

MEETING NOTES

Major Criminal Cases Advisory Committee Meeting of November 16, 2009

Advisory Committee Members Present

John D. McCamus, Chair
Justice Sidney B. Linden
Norman Williams
Kenneth G. Hall
John Struthers
Norman Boxall
John Rosen
Nancy Cooper
James McNee
Paula Rochman

Members Not Present

Malcolm Heins
Bob Ward (*ex officio*)

Legal Aid Ontario Representatives Present

David McKillop
Heather Robertson
Rod Strain
Heather Morgan
Stephanie Mealing

Others Present

Martha Otton, MAG
Brent McCurdy, MAG
Lou Strezos, CLA (observer)

Introductions and Opening Remarks

Committee Chair John McCamus opened the meeting and welcomed the participants. There were introductions around the table and on the phone.

The Chair invited comments on the meeting notes that had been circulated to members. The meeting notes of the other committees will be posted on the LAO website as they become available.

The Committee was advised that, at a recent meeting with the Minister, LAO was asked to meet the December 15 deadline for providing advice from the committees, so as to enable funding to flow in the current fiscal year. The

Minister has indicated that the new funding could be at risk of being lost if left unattended, given the current fiscal situation.

The Chair emphasized that the outcome of this committee process has not been predetermined. He also emphasized that this committee process is not the end of LAO's consultations with the bar. LAO has its own advisory committees to the Board and its own forms of consultation that will continue.

The Chair introduced David McKillop, LAO's Vice President, Policy and Research, who drew the Committee's attention to some of the slides, particularly those dealing with compensation issues, from the slide deck previously distributed to members.

The Chair invited discussion from members, noting that the overall purpose of this meeting was for the Committee to make recommendations for improving support to major case service providers as well as making improvements to the quality and efficiency of service. The Attorney General has indicated that the Ministry's commitment to Justice on Target (JOT) is unwavering.

Discussion

The opinion was expressed that committee recommendations should focus on the big picture and refer to broad principles.

The comment was made that, while these rushed meetings are not ideal, all the committee can do is give its best advice.

It was stated that recommendations made in the course of this committee process should not be viewed as detracting from the position held by members of the CLA that the new funding that the Minister has put on the table is insufficient to solve the problems that brought on the CLA boycott. CLA members who are also members of this committee may take off their "boycott hats" in order to discuss how LAO might best use an additional \$5 million, or whatever proportion of the new funding is ultimately allocated to major cases, but this is in no way an indication or admission that an additional \$5 million can solve the problem of inadequate compensation. All that the committee can do is say that the money on the table is not enough but, within that context, this is the best thing that could be done with it. Also, it was noted that, while committee members may agree personally with certain proposals, this is not to say that these members are agreeing with them on behalf of the CLA.

Norm Boxall is presently consulting with the CLA and the results of that process will be circulated to this committee.

One member stated that the CLA holds the view that a comprehensive settlement is required, one that addresses standard cases as well as major cases. Concern was expressed about what will happen if this committee makes recommendations that essentially involve spending all of the new money on major cases, creating a risk that standard cases will be left out of the equation. The Chair said that each committee must make its own recommendations, and that the Minister will have to decide on the outcome.

Ideas put forward in the course of discussion were:

- Increase the level of compensation as the seriousness/complexity of a case increases.
- There needs to be some way to recognize lawyers who successfully resolve a case to the benefit of both the client and the system. This is not a recommendation for “bonuses for guilty pleas”, rather that there needs to be a way to recognize good lawyers who are able to tell when a case should have an early resolution.
- Perhaps there should be an enhanced fee for BCM lawyers who have shown a commitment to legal aid. LAO cannot increase the rate for all of the lawyers who work on big cases, or the increases would end up being too small. Perhaps a significant increase could be given to a select number of tier 3 lawyers (preferably more than 15 but obviously not 500).
- The problem with potentially creating new tiers is that they put all the emphasis on number of years at the bar, instead of also looking at relevant experience and quality of work. Some tier 2 lawyers do a better job on ESM cases than some tier 3 lawyers do. There also has to be a way, perhaps through discretion, to encourage younger lawyers who have real talent. If BCM cases account for nearly 25 per cent of the criminal budget, there must be more involved in deciding who gets to take those cases than number of years at the bar.
- There needs to be a process to recognize ability, with accompanying enhanced compensation: something like a certification process, although it should not necessarily be called certification because it would become confused with Law Society specialist certification. The point was also made that many lawyers who have been designated specialists by the Law Society are not really specialists. It was suggested that LAO develop something like a preferred supplier system. It should not prevent a client from selecting a lawyer who is not a preferred supplier, however, on the understanding that that lawyer would be paid at a lower rate. In this way it would not be the case itself that would attract the higher tariff, but the skill of the lawyer that allows that lawyer to complete the case more efficiently and at lower cost. Perhaps the determination could involve a combination

of the lawyer's skill and the seriousness of the case. Of course, the cost of administering such a system would have to be factored in to the overall cost. There is the important question of who decides who gets to be a preferred supplier, and what the criteria actually are.

- There needs to be some mechanism for weeding out counsel who are not efficient or competent. Maybe there is a need for outside input – such as from Crowns and judges – to help decide which lawyers do the best job. The danger in going “outside” for this kind of input, however, is that there is a real potential for abuse; there is a risk that a lawyer could be blackballed by someone just because they were once on the opposite side of a contested matter.
- What should LAO do when a lawyer handles a major case badly? The “preferred suppliers” or “enhanced tariff” group cannot be like an old boys’ club, with membership etched in stone. Having criteria for being on this panel would be very important. The Exceptions Committee, if given a strengthened role, could provide input for making these kinds of decisions. Post-case review should not be done by the trial judge, but it could be an appropriate function for the Exceptions Committee, which could look at how the case was handled and also make recommendations for recognition for proper resolution of a case at an earlier stage. Of course, if a system can be established to ensure that the best lawyers are handling major cases, there will not be so much of a need for back-seat driving by the Exceptions Committee because quality issues will take care of themselves.
- LAO should revisit its definition of a big case, because not all cases currently in the BCM program should be eligible for enhanced fees. Some cases are simply long (because of the number of co-accused), as opposed to being serious or complex. The over-use of conspiracy and criminal organization charges is adding to LAO’s costs.
- Defence experts need to be paid at the same rate as Crown experts. Many cases are driven by experts. If the defence is able to retain good experts, this can lead to increased efficiency. This principle could not be expanded to include parity in payment for resources like interpreters and transcribers, however, because the resulting costs would be unmanageable. The existing system allows counsel to ask LAO for additional money to pay for these kinds of disbursements, but the rate that can be paid for psychiatrists has been set in stone and needs to be increased.
- Mentoring is important. Junior lawyers need to be able to work on big cases so they can gain experience. They cannot survive on the junior

counsel rate, so they need to be brought on board as co-counsel, and paid according to their tier level.

- There was no consensus on the desirability of moving from the current billing system to a system based on regular payments to lawyers. Some members liked the idea but others thought that LAO should focus on paying interim accounts quickly, instead of moving to a quarterly payment system which could lead to trouble if lawyers did not actually work the hours paid for and which could also run afoul of the Law Society's prohibition on receiving money in a general account for work not yet performed.
- Ideas like pensions and staff support should be set aside for another day. They would consume the available funding without solving the fundamental problems, so they are not affordable at this time.

Recommendations from the Committee

The following recommendations were unopposed by all members present.

1. LAO should develop appropriate mechanisms for offering enhanced fees to competent counsel handling extremely serious cases. The more serious the case, the higher the fee ought to be. Criteria for this will have to be developed.
2. The role of the Exceptions Committee should be strengthened, and in future should include ability to conduct post-case reviews.
3. To the extent possible, the defence should be placed on the same footing as the Crown in respect of retaining outside experts.
4. There should be better access for junior counsel to work on major cases, with payment as co-counsel at the appropriate tier level.