society  
The Mental Health Legal Committee

\*\* In the year 2019-2020 the LFO transferred \$91 million to LAO. The 2020-2021 expectation was \$30 million would be available for transfer.