

Legal Aid Ontario

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# Complex Case Rate Policy

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LEGAL AID ONTARIO  
AIDE JURIDIQUE ONTARIO

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## 1) Introduction

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Legal Aid Ontario is an independent, not-for-profit, statutory corporation established under the *Legal Aid Services Act 1998 (LASA)* to administer Ontario's legal aid program. LAO's mandate is to promote access to justice for low-income Ontarians by providing consistently high quality legal aid services in a cost-effective and efficient manner.

The recent Memorandum of Understanding (MOU) signed by the Ministry of the Attorney General (MAG), the Criminal Lawyers Association (CLA), and Legal Aid Ontario (LAO) established an enhanced tier of funding for complex criminal cases in Ontario. The Complex Case Rate (CCR) was enshrined in an amendment to LAO's tariff regulation<sup>1</sup>.

LAO's CCR policy reflects the many priorities that LAO must balance in its funding of complex and expensive criminal cases. The CCR program must:

- Provide funding to promote fair trials for financially eligible defendants in the most serious, complex, and costly criminal cases.
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- Provide funding that is prioritized and proportionate to the importance and complexity of the case.
- Encourage Ontario's best criminal lawyers to accept legal aid certificates in complex criminal cases
- Ensure that CCR resources are used effectively and efficiently in accordance with the client of modest means standard.
- Provide services that meet high standards of client service, professional judgment, quality, accountability, and efficiency.
- Promote justice system-wide efficiency and effectiveness in a manner consistent with the public interest, client interests and a lawyer's professional obligations.

LAO's CCR policy strives to be transparent, fair and objective. LAO will streamline the CCR applications process to ensure funding decisions are made quickly. LAO will develop a "CCR Process Timetable" that sets out LAO's targets for key decisions on CCR applications.

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<sup>1</sup> O.Reg. 151/10, amending O.Reg. 107/99.

## 2) CCR CASE ELIGIBILITY

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### a) General

For a case to receive CCR funding, the following three-part test must be satisfied:

- The case must be accepted into the BCM program;
- The case must meet the CCR case eligibility criteria; and,
- The lawyer must be on the CCR panel.

### b) Applications And Decision-Making

The CCR regulation states that the President of LAO or his or her designate, having regard to the complexity and duration of the proceeding and the demonstrated skill and expertise of the lawyer providing services under a certificate, may decide that the [CCR] is payable for all services provided under the certificate for the proceeding<sup>2</sup>.

LAO will assess every application for CCR funding on a case by case basis. To be eligible for CCR funding, a lawyer must complete the appropriate LAO forms and comply with LAO's CCR funding application policies.

Lawyers may apply for CCR funding for any proceeding that has been accepted into the BCM program, including criminal appeals.

Counsel may reapply for CCR funding in the event LAO has denied an initial application. LAO will consider new applications for CCR funding if there has been a change in circumstances which is likely to make the case eligible for the CCR.

Decisions regarding case eligibility for the CCR program will be made by LAO's Vice-President, Central Planning and Innovation following a review by BCM staff and with the advice of the Exceptions Committee, where appropriate. Lawyers may ask for a review of the Vice President's decision by the President of LAO.

### c) CCR Eligible Cases

For a case to receive CCR funding, the case must be accepted into the BCM program. LAO will deem that certificates for the following charges are eligible for the CCR:

- First degree murder
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- Second degree murder

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<sup>2</sup> O.Reg. 151/10, s. 2 (5).

In other matters, LAO will assess Complex Case Rate case eligibility based on the following factors established by the regulation and LAO policies:

- Big Case Budget
- Duration of proceedings
- Length and nature of police investigation
- Complexity of the Crown's case
- Personal characteristics of client
- Impact on client, including the severity of the offence and consequences to the accused
- Novel, unusual or otherwise challenging legal, factual or public interest issues
- Multiple charges or accused
- Demonstrated skill and expertise of the lawyer
- Other relevant factors that would warrant payment of enhanced rate

LAO may seek the advice of senior members of the bar, including members of the Exceptions Committee, in evaluating CCR case eligibility in accordance with LAO policies. LAO will not deny a CCR application without seeking the advice of senior members of the bar.

LAO may reconsider the CCR case eligibility criteria periodically and may update or amend the criteria as necessary based on financial or other circumstances.

### **3) CCR LAWYER ELIGIBILITY – PANEL STANDARDS**

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LAO will establish a new panel for CCR-eligible lawyers. Lawyers must be on the CCR panel in order to receive enhanced CCR funding. Membership on the ESM panel and the general criminal panels are prerequisites to be eligible for the CCR panel.

