

# SWADRON ASSOCIATES

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To Whom It May Concern,

## *Legal Aid Services Act, 2020 Draft Rules*

I am writing on behalf of the Mental Health Legal Committee (MHLC), to provide the following submissions respecting the draft rules circulated publicly on April 21, 2021.

### ***The MHLC***

The MHLC was formed in February 1997 by lawyers and community legal workers practising in the area of mental health law. It has, since 2009, been a member of the Alliance for Sustainable Legal Aid (ASLA). The MHLC's guiding principles emphasize the liberty and autonomy interests of mental health consumers and self-identified psychiatric survivors. Lawyer members of the MHLC represent clients in all areas of mental health law (criminal, civil and administrative) before tribunals and in all levels of court. As a result of the varied nature of our practices, our work and our clientele, the MHLC has specialized knowledge in the rights and interests of people with lived experience with mental health issues.

The MHLC also advocates for the rights of consumers and survivors through a broad array of public interest activities including systemic advocacy, public legal education, policy work, community development, access to justice and law reform initiatives. The MHLC has been granted leave to intervene by the Supreme Court of Canada in ten appeals where the rights of people with mental health issues have been implicated and has gained a reputation as an experienced stakeholder in the area of mental health law and has been widely consulted by government, the judiciary, administrative tribunals, and community agencies. We aim to support rather than supplant the voices of those directly affected by policy and systems.

The MHLC has worked with Legal Aid Ontario (LAO) on a broad range of projects, notably LAO's Mental Health Strategy, the development of panel standards, LAO's Mental Health Appeals Project and representation on the Mental Health Law Advisory Committee to the Board. Representation by experienced lawyers of choice is essential to the constitutional operation of the various liberty-restricting legal regimes that our clients must navigate in matters of both

provincial and federal jurisdiction. The proper operation of LAO under the new *Legal Aid Services Act, 2020* is fundamental to the ability to meet this constitutional imperative.

The MHLC is grateful for the opportunity provided to express our views directly to the Minister, the Board and senior staff as part of LAO's meeting with ALSA on April 29, 2021. We wish to underline our support of the May 19, 2021 submission of ALSA respecting the rules. The following further submissions are relevant to our specific practice areas.

### *Consultation*

Section 33 of *LASA 2020* requires LAO to develop a public consultation policy to be approved by the Minister. This has not occurred and it is not part of the draft Rules. With respect, conducting the present draft rules consultation in the absence of a consultation policy amounts to putting the cart before the horse. It further creates the hopefully mistaken impression that stakeholder and public consultation is a low priority for the corporation. The short time frame of the current consultation has been particularly challenging for organizations with volunteer leadership such as ours.

As a smaller practice area within LAO's program, the mental health law bar can get overlooked. The error in the tariff for appeals to the Superior Court of Justice from the Consent and Capacity Board discussed below is just the most recent instance. Another example is the regular mis-application of the newer discretion criteria established for criminal and family cases to mental health law accounts where the original discretion criteria in the tariff continue to apply to mental health accounts.

In recent years, the MHLC has engaged most regularly with the LAO Policy Division, particularly in respect of LAO's mental health strategy and the mental health appeals project. This has generally been workable, subject to the drawback that the Policy office generally must take issues that we raise to other parts of the corporation to be addressed. For the last year, however, there has been no policy lawyer assigned to the mental health file. Much unnecessary time is spent seeking access and re-educating. **The mental health law practice area needs an established means of access or dedicated point person at LAO with whom it can address and troubleshoot practice issues affecting legally aided clients.**

### *General Interpretation*

The rules are written in a manner that establish rigidity in terms of the criteria that must be met by those receiving services. Examples are provided below. At the same time, LAO is given wide discretion when withholding or withdrawing services. Given the importance of legal aid as a social program in the provision of access to justice for marginalized populations, it may assist to provide a general interpretive principle in the rules. That principle would be that: **Where a rule relates to the granting of a benefit, it should be given a broad and liberal interpretation and that when a rule would tend to withhold or withdraw a benefit, it should be construed narrowly.**

## *Eligibility*

The application process contemplated in Rule EL3(2) fails to give LAO residuary discretion to find an applicant eligible despite incomplete information. This can often occur when a person is confined to hospital involuntarily and is completing an application for Legal Aid with the assistance of a rights adviser or a patient advocate.

