



OBA Submission on Legal Aid Ontario's
Minimum Experience Standards for Roster Members

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du Barreau canadien



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Introduction

The Ontario Bar Association (the “OBA”) appreciates the opportunity to make this submission to Legal Aid Ontario (“LAO”) in respect of the proposed changes to the minimum experience standards for prospective roster members.

The Ontario Bar Association (OBA)

The OBA is the largest and most diverse volunteer lawyer association in Ontario, with over 16,000 members who practice on the frontlines of the justice system, providing services to people and businesses in virtually every area of law in every part of the province. Each year, through the work of our 40 practice sections, the OBA provides advice to assist legislators and other key decision-makers in the interests of both the profession and the public, and delivers over 325 in-person and online professional development programs to an audience of over 12,000 lawyers, judges, students and professors.

This submission was prepared by members of the Legal Aid Working Group. This Working Group is comprised of members who engage in LAO certificate work and who practise in various areas of law including criminal, family, children and youth, immigration and refugee law.

The OBA has been a consistent advocate for a strong, sustainable legal aid system, which is critical to a strong civil society. Our members provide both certificate and clinic services, and display their commitment to their clients, communities, and the legal aid system in, more often than not, expending countless pro bono hours, well over and above certificate hours and long after their clinics have closed for the day. This commitment is representative of the importance legal aid practitioners place on access to justice for those in their communities and is also indicative of the commitment to the shared goal of improving and enhancing the legal aid system.

Overview

We support maintaining minimum experience standards that prospective roster members must meet to join LAO’s roster and be eligible to provide legal aid certificate services, if there is flexibility where there may be challenges in meeting these requirements. This includes imposing reasonable conditions or requirements on a roster member’s enrollment (e.g., agreement to acquire the



minimum related experience within a specified period, attend training courses, utilize mentorship, etc.). It is critical to not create additional barriers on lawyers willing to take on legal aid work and place them at a higher standard than required by the Law Society. Ensuring a balance between access to justice and providing consistent high-quality legal representation to some of the most vulnerable members of our society is fundamental to a strong and sustainable legal aid system.

For the purposes of the public consultation, this submission focuses on general recommendations for maintaining these minimum experience standards, and provides specific recommendations in response to the specific area of law.

General Recommendations

i. Conditional Enrolment

For applicants who do not meet the minimum experience standards, conditional enrolment is still possible under the proposed changes. But it is buried within the new *Legal Aid Services Act 2020* Rules (“*LASA 2020* Rules”).¹ Under existing standards, such as in “Criminal Law (General)”, lawyers new to the practice area can be enrolled as a roster member on the condition that they utilize mentorship for a specