

Chapter 6: Costs and Contributions



Table of contents

Introduction	6-2
Costs	6-3
<ul style="list-style-type: none">- General principals- Costs against institutional parties- Costs and Family Responsibility Office (FRO)- Assessment of costs- Costs and support orders- Costs recovered- Steps to take after costs awarded- Wits of Execution of Notices of Garnishment- Waiver of costs- Costs for services performed while the client was not legally aided- Costs awarded against a legally aided client	
Settlement and judgments	6-8
<ul style="list-style-type: none">- General principals- Amounts recovered- Settlement/judgment amounts uncollected- Settlement/judgments before administrative tribunals- Waiver of LAO's charge against money or other property	
Contribution agreements	6-11
<ul style="list-style-type: none">- General principals- Estimated amounts- Fixed amounts- Monthly contribution agreement- Legal aid liens and other forms of security- Estimated total fees- Change in client's financial circumstances	
Negotiating a settlement	6-14
<ul style="list-style-type: none">- Waiver of costs to facilitate settlement- Waiver to LAO's charge on recovery to facilitate settlement- Settlements involving the transfer of sale of property with a lien	

Chapter 6: Costs and Contributions

Introduction

A significant source of revenue for Legal Aid Ontario (LAO) is the money collected pursuant to the Corporation's:

- Statutory entitlement to costs awarded to legally aided clients;
- Statutory charge against money or property acquired by legally aided clients as a result of legal aid services;
- Entitlement to repayment from legally aided clients or other persons who have entered into contribution agreements.

You must be aware of your responsibilities and obligations when your legally aided client is awarded costs, becomes entitled to money or property, and/or has entered into a contribution agreement with LAO.

You must also be aware of the policies of LAO with respect to client contributions, and be able to recognize circumstances where it is appropriate or advisable to compromise LAO's entitlement to repayment.

LAO has discretion to compromise its entitlement to repayment where:

- Failure to exercise the discretion would cause the applicant or person responsible hardship;
- All or part of the amount owing is uncollectible;
- The exercise of the discretion would reduce the overall amount ultimately payable by Legal Aid Ontario; or
- The exercise of discretion would promote the timely settlement of the proceeding.

Requests for a waiver or compromise of the amount owing to LAO must be made in writing. The request should provide an estimate of your total account for net fees and disbursements and information as to the client's current general financial circumstances and hardship factors such as age, number of dependants, disability and employment possibilities, any extraordinary expenses (provide details), current income, and a general breakdown of expenses (example, a current Family Law financial statement).

Costs

General principles

Costs awarded to a legally aided client are the property of LAO. Thus, the general rule is that where appropriate you must seek costs in all civil proceedings just as you would for a reasonable private paying client. You only need to obtain the costs order and then take initial steps to advise and protect LAO's interests. Eventual collection proceedings will be conducted by LAO.

Costs awarded to a legally aided client are recoverable in the same manner and to the same extent as though awarded to a non-legally aided client. The fact that a client is legally aided is not relevant to the assessment of costs. When assessing costs, the private retainer rate of the legal aid lawyer should be referenced.

When seeking costs you are encouraged to attempt to have costs fixed by the court to avoid the delay and expense of an assessment.

It is recommended that the costs be made payable directly to Legal Aid Ontario as opposed to the client. Costs awarded to legally aided clients in family law matters are **not** to be enforced by or collected by the Family Responsibility Office.

Costs awarded to a legally aided client are the property of LAO and must be paid to the Corporation, even if the costs are greater than the amount paid by LAO in respect of the legal aid services. Lawyer Services and Payments can consider a special discretionary increase to the solicitor where costs actually recovered exceed the fees and disbursements as actually billed.

If costs have been awarded to a legally aided client, lawyers are required to take steps to secure LAO's interest in the costs.

Costs cannot be abandoned, waived or compromised except with permission from Lawyer Services and Payments. If you would recommend to a reasonable private paying client that costs be abandoned, waived or compromised you should contact Lawyer Services and Payments.

In a settlement, costs may be negotiated with the prior approval of Lawyer Services and Payments.

Costs awarded against a client are the responsibility of the client.

Costs against institutional parties

The general policies do not necessarily apply in cases involving institutional parties.

Particular circumstances will be identified below.

When deciding whether to seek costs in cases involving institutional parties, an important consideration is whether the client is contributing to the costs of his or her

legal aid services. Costs recovered are applied to reduce the client's contribution agreement with LAO.

Where the client has a financial interest in whether costs are recovered, counsel should discuss the issue with the client.

When costs are awarded against an institutional party, it is not necessary for the lawyer to obtain a writ of seizure and sale.

1. Group Application and Test Case Committee Cases

In view of the potentially precedent-setting nature of these cases, costs are not always awarded. The lawyer should seek costs in those cases where a state agent's misbehaviour forms part of the litigation or unduly prolongs the case.

2. Children's Aid Societies

Where the conduct of the CAS has been patently unreasonable such that the case could be considered egregious or exemplary, it may be appropriate for the lawyer to seek costs against the Society.

In circumstances where an Offer to Settle was served under the Rules and the judgment is as favourable or more favourable than the Offer, an application for costs may also be considered. This is a developing field, so applications and their outcome will be monitored.

3. The Crown as a Defendant in Civil Cases

The general rule applies. The lawyer should seek costs just as you would for a reasonable private paying client.

4. The Crown as Prosecutor in Criminal Proceedings

The lawyer is not encouraged to seek costs against the Crown. If a costs order is made, LAO will take steps to enforce the cost order.

Costs and Family Responsibility Office (FRO)

Costs belong to LAO. Whenever possible, have the costs order specify that the costs are the property of Legal Aid Ontario. Costs awarded to legally aided clients in family law matters should not be enforced by or collected by FRO.

Assessment of costs

Where costs have been awarded to a legally aided client, it is best to have the quantum fixed. If the costs are not fixed, then proceed to have the costs assessed, unless directed otherwise by Lawyer Services and Payments. At an assessment, the solicitor's private retainer rate should be referenced as opposed to the legal aid rate. Lawyer Services and Payments can provide you with the current case law.

Costs and support orders

In family law matters where support was an issue and costs are awarded, counsel should request of the judge that the costs order be apportioned between issues of support and all other issues. Cost orders that are apportioned to support will survive the bankruptcy of the judgment debtor. A significant number of judgment debtors go bankrupt within days of a final costs award. If you have invested the time and effort to obtain a costs award, then it is worth the extra effort to make it bankruptcy proof.

Costs recovered

Once costs are awarded, you should send a demand to the judgment debtor. If it is an interim order for costs, you can request that the costs be paid to you in trust. If costs are received, then hold the costs in trust pending your next account for fees and disbursements.

Indicate in your next account that you are holding costs in trust. LAO will provide further instructions. Usually, we will instruct you to transfer the funds from trust to general in payment of fees and disbursements.

Steps to take after costs are awarded

When costs are awarded and not recovered, it is your responsibility to protect Legal Aid's interest in the costs.

- The Order awarding costs should be issued and entered.
- If the costs are not payable to LAO, but are payable to your client, then you should have your client sign an Assignment of Judgment for Costs (see the Sample Forms Chapter for a copy).
- You must also send a letter to the judgment debtor at his or her last known address advising that the costs are the property of Legal Aid Ontario pursuant to s. 46 of the *Legal Aid Services Act*, and if applicable, enclosing a copy of the assignment of costs.
- Copies of the Order, the Assignment if required and the letter to the judgment debtor should be forwarded to LAO's Client Account Services Department.

Where costs are awarded to a client in a claim before an administrative board, tribunal or expropriating authority, unless directed otherwise by Lawyer Services and Payments, you must deposit a notice with the body after it has made its decision. The notice must state that:

- The client is the recipient of legal aid services;
- Legal Aid Ontario has a statutory claim for the costs awarded to the client; and

- Costs awarded to the client are the property of Legal Aid Ontario.