Discretion has been exercised historically as an accommodation of the disability of applicants and in recognition of the speed at which Consent and Capacity Board (CCB) hearings are scheduled (within seven days of the Board's receipt of the application). Further, applicants confined to hospital are often deprived of access to their finances by design (i.e. a finding of incapacity to manage property) or by the intervention of others (i.e. attorneys for property withholding access to funds or family members withholding cheque books or bank cards).

Contribution agreements typically take the form of liens on property, which are costly to administer, particularly in proportion to the cost of certificates for representation before the CCB and the ORB. Further, liability can arise in cases where an individual enters into a contribution agreement only to be found to have lacked capacity to do so. A guardian or attorney for property asked to enter into a lien agreement may refuse to do so because they wish to prevent the person from accessing legal services.

Expecting lawyers to attempt to enter a private retainer or contribution agreements with clients in some circumstances is inappropriate. While everyone is presumed capable of managing their property and the mere fact that a person is detained in a psychiatric facility does not displace this presumption, some clients who have matters before the CCB or the Ontario Review Board (ORB) lack a clear picture of their finances. If detained in hospital they often lack access their financial information to get a clear picture of their finances before making an agreement.

Clients who are capable of managing their property and have access to funds generally do carry out their financial obligations. If LAO wishes, in the interest of saving public funds, to encourage lawyers to attempt to enter into private retainer arrangements with detained clients in such circumstances, it must be prepared to act as a backstop when the private retainer fails to result in payment.

**In cases where LAO is assessing the eligibility of individuals for legal aid funding in matters before the CCB and the ORB, LAO should, for a number of reasons, consider waiving the financial eligibility test ("FET") altogether.<sup>1</sup> At the very least, however, it must retain discretion to grant a certificate despite an application being incomplete and to waive the FET in appropriate circumstances. Where a client detained in hospital enters into a**

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<sup>1</sup> While time does not permit the full exploration of this issue in the present submission, the reasons for waiving the criteria would include: (1) the overwhelming proportion of applicants to the CCB do meet the FET; (2) problems of client access to funds; (3) the speed of proceedings before the CCB; (4) the cost of administering payments and liens under contribution agreements; (5) some clients, by reason of their mental health conditions, are mistaken respecting the extent of their assets; and (6) the reality that in many cases, clients refused a certificate may, given the nature of the rights at issue, be entitled to some form of publicly funded counsel.

**private retainer agreement with a lawyer but ends up being unable or unwilling to pay, LAO should retain discretion to issue a certificate retroactively.**

Consistent with the above comments respecting eligibility, issues of accommodation of clients with disabilities can also arise in other areas impacted by the rules, such as the cancellation of certificates, changes of lawyer and the appointment of lawyers. **The MHLC recommends that LAO engage an external consultant to vet the Rules with a view to compliance with the *Human Rights Code* and the *Accessibility for Ontarians with Disabilities Act, 2005*.**

### *Tariff*

The tariff for appeals from the CCB to the Superior Court of Justice was the subject of a multi-year pilot project from 2015 to 2019. 50 hours of preparation time were permitted. The initiation of a modified merit test effective November 20, 2017 reduced the number of appeals funded by LAO (which was always small). Following the April 2019 provincial budget, however, the tariff was reduced to 25 hours, which made the effective representation of clients in such appeals untenable. The insufficiency of this particular tariff item has historically resulted in the long-term detention of patients in hospital while the hearing of their treatment capacity appeals have been delayed.<sup>2</sup> It has also led to over a decade of litigation including *amicus curiae* and *Rowbotham* orders. In far too many cases, however, mentally disordered appellants have been forced to represent themselves in court in circumstances that are morally unconscionable.