CCR cases involve the most serious consequences for low-income Ontarians. They are also the most complex criminal cases and the most costly proceedings funded by LAO. In these circumstances, LAO has an obligation to ensure that public resources are focused on the legal issues and court proceedings most likely to advance the client's interests and the public interest. Accordingly, CCR -eligible lawyers must demonstrate they can provide high-quality and cost-effective criminal representation. They must also demonstrate that they can comply with LAO's rules, policies, and procedures.

Appointments to the CCR panel are for a four year term. Lawyers will be asked to reapply at the expiry of their term pursuant to a CCR panel renewal policy. There is no number of renewals or the number of lawyers on the CCR panel. Lawyers may be removed from the panel in LAO's discretion if they do not comply with this policy or any other relevant LAO policy or rule.

LAO will have the final decision on panel membership. In addition to the panel application information, LAO may make discrete and confidential inquiries if LAO believes such information would assist its determination. LAO will also seek the advice of the senior members of the bar, including members of the Exceptions Committee, in evaluating applications for membership to the CCR panel.

A lawyer on the CCR panel is only eligible for CCR funding on LAO-approved CCR cases. In other words, membership on the CCR panel does not entitle a lawyer to CCR funding on regular criminal certificates or other BCM cases.

LAO's CCR panel standards are attached as Appendix A to this policy.

### **4) CCR PANEL MANAGEMENT**

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Membership on the CCR panel is within the absolute discretion of LAO.

Panel membership recognizes that a criminal lawyer has a proven track record delivering high-quality legal representation.

LAO will work with the CLA and CCR panel members to develop innovative supports and programs on CCR cases. These initiatives will be developed with a view to improving LAO's supports for both CCR panel members and members of other LAO's criminal panels in the future. These programs will be developed over time, but could include innovative business arrangements on legal aid cases, more delegated decision-making to criminal lawyers, and/or LAO support for lawyer educational programs, mentoring, articling students, etc. LAO will also work with the CLA and CCR panel members to develop improved and more efficient accountability requirements for LAO and CCR panel members. Any programs developed in this manner will be consistent with the letter and spirit of the MOU.

## **5) MENTORING**

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The MOU commits LAO to consult with the CLA to develop a mentoring program to encourage junior lawyers to participate in legal aid and to enhance the quality of their work.

LAO believes the CCR program can be an important support and catalyst for mentoring junior members of the criminal bar. As a result, LAO will work with the CLA and CCR panel members to develop this program. Where possible, LAO will provide financial support for such programs.

## **6) PROVISIONAL DECISIONS/ONGOING EVALUATION AND UPDATES**

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The decisions and rules included in this policy are provisional. LAO may amend or update any part of this policy based on experience, financial considerations, or other circumstances that LAO deems to be relevant. LAO will continue to consult with the CLA on these other CCR issues.

## **7) EFFECTIVE DATE**

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This policy is effective April 1, 2011.

## **8) CONSULTATIONS WITH THE CLA**

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LAO will continue to consult with the CLA on the development of the CCR program.

## Appendix A

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### LAO's CCR Panel Standards

#### 1) INTRODUCTION

Legal Aid Ontario (LAO) intends to establish panel standards for the Complex Case Rate program. These standards should include fair, transparent and objective criteria to determine who will be eligible for Complex Case Rate funding.

CCR panel lawyers must be able to provide high quality, cost- efficient criminal representation in the most serious and complex criminal proceedings.

The draft panel standards recognize that there is no one single measure or indicator that identifies the highest-quality criminal lawyers. As a result, the panel standards combine qualitative assessments, statistical measures, experience requirements, and an assessment of the applicant's professional judgement and track record of success and favourable results for clients. The panel standards also recognize that a lawyer's reputation and the opinion of his or her peers is an important indicator of high-quality service.

The draft panel standards are detailed but not rigid. LAO will consider the totality of an applicant's experience, skills, results achieved, reputation and relationship with LAO to assess their application. The draft panel standards also include an exception clause to allow LAO to recruit high-quality younger counsel to the CCR panel. This clause will also assist LAO to recruit senior, high-quality lawyers who may not currently accept legal aid certificates.

LAO will not assess applications in isolation. LAO will seek the advice of senior members of the bar, including members of the Exceptions Committee, in evaluating applications for membership on the CCR panel. LAO may also make discrete and confidential inquiries within the justice system. When considering applications, LAO will consider regional differences and account for variations in criminal practise.

#### 2) CCR PANEL APPLICATIONS

Applicants for the CCR panel will be required to submit their application in the prescribed form.

#### 3) PANEL MEMBERSHIP CRITERIA

Membership on LAO's ESM panel and general criminal panels are prerequisites to be eligible for the CCR panel.