Writs of Execution or Notices of Garnishment

When costs are awarded and immediate payment is not expected, then counsel must consider the efficacy of obtaining a Writ of Seizure and Sale or a Notice of Garnishment.

If the judgment debtor owns real property in Ontario or there is a very real likelihood that the judgment debtor will inherit real property in Ontario then it usually cost effective to obtain a Writ of Seizure and Sale. When filing the Writ with the Sheriff in the jurisdiction where the property is located, an Assignment of Judgment for Cost must be filed along with the Writ if the costs are payable to the client and not directly payable to Legal Aid Ontario.

If the judgment debtor does NOT own real property in Ontario and there is no real likelihood that the judgment debtor will inherit real property in Ontario, then it is a matter of discretion as to whether or not it is cost effective to obtain a Writ of Seizure and Sale.

If the costs award is under \$1,000.00 and the judgment debtor does not own real property, then it usually is not cost effective to obtain a Writ. But if the costs award is over \$1,000, then it may be cost effective. If you are of the opinion that a private paying client of modest means would want a Writ of Seizure and Sale, then proceed to obtain the Writ. However, if you are of the opinion that you would not recommend to a private client of modest means that they obtain a Writ, then please contact Lawyer Services and Payments for instructions.

If the judgment debtor is known to own property in Canada, but outside of Ontario, then please advise Lawyer Services and Payments. LAO has reciprocity agreements with other Canadian legal aid societies. There is a very real chance of recovery.

If the judgment debtor does not own real property in Ontario, but is gainfully employed, then the costs award may be collectible by garnishment. Contact Lawyer Services and Payments, if you believe a garnishment would be effective. We can instruct you to prepare and issue a Notice of Garnishment.

Waiver of costs

Prior to the completion of the legal aid services and prior to or at the time of submission of the final account, the Lawyer Services and Payments Department has authority to waive costs. However, costs awarded to a legally aided client that have been collected cannot be waived and must be paid to LAO.

Requests for a waiver of costs must be made in writing and should set out the basis of the request and an opinion as to whether you would recommend to a reasonable private paying client that costs be waived in the circumstances. You should be prepared to provide information to justify the recommendation, in terms of the probability, amount and collectability of the cost award, and the amount of your account. In cases involving clients who have entered into a contribution agreement, you must ensure that the client agrees with the waiver of costs.

If you are seeking a waiver of costs and:

- The legal aid services have been completed;
- Your final account has been paid; and
- LAO's interest in the costs has been secured by the filing of a Writ of Execution and Assignment of Judgment for Costs with the Sheriff,

you should send your request for a waiver of costs in writing to the Client Account Services Department.

Costs for services performed while the client was not legally aided

If costs awarded to a legally aided client relate to both legal aid and non-legal aid (private) services with respect to the same matter, a Lawyer Services and Payments staff lawyer determines the amount of costs payable to LAO and the amount payable to the client.

Costs awarded against a legally aided client

Costs awarded against a legally aided client are the responsibility of the client.

- In rare and limited circumstances, on application by the client or the party to whom the costs are owed, LAO, within its sole discretion, may pay some or all of the costs on behalf of the legally aided client.
- In the case of an interim order for costs, such applications are made in writing to the Lawyer Services and Payments Department.
- In the case of a final order for costs such applications are made in writing to the General Counsel's office at LAO.

Settlements and Judgments

General principles

Pursuant to s.47 of the *Legal Aid Services Act*, LAO has a first charge against any interest in money or other property a legally aided client recovers or becomes entitled to as a result of legal aid services. This charge exists even in a case where the legal aid certificate was issued without the requirement of a contribution agreement.

The amount of LAO's statutory charge is equal to the total of all fees and disbursements paid (without GST) for all legal aid services relating to the proceeding out of which the recovery or entitlement arose (there may be more than one certificate). An administrative fee calculated at 10 per cent of the total net fees and disbursements paid is added.