After much effort by the MHLC, including the convening of a meeting with LAO representatives and the lead judges of the Superior Court, the tariff was increased in early 2020 back to 35 hours, consistent with the preparation hours permitted for appeals from the ORB. We were advised that the increase from 25 to 35 hours was occurring as a pandemic measure but that there was recognition, at least in some quarters of LAO, that this was also addressing the historic inequity in the funding of these appeals. Practically, meeting the needs of clients and the expectations of the court in such appeals almost always requires more than 35 hours of preparation time. The bar has been willing, however, to contribute some *pro bono* time and seek discretion when necessary. The proposed tariff at page 17 in the payments schedule again reflects 25 hours, rolling back a hard-won gain for clients needing effective representation in this area. Despite inquiries, we have not, thus far, received confirmation that this is simply an error. **The tariff for preparation time in appeals from the CCB to the Superior Court of Justice should be stated as 35 hours.**

### *Appointment of staff lawyers*

Rule C4 sets out a process for the appointment of lawyers for hard to serve clients. It is engaged in situations where a client is deemed to have fired a lawyer unjustifiably or where it appears that a client requiring a lawyer is unlikely to engage one. **The Rules should be more specific respecting the conditions that will lead LAO to determine that a person is unlikely to retain**

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<sup>2</sup> By virtue of section 18 of the *Health Care Consent Act, 1996, (HCCA)*, a treatment that has not yet begun cannot be commenced pending the disposition of an appeal respecting treatment capacity.

**counsel as well as what constitutes “unreasonableness of the individual’s conduct” (see C4[2][a] and [c]).**

In addition, Rule C4 also contemplates certificates being issued either to roster lawyers or staff lawyers. Why a salaried staff lawyer would need a certificate is unclear. It seems, however, that staff and certificate lawyers might be competing for certificates and that staff lawyers might have the inside track. LAO has had significant success in carrying out its responsibility to arrange for representation when the CCB makes orders requiring LAO to do so under section 81 of the *HCCA*. It uses email distribution lists alerting members of the applicable lawyer panel of the need for representation and receives responses from available lawyers. Email distribution lists or similar means of canvassing the appropriate rosters of certificate bar lawyers can be established in each area where LAO is mandated to arrange representation. There is no need for LAO to set up, train, house and ultimately pension a roster of staff lawyers to duplicate the services offered as-and-when-needed by the certificate bar.

**The rules should provide that staff lawyers should be engaged to represent clients to whom certificates would be available only where it is demonstrated that the certificate bar is unable to meet this need.** A demonstrated gap should not include one created by the inadequacy of the tariff, such as that reflected in the above discussion respecting the tariff for appeals from the CCB to the Superior Court.

#### ***Entity Service Providers***

LAO’s abandoned experiments with alternative payment arrangements with preferred service providers and community clinics providing bundles of refugee-related services for a fixed fee have harmed clients, caused disaffection amongst service providers and reputational harm to LAO. If any money has been saved (which the MHLC suspects is not the case), it has only been to the detriment of the service providers and the quality of the services provided. **Consistent with its position respecting the use of staff lawyers, the MHLC opposes the provision of services for which certificates would be issued through entity service providers as described in this rule unless it is first demonstrated that the certificate bar is unable to meet this need.** In the mental health practice area, representation by a lawyer of choice is constitutionally mandated. LAO must be careful not to abridge this right.

#### ***Appointment of amicus curiae***

Section 15 of *LASA 2020* gives LAO responsibility for funding counsel in a number of circumstances, including *amicus curiae*. **Rules are needed in to implement section 15 of *LASA 2020*.** Presently the payment for such services is administered by LAO under a protocol agreement established with the Ministry of the Attorney General (MAG). LAO is then reimbursed by MAG. Importantly, **LAO must ensure that it does not incur the burden of funding court-mandated representation and *amicus curiae* without additional government funding of this burden plus the associated administration costs.**

### *Withdrawal of lawyers*

Questions are also raised by the requirement contemplated on in Rule C4(4) that LAO's permission be obtained prior to the withdrawal of a lawyer whose representation has been arranged by LAO. That this permission might be withheld in circumstances where the lawyer has been fired or permitted to withdraw by the court is concerning.

