



FOLA Legal Aid Report for May 2021 Plenary

It is now old news that the Legal Aid 2020-2021 budget year saw a dire prediction of a lack of funding. Entering the summer of 2020, LAO debriefed stakeholders within the Alliance for the Sustainability of Legal Aid (ASLA) by sharing a projection of no funds past December 2020 with a quarter of a year in the balance. The coffers were to be empty with an anticipated deficit of \$61 million!

This was a shocking revelation that saw various stakeholder organizations, collectively through ASLA and individually, launch into a swift lobby of both levels of government.

Previously, I reported to you that ASLA was continuing to liaise closely with the Honourable Attorney General for the Province of Ontario, Doug Downey. Together, the Province and the various stakeholders actively encouraged enhanced Federal funding. This is appreciating refugee and immigration plus criminal law funding considerations.

Our [letter](#) to the Honourable Justice David Lametti (Minister of Justice and the Attorney General for Canada) saw acknowledgement and [reply](#).

FOLA also joined directly with the Toronto Lawyer’s Association (TLA) in a series of outreach and zoom meetings with Members of Parliament to introduce the LAO funding crisis.

You may recall that the root of these financial woes began with the April 11, 2019 Queen’s Park release of the Ontario Budget resulting in an unanticipated and unprecedented \$133 million reduction in the Legal Aid Ontario (LAO) budget for the 2019-2020 year and the further announced budget cut of \$164 million in the 2020-2021 year. Although the provincial government did not follow through with the additional 2020-2021 budget cuts, LAO was clear that the reduced budget repetition of the prior year was devastating all the same. The sustainability of LAO, as we know, was called to question.

These budget cuts were poorly timed for LAO given the additional complexities of the funding model involving the Law Society of Ontario Foundation. Repeating my past explanation as to how this system works, the Law Foundation of Ontario receives interest earned on lawyer and paralegal trust fund balances. This income source for LAO is dependent on real estate activity and interest rates. Both of these are subject to fluctuation. For instance, in May 2020, the Bank of Canada cut the key interest rate to 0.25%. I remind everyone of the real estate decline in the first part of 2020. Although interest rates are still low, at least the real estate market has well survived the pandemic to date. LAO identified this funding pressure as one of \$70 million. This fluctuating income source is not ideal as an operating budget source.

As reported at the November Plenary, the LAO financial demise did not materialize in September 2020. Rather we were alerted to a budget surplus by September, 2020. The pandemic results saw, in part, lawyers not billing LAO to the degree anticipated. This significant billing decline has been noted by LAO to offset the loss in LAO revenue. But for me, the real question is whether that is because legal services are diminished or is there simply no ability for the smalls and soles to generate LAO billings due to time constraints and staffing issues. Time will tell. At present LAO continues to consider late accounts from counsel with a proper explanation as to the



pandemic impact on the practice and a request for the discretion to late tender an LAO account.

LAO identifies these “irregular certificate billing patterns” as not following past trends. It is noted that December 2020 closed out the year with increased non-big case managed criminal and family law accounts being submitted at a much higher rate than anticipated. The regional services charged have fluctuated up and down with court “re-openings” in 2020. LAO identified that certificate issuance was returning to pre-pandemic levels by the end of the calendar year.

Also, it is to be appreciated that the dynamic of pandemic changes in policing, and the laying of charges, to the Crown engagement in enhanced diversions and withdrawal of charges not in the public interest certainly has altered the statistics.

With time, however, the crime statistics will shift again. As the pandemic has persisted and people are forced to work from home and the like, domestic assaults have increased and overall crimes of violence are on the rise. Demands on the family law system are enhanced too. Lock downs in family homes has brought dire outcomes to many. LAO has responded with changes to screening and coverage for domestic abuse victims. LAO has allowed lawyers to complete remote funding applications to assist the public. Again, only time will show the true statistics.

I remind you, as past reported:

FOLA responded in 2019, 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 years plus 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 scene work.

Your FOLA Legal Aid Committee has continued since last November 2020 to remain actively engaged.

Since the November Plenary:

December 2020 saw participation with LAO in a consultation process on the modernization of LAO Tariffs and billing practices. LAO consultations were held on December 8, 9, 10, 14, 15 and 17, 2020. FOLA attended all but the December 15, 2020 meeting. Unfortunately, that process has virtually paused as LAO is immediately focused on the legislative changes expected to come into effect in the fall of 2021 and the need for LAO to actively implement infrastructure changes.

I remind you that I concluded my November Plenary Report with the following:

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, 2019](#) by the Ontario Legislature. Some fear that these changes threaten an already fragile Legal Aid system in Ontario. While 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. In the end result, we see that this is 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.

Since then, FOLA worked through ASLA by attending zoom meetings on January 18 and March 23, April 14, 20, 23, and 29, 2021 to discuss a series of LAO consultations on the following areas: Criminal; Family and Child Protection; Immigration & Refugee; and Mental Health Law.