Panel membership will be determined on the basis of several criteria, including:

- Experience
- Track record of success and the results achieved;
- Professional judgement, effectiveness and efficiency
- Professional reputation, credibility and civility
- Compliance with LAO policies
- Willingness to participate in mentoring programs for younger criminal lawyers
- Compliance With Law Society Requirements
- Willingness to participate in an ongoing CCR evaluation

LAO will consider the totality of an applicant’s experience, skills, results achieved by the applicant (including precedent setting cases), reputation and relationship with LAO to assess their application. An applicant may be asked to supplement their application and/or provide additional information or references.

Lawyers may be removed from the CCR panel in LAO’s discretion if they do not comply with this policy or any other relevant LAO policy or rule.

**a) Experience Criteria**

[Insert minimum years, trials, jury trials, results achieved for clients etc.]

**b) Professional Judgement, Effectiveness and Efficiency**

Lawyers on the CCR panel must be able to conduct the most complex criminal proceedings efficiently and effectively. More specifically, lawyers on the CCR panel should have a demonstrable track record of:

- Achieving successful results advancing client’s interests on complex, criminal cases, including but not limited to the ultimate outcome;
- Focussing on the important issues in the case;
- Establishing a credible theory of the case;
- Making responsible admissions when issues cannot reasonably be disputed;
- Declining to pursue issues or proceedings that have no real prospect of success or that fail to advance the client’s defence;
- Examining and cross-examining experts and witnesses effectively and efficiently;

- Effective client management;
- Demonstrating the effective and efficient use of public funds consistent with the lawyers obligations to the client, professionalism and the administration of justice;
- Demonstrating the highest ethical standards.

LAO will interpret these requirements in a manner consistent with counsel's duty to advance client's interests, counsel's duties as an officer of the court, counsel's independence from the client, counsel's duty of loyalty to the client, and the Rules of Professional Conduct.

### **c) Professionalism**

Within the criminal justice system, a lawyer's professionalism is an important indicator of his or her ability to advance his or her client's interests, to achieve successful results, and to provide high quality services.

LAO will consider the opinion of the applicant's peers and professional colleagues when considering applications for the CCR panel. LAO will seek the advice of the Exceptions Committee in evaluating applications for membership on the CCR panel.

LAO may also make discreet and confidential inquiries within LAO and the justice system generally to assess the quality of the lawyer's outcomes, his or her judgement, professionalism, ethical standards, and civility.

Lawyers may submit reference letters in support of their applications, including senior defence counsel, judges, or Crowns. Referees must have direct and extensive knowledge of the applicant's work as a criminal defence counsel. None of the following persons are eligible to act as a reference:

- A person whose license is in abeyance under subsection 31 (1) of the *Law Society Act*;
- A partner, an associate, a co-worker, an employer or an employee of the applicant;
- A relative of the applicant;
- A member of LAO's Board;
- An employee of LAO; or,
- Members of the Exception's Committee.

### **d) Compliance With LAO Policies**

LAO may make discreet and confidential inquiries within LAO to assess the applicant's compliance with LAO's administrative requirements. These inquiries will focus on the lawyer's:

- Compliance with LAO’s policies and procedures;
- Responsiveness to LAO inquiries;
- Commitment to providing information to LAO in a timely way; and
- Civility.

Lawyers will be eligible for the CCR panel if this review indicates in LAO’s judgment that the applicant is in substantial compliance with LAO’s administrative requirements.

All lawyers apply for the CCR panel must also agree to comply with the *Legal Aid Services Act*, its regulations and schedules, the Tariff and Billing Handbook, the general terms and conditions for panel lawyers, and LAO’s general policies, standards, and procedures. Lawyers on the CCR panel are also required to comply with several policies and procedures respecting the BCM program, including:

- The BCM regulation (Section 5, O.Reg. 107/99)
- CCR and Big Case Management Policies and Guidelines
- Any LAO quality standards or policies applicable to big cases
- Any other CCR or BCM-related policy or procedure that LAO may establish from time to time

**e) Mentoring Program**

Members on the CCR panel must be willing to participate in an LAO mentoring program to develop younger members of the criminal bar.

**f) Compliance with Law Society Requirements**

Lawyers on the CCR panel must be members in good standing of the Law Society of Upper Canada.

**g) CCR Program Evaluation Participation**

Lawyers on the CCR panel must be willing to participate in an ongoing evaluation and monitoring of the CCR program.

**4) EXEMPTION POLICY**

LAO may in its sole discretion exempt a lawyer from specific CCR panel standards in order to recruit high quality counsel who may not meet all of the explicit CCR criteria. LAO will not, however, exempt lawyers from the professional judgement or reputational requirements set out above.

## 5) CONFIDENTIALITY

All information relating to an application including the contents of the application form, reference letters, files, reports, findings and recommendations is confidential and will not be disclosed to anyone, including the applicant. Information will only be shared as necessary with appropriate LAO staff and designated members of the Exceptions Committee.