Any rules requiring LAO's permission prior to withdrawal must acknowledge the primacy of the courts and tribunals in matters of representation. Further, Rule 3.7 of the Rules of Professional Conduct outlines the circumstances in which a lawyer must withdraw from a solicitor client relationship as well as those in which withdrawal is justified but not mandatory. Any delay occasioned by the need to obtain LAO's permission could significantly prejudice the client and the proceedings.

**Rule C4(4) should be amended to clarify that in circumstances involving mandatory withdrawal by the lawyer under rule 3.7 of the Rules of Professional Conduct, the lawyer need not seek permission from LAO.**

### *Recovery of costs*

The cost recovery regime under s. 46 of *LASA, 1998*, presently prevents courts from considering the fact that a party is legally aided when determining the party's entitlement to costs. Draft rule RC6 (1)(b) requires lawyers for clients who are entitled to recover their costs to seek to negotiate settlements respecting costs that no court would award. Courts award costs on either a partial indemnity or substantial indemnity scale depending on the circumstances, not the provider's private retainer rate, which would be higher than either scale. **If LAO is seeking to give lawyers standard instructions respecting the recovery of costs, those instructions ought to be to negotiate such amount as is likely to be awarded by the court, which will be both more flexible and more realistic.**

### *Standards for all of LAO panels*

Panel or roster standards are an important means of ensuring quality control and the maintaining of practice standards. There are some legal areas covered by LAO that do not presently have their own discrete panels or corresponding panel standards. The rosters that replace panels should in each case have panel standards. The MHLC participated in the establishing of panel standards for the Consent and Capacity Board panel, which were put in place a decade ago and was involved in developing a mental health criminal panel, which has yet to be implemented. Standards should also be established for an Ontario Review Board roster. This latter roster could draw from both the criminal and civil law-practising members of the mental health bar. Finally, LAO should play a more significant role in promoting the competence of its rosters by working with stakeholders such as the MHLC to develop training and supports such as mentoring. **LAO should strike committees and initiate transparent processes to establish and clarify existing roster standards for each area of law in which LAO serves clients and invite representatives of the applicable lawyer associations to participate as well as working with stakeholder organizations to promote competence.**

### *Test Cases*

The Rules do not address the crucial function of LAO in funding test cases. Such cases including *Charter* challenges, group applications, coroner's inquests, and appellate interventions were selected historically by the Group Applications and Test Cases Committee and more recently through LAO's Policy Division. A single test case can save LAO the value of the investment hundreds of times over. **The continuation, procedure and criteria for test case funding should be the subject of its own rule.**

The proceedings required to advance test cases can fall outside of those funded by Legal Aid. For example, an action or application to determine the constitutional validity of a statute would notionally fall within civil litigation, an area of law not funded by Legal Aid since 2010. A case involving the characterization of Henson Trusts (testamentary trusts meant to be excluded from the definition of income for the purpose of ODSP eligibility) might fall into trusts and estates law yet impact a significant number of marginalized Ontarians. Draft Rule EL4 states that legal aid can only be granted in areas of law where LAO provides services. **Rule EL4 should explicitly provide for an exception for group applications and test cases that are approved under the test case criteria, as determined by LAO's processes.**

### *Conclusion*

Even if it is expected that Rules will be more amenable to revision than the present regime of regulations, it is important that LAO get started on the right track. Many hundreds of thousands of vulnerable Ontarians and the justice system itself depend on a legal aid program that operates optimally. LAO has an historic opportunity to get this right from the outset and we wish it success in doing so.

Thank you for your kind consideration. Please feel free to contact us if we can be of further assistance.

Yours very truly.



Marshall A. Swadron

Chair, Mental Health Legal Committee

cc. The Honourable Doug Downey, Attorney General of Ontario  
Charles Harnick, Chair, Legal Aid Ontario  
David Field, President and CEO, Legal Aid Ontario  
Lenny Abramowicz, Chair, Alliance for Sustainable Aid  
Teresa Donnelly, Treasurer, Law Society of Ontario