If there is any likelihood that a legally aided client may become entitled to money or other property (e.g.: award of damages or compensation from a court or tribunal, sale of matrimonial home, equalization payment, lump sum support, support arrears), at the outset you should advise the client and the Area Office of that likelihood. You should advise the client of our charge. To avoid any allegation by the client that you did not advise him or her, you should have the client sign a written direction to Legal Aid Ontario and to yourself. The direction should state that all money to which the client is entitled must be delivered to you to be held in trust pending authorization from Lawyer Services and Payments to release the funds. A sample direction is included in the Sample Forms chapter.

If a legally aided client has become entitled to money or other property as a result of legal aid services, you are required to take steps to secure LAO's interest in the client's entitlement.

No money or property may be delivered to the client, nor can LAO's charge be waived or compromised, without approval of Lawyer Services and Payments.

Amounts recovered

If a legally aided client becomes entitled to money or other property as result of the legal aid services, you must forward to the person from whom the money or property is recoverable and that person's lawyer, if any, the written direction and a notice. The notice should state that Legal Aid Ontario has a charge against the money or other property pursuant to s.47 of the *Legal Aid Services Act* and that no money or other property should be delivered directly to the client until the charge has been released.

Monies received by you further to the direction and notice are generally held in trust until submission and settlement of your final account at which time instructions are provided. You may request authorization from Lawyer Services and Payments to release funds to the client prior to submission of a final account. When making that request you should also advise Lawyer Services and Payments of your best estimate of your final account for fees and disbursements to conclude the legally aided matter. Please take care to be

realistic, because if your estimate is less than your actual account, then we may not pay fees and disbursements in excess of your best estimate.

In the case of property, no title should be delivered to the client until LAO's charge is secured by a mortgage, chattel mortgage or lien agreement.

If you fail to protect LAO's charge against a legally aided client's settlement, your account may be reduced or disallowed.

Settlement/judgment amounts uncollected

If the money or property has not been recovered, you must, unless otherwise directed by Lawyer Services and Payments, file with the appropriate Sheriff a Writ of Seizure and Sale. Make sure to include the written direction and a notice stating that Legal Aid Ontario has a charge against the money or other property pursuant to s.47 of the *Legal Aid Services Act*, and that no money or other property should be delivered directly to the client until the charge has been released. You must not take any further steps with respect to enforcing a judgment without authorization from the Area Director.

If you would recommend to a reasonable private paying client that a Writ of Seizure and Sale not be filed, ask Lawyer Services and Payments for a waiver or compromise of LAO's charge.

Settlement/judgment before administrative tribunals

Where a settlement is awarded to a client in a claim before an administrative board, tribunal or expropriating authority, frequently the statute provides that the settlement/ judgment/ award shall be paid to the client directly. Prior to the settlement or award, you should obtain a signed Direction and Acknowledgment from the client that Legal Aid Ontario has first charge against the settlement proceeds. Prior to the settlement or judgment you should obtain from the client a signed Direction that Legal Aid Ontario has a statutory first charge against any sum recovered by the client. You should forward to the statutory body a notice, which states that:

- The client is the recipient of legal aid services;
- Legal Aid Ontario has a statutory claim against any award or payment to the client; and
- That any costs awarded to the client are the property of Legal Aid Ontario.

Waiver of LAO's charge against money or other property

In some cases it may be appropriate to waive LAO's statutory charge against a legally aided client's entitlement to money or other property because failure to do so would cause the applicant or person responsible hardship.

Whether or not the legal services are completed, the Lawyer Services and Payments

Department generally handles requests for a waiver of LAO's charge against a legally aided client's entitlement to money or other property as result of the legal aid services.

Requests must be made in writing and should include information as to the client's general financial circumstances and hardship factors such as age, number of dependants, disability and employment possibilities. A copy of the minutes of settlement, judgment or orders obtained and an estimate of the lawyer's total account should also be provided.

