

24 January 2022

Marcus Pratt
Director of Policy and Strategic Research
Atrium on Bay
40 Dundas Street West
Suite 200
Toronto, ON M5G 2H1
Sent by Email to: consultation@lao.on.ca

Dear Mr. Pratt,

Re: Consultation on minimum experience standards for roster members: IRL General and Appellate rosters

Legal Aid Ontario has prepared new minimum standards for enrolment in its General and Appellate panel “roster” standards, which do away with much of the detail of the standards established in 2015. The 2015 standards followed extensive advocacy by the RLA, NGOs serving immigrants and refugees, and media attention to negligent representation which had been enabled by a lack of enforcement of clear standards. Although media attention was limited to negligent representation of Roma refugees, the problem had been flagged as a systemic issue in consistent advocacy by the RLA since the early 1990s.

In 2020 LAO’s administration was given unprecedented influence over the Rules governing it, as the 2020 LASA permits LAO’s Board to put forward and pass Rules subject to the Attorney General’s approval. This has put LAO in the lead in developing its Rules and Policies. LASA 2020 was prepared by LAO and approved without intervention by the Attorney General.

When LAO was governed by the Law Society, a perceived impediment to formulating and enforcing clear standards of competent representation was the perception this could overlap with Law Society oversight of ethics. When LAO became an arm’s length corporation under the Attorney General, a perception was that it might be limited by its governing legislation. The RLA advocated under both systems that LAO had the authority to ensure it funds competent

representation, and a responsibility to the vulnerable clients immigration and refugee lawyers serve.

LAO did adopt minimum panel standards which set out basic professional practices that could be expected of any lawyer representing a refugee, following province-wide consultations with refugee lawyers facilitated with the RLA. Unfortunately LAO modified these to be discretionary, however they served to at least point to basic practice standards.

It was not until substantial media attention that LAO adopted the May 2015 General and Appellate standards, which are comprehensive. In 2015 LAO also engaged in enforcement of the standards, leading to removal of a significant number of lawyers. By that time the LAO panel had been unmonitored for many years, including lawyers who had died, left practice, failed to maintain interest in the area or otherwise simply did not meet panel standards. Beyond the relatively simple removal of lawyers who could not even in the abstract be qualified, LAO engaged in a substantive review of the quality of work of all lawyers, including experiences lawyers. The management of that review was apparently costly, and this is in part because LAO disregarded practical advice from the RLA about streamlining reviews. Although some capable lawyers left the system out of frustration with the review, the overall impact was to improve the panel, removing lawyers who simply were not providing competent representation.

The new minimum standards prepared by LAO's Executive do away with the entirety of the substantive May 2015 General and Appellate standards. LAO has been told by its IRL Advisory Committee that this is alarming and will predictably lead to a resumption of the sort of systemic negligence enabled by the old management practices. It is disappointing that this is being done at a time when LAO has unprecedented autonomy in developing and implementing its Rules and Policies.

The RLA echoes the advice of the LAO IRL Advisory Panel. We are concerned at LAO's abandonment of the substantive standards for the General and Appellate panels. We expect that this will lead to systemic problems in the quality of representation.

We are also concerned that LAO's administration has largely stopped enforcing the existing standards.

We recommend that LAO restore the May 2015 General and Appellate standards and incorporate them into its current minimum standards.

Alternately, if LAO has concerns with the scope of the May 2015 standards, we recommend that they be restored pending consultation with the bar.

With respect to the specifics of the new minimum standards, beyond the major systemic issue in LAO abandoning substantive standards, we have the following concerns.

1 It is unclear from the new policy how conditional empanelment will be, in practical terms, accessible for new lawyers. Although LAO has informally assured us there will still be conditional empanelment, the actual policy makes no reference to this. The policy should include clear explanation of conditional empanelment as this risks deterring new lawyers from attempting to apply, and risks leaving them in administrative limbo.