The January meeting was especially informative with a presentation by LAO of the LASA implementation and funding model and attendance by LAO Chair, Charles Harnick, and David Field, David McKillop and Kathleen Murphy, LAO Staff.

By April, 2021, attention was turned towards [LAO Draft Rules](#) which are needed as a result of LASA to help modernize the legal aid system and ensure it can continue to meet the needs of the people it serves well into the future.

On April 20, 2021, FOLA, through ASLA, welcomed a technical briefing by various LAO representatives who offered an overview of the rules and the anticipated changes. On requesting a comparison chart of the old to the new, none was on offer. ALSA stakeholders are currently compiling a bullet point commentary on the new rules and a focus on anticipated impact. This feedback is important to ASLA as further meetings will involve LAO Board members, many of whom are new. ASLA’s goal is to effectively communicate with LAO and in a positive manner to be constructive in the presentation of concerns and to offer solutions to any identified problems.

Remaining the same appears to be LAO’s access to justice mandate and the areas of practice to be funded along with a reference to providing high quality legal aid services to low-income clients.

However, a significant change has to do with governance. This is grants enhanced LAO independence. New is the ability of LAO to make rules to govern aspects of the provision of legal aid services. Section 46 of the new Act identifies areas where LAO can establish “rules”.

LAO identified in the January 2021 ASLA debriefing that LAO was working on rules to codify (my word) existing processes and LAO requirements.

Of interest, is the ability for LAO to determine what they label as outdated and inefficient “ways of doing things with a more client-focused, effective, and easier to navigate process for clients and service providers alike.”ⁱ

At the time of writing this report we are at this stage. FOLA written submissions be presented to LAO shortly after Plenary and will be posted to the website.

LAO’s first phase of consultation, seeking input on the LASA 2020 LAO draft rules, included a two-week awareness campaign that commenced on April 8, 2021. LAO designed a dedicated online presence to release the draft rules with feedback options.

[The Rules](#) went public on April 21 and FOLA sought input from the Associations to be able to fully represent your interests. As a FOLA LAO committee we strive to provide you with



information and updates as frequently as possible. Executive Director Katie Robinette is to be praised for her significant dedication to maintaining the dissemination of information and to seeking communication from you the members on the LAO topic and beyond. Thank you, Katie, for your support.

On behalf of the FOLA Legal Aid Committee, I thank you (the members & the association Boards) for all your diligence in sending letters, especially this past year to your MPs and MPPs. We thank you for writing to us and for actively engaging in the LAO consultation process. Your input enhances our ability to communicate your true needs.

FOLA continues to encourage our Members to bring LAO funding concerns back to your Boards and your membership at large. Please, continue your communication with your local MP and MPP. FOLA and other stakeholders identify that a change in the LAO funding model is required.

As I write to you, we are caught in the third wave of COVID 19. On April 1, 2021, Premier Doug Ford placed the entire province into a further lock down and a stay-at-home Order initiated to commence on April 3, 2021 for four weeks. This has since been extended a further two weeks and greatly modified with enhanced restrictions.

This week the Chief Justice of the Superior Court of Justice Geoffrey B. Morawetz announced on April 20, 2021 that until May 7, 2021 the court will focus on the most serious child protection matters, urgent family matters, critical criminal matters and urgent commercial or economic matters where there are employment or economic impacts. Association administrative Justice memos quickly cancelled courts directing bench warrants with discretion with future Assignment Courts. This saw even virtual attendances cancelled inclusive of Judicial pretrials and the like.

Likewise, Lise Maisonneuve, Chief Justice of the Ontario Court of Justice followed the government announcement restricting court cases. Trials and Preliminary Hearings are currently cancelled between April 26, 2021 and May 7, 2021. That is other than in custody. Remote Case Management Courts, pleas, sentencings, Judicial pretrials and bail hearings all continue.

All LAO staff continue to work from home.

As your FOLA Legal Aid Committee Chair, I hope you are successful in your ability to adjust your practice to both stay healthy and productive.

In closing, I remind you that your voice matters and FOLA welcomes your input. To that end, you are always welcome to write to me, as your FOLA LAO Chair, at:
terrylbrandon@acriminaldefence.ca .

I would be most happy to hear from any member about concerns or questions. Suggestions as to problem solving are invited too.

As said in the past:

Membership in your local Law Association carries membership in the Federation of Ontario Law Associations and representing over 16,000 members of the practicing Bar, we do have a role to play with the government and the Alliance.



With gratitude, I once again 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.

With well wishes,

Terry L. Brandon, FOLA’s Legal Aid Committee Chair and 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 Association
The Advocates’ Society
The Mental Health Legal Committee

ⁱ David Field, LAO President and CEO ASLA debriefing materials from January 18, 2021 presentation.