Contribution agreements

General principles

As a condition of receiving legal aid services, the Area Director may require an applicant or a person responsible for the applicant, to enter into a contribution agreement. The contribution agreement requires that the applicant or person responsible for the applicant contribute toward the cost for the legal aid services. The contribution agreement is almost always for an estimated amount, but in some cases it may be for a fixed amount.

The amount that a legally aided client or person responsible has agreed to contribute shall be paid by the client or the person responsible, and is a debt owing to LAO which may be recovered in any court of competent jurisdiction.

You should ensure that both you and your client read and understand the terms of the contribution agreement. The time spent in rendering advice about the contribution agreement may be billed in your account. The obligation to contribute to a contribution agreement exists regardless of the outcome of the case.

Any costs collected by LAO or any amount collected by LAO pursuant to its statutory charge reduces your client's debt to LAO. Likewise, in most circumstances, any amounts collected by LAO pursuant to your client's contribution agreement reduce the amount owing to LAO pursuant to a cost order in your client's favour or pursuant to LAO's statutory charge.

Estimated amounts

If the contribution agreement is an estimated amount, the obligation under the contribution agreement is to repay to Legal Aid Ontario:

- An amount equal to the amount of the lawyer's account for fees and disbursements (without GST) as settled by Lawyer Services and Payments, plus an administrative fee currently calculated at 10 per cent of the lawyer's account for net fees and disbursements; and
- Interest on any overdue contributions.

If, as a result of the legal aid services, there is a recovery of costs that exceeds your total account for net fees and disbursements and administrative fee, Legal Aid Ontario requires the full amount of the costs recovered.

Fixed amounts

In the case of a contribution agreement in a fixed amount, the obligation under the contribution agreement is to repay to LAO the lesser of:

- The amount specified in the contribution agreement; or

- The amount of the lawyer's account for fees and disbursements (without GST) as settled by Lawyer Services and Payments, plus an administrative fee currently calculated at 10 per cent of the amount of the lawyer's account for net fees and disbursements as settled by Lawyer Services and Payments.

If, as a result of the legal aid services, there is a recovery of costs, money, or other property, LAO may require a total contribution that exceeds the fixed amount set out in the contribution agreement. The total contribution may be in an amount equal to the greater of:

- The costs awarded to the legally aid client; or
- The amount of the lawyer's account for net fees and disbursements as settled by Lawyer Services and Payments, plus an administrative fee currently calculated at 10 per cent of the lawyer's account for net fees and disbursement as settled by Lawyer Services and Payments.

Monthly contribution agreement

The terms of repayment are set out in the contribution agreement executed by the applicant or person responsible for the applicant. The terms of payment may include a monthly payment. A client's failure to make payments in accordance with the terms of the contribution agreement results in cancellation of legal aid coverage.

- If the legal aid services are not complete, requests for a compromise should be made in writing to the Area Director.
- If the legal aid services are complete and the lawyer's final account paid, requests should be made in writing to the Client Account Services Department.

Legal aid liens and other forms of security

The amount owing on a contribution agreement may be secured by a lien against real property in which the applicant or person responsible for the applicant has an interest, or secured by other forms of security such as a chattel mortgage or assignment. Generally, the amount owing on a contribution agreement with a lien or other security is not due until the property or other security is transferred, sold or re-financed. Check the terms of the individual contribution agreement.

Before April 1, 1999, liens with respect to real property were filed in the same way as an execution and are shown on an execution certificate. However, legal aid liens are secured interests in land described on the Certificates of Lien, and have priority over normal executions.

On or after April 1, 1999, liens with respect to real property are in the form of notice of lien registered against land in the proper land registry office.

Chattel mortgages may be in the form of a financing statement as prescribed by regulation under the *Personal Property Security Act*.