2 LAO has discontinued its mentoring (“second chair”) program, but not replaced it with any other mentoring or supervised practice program. Experienced lawyers have no practical means to receive funding for non-exploitative mentoring or supervision of junior lawyers. Junior lawyers may find it difficult to access conditional empanelment without adequate systemic supports. LAO should prioritize consulting with the bar, including junior lawyers, to implement a practical system to facilitate this.

3 The requirement to demonstrate having done of a minimum number of types of cases makes no reference to substantive quality of representation.

4 It is unclear how the minimum standards apply to a lawyer renewing membership. The 2015 standards made allowance for lawyers who had already established competence but had to leave practice, for example for maternity leave.

5 The new standards do away with requiring that a minimum portion of the lawyer’s practice be IRL work. This will promote enrolment of lawyers who are not maintaining expertise in IRL. This is particularly problematic as it combines with LAO’s abandonment of substantive standards.

We are also concerned that these changes come at a time when experienced lawyers are being discouraged from engaging with the LAO certificate system due to several administrative policies LAO has reiterated under LASA 2020 including: enforcement of annual billing deadlines; unduly narrow criteria for discretion; limiting time billable for IRL hearing attendance time to the specific time a Board Member commences a hearing; insufficient hours to cover working with the current IRCC portal system. Enabling lawyers to join the roster without adequate standards, and failing to implement a viable mentoring system, while some experienced lawyers reduce or limit certificate acceptance, will likely aggravate the situation of vulnerable clients seeking competent representation.

LAO’s support for competent representation of Immigrants and Refugees ensures that people

who have historically, and currently, been particularly vulnerable to poor representation get access to capable and ethical lawyers. We encourage LAO to prioritize enabling the maintenance and development of access to capable representation through the IRL certificate system.

Yours truly,

Arvin Afzali and Pablo Iribarra

Members of the Executive

Refugee Lawyers' Association of Ontario

Annex:

LAO LASA 2020 Minimum Experience Policy:

Refugee and Immigration (General)

For all refugee and immigration services, with the exception of the services under the Refugee and Immigration (Appellate) authorization.

Minimum Experience To be authorized to provide Refugee and Immigration (General) services, roster members must have completed 10 or more, or any combination of the following matters, within the last two years before seeking authorization:

- Completion of 10 Basis of Claim Forms
- Refugee Protection Division hearings
- Pre-Removal Risk Assessment (PRRA) submissions
- Danger Opinion submissions
- Refugee Appeal Division appeals
- Perfected Federal Court Applications for Leave and for Judicial Review of Refugee Protection Division (RPD), Refugee Appeal Division (RAD), PRRA or Danger Opinion decisions
- Federal Court motions to stay removal
- Federal Court judicial review hearings in respect of RPD, RAD, PRRA or Danger Opinion decisions
- Appeals before the Federal Court of Appeal in respect of a refugee or immigration law matter.

Roster members must review the material enumerated in the document entitled "Material for review by roster members authorized to provide legal aid services in Refugee and Immigration (General)" and attest they have reviewed same.

Refugee and Immigration (Appellate)

The services under this authorization are as follows:

- Appeals before the Refugee Appeal Division
- Judicial Reviews before the Federal Court
- Appeals before the Federal Court of Appeal
- Appeals before the Supreme Court of Canada
- Applications before the Superior Court for a writ of habeas corpus
- Applications to Canada Border Services Agency (CBSA) for a deferral of removal and motions for a stay of removal before Federal Court

Minimum Experience

Ten or more, or any combination of the following services, must have been completed within the last two years before seeking authorization:

- Refugee Appeal Division appeals;
- Perfected Federal Court Applications for Leave and for Judicial Review of RPD, RAD, PRRA or Danger Opinion decisions;
- Federal Court motions to stay removal;
- Federal Court judicial review hearings in respect of RPD, RAD, PRRA or Danger Opinion decisions
- Appeals before the Federal Court of Appeal in respect of refugee/immigration law matters.

Roster members must review the material enumerated in the document entitled "Material for review by roster members authorized to provide legal aid services in Refugee and Immigration (Appellate)" and attest they have reviewed same