Whether or not the legal aid services are complete, the Client Account Services Department handles requests for a waiver or compromise. In certain circumstances, requests are handled by the Lawyer Services and Payments Department (see Negotiating a Settlement, page 7-10).

If you are going to request a waiver or compromise, and the client has a contribution agreement with a legal aid lien or other form of security, you should be prepared to provide information as to the amount of equity in the subject property or other security, along with copies of supporting documentation.

Estimating total fees

If the contribution agreement is an estimated amount, the amount to be repaid to LAO is determined by the total fees and disbursements (without GST) paid to you for all legal aid services authorized by the certificate to the end of proceeding, plus a 10% administration charge. You must notify the Area Director promptly if, and when it appears that your total account for net fees and disbursements will exceed the estimated amount. You must also keep your client advised as to any change in the estimated cost as the case proceeds.

Failure to notify the Area Director may result in prejudice to LAO, in which case there is a strong likelihood that your account will be reduced or disallowed. Failure to keep your client advised of any change in the estimated cost may result in surprise on the part of your client at the conclusion of the case, which may lead to a review of your accounts at the client's request.

Change in client's financial circumstances

Whether or not a client has entered into a contribution agreement, you are obligated to advise the Area Director when there is a change in the client's financial circumstances. The Area Director determines whether a financial reassessment is appropriate to determine whether the legal aid certificate should be cancelled, or a contribution agreement deleted or amended, or required if one does not already exist.

Negotiating a Settlement

When negotiating a settlement on behalf of a legally aided client, you must be aware of:

- Legal Aid Ontario's entitlement to costs awarded;
- Legal Aid Ontario's charge against your client's recovery of any money or property;
- Your client's obligation under any contribution agreement he or she may have entered into with Legal Aid Ontario.

If a settlement contemplates or requires a waiver or compromise of LAO's entitlement to costs, charge against recovery and/or a contribution agreement, a Legal Accounts Officer must approve the settlement in advance.

Waiver of costs to facilitate settlement

In some cases it may be advisable and appropriate to waive costs in order to facilitate a timely resolution of the litigation, or because costs, if awarded, would be uncollectible. In such cases you should make a request that costs be waived.

Requests must be made in writing and should set out the basis of the request and include information as to the proposed terms of the settlement and an opinion as to whether you would recommend to a reasonable private paying client that costs be waived in the circumstances. If the request is urgent, call the Lawyer Services and Payments Department.

Waiver of LAO's charge on recovery to facilitate settlement

In some cases in order to promote the timely settlement of the proceeding, a waiver may also be advisable in order to reduce the overall statutory charge LAO has against any interest in money or other property a legally aided client recovers or becomes entitled to recover. In such cases you should make a request that the statutory charge be waived. Requests must be made in writing and should set out the basis of the request and include information as to the terms of the proposed settlement. Information as to the client's general financial circumstances and hardship factors such as age, number of dependants, disability and employment possibilities should also be provided as this information may also be relevant. An estimate of your total account should also be provided.

Settlements involving the transfer or sale of property with a lien

The amount owing by a legally aided client pursuant to a legal aid lien is not due until the sale, transfer or re-financing of the property. Check the terms of the individual contribution agreement. Contact LAO's Client Account Services Department where there

is a transfer, sale or re-financing involving a property against which there is a legal aid lien.

In some cases the transfer, sale or re-financing is necessary to effect a settlement on behalf of a legally aided client, and a discharge or postponement of the legal aid lien is necessary to facilitate such a settlement. In these cases you should seek prior approval of the settlement from Lawyer Services and Payments.

A request for approval must be made in writing and should include information as to the terms of the proposed settlement, the amount of equity in the subject property, the client's general financial circumstances and an estimate of your total account, along with supporting documentation. Legal Aid Ontario must act as a reasonable creditor. Other reasonable creditors do not usually compromise or waive their secured debt so that the debtors can pay other creditors. Thus, there must be compelling reasons supporting a request to Legal Aid Ontario to waive or postpone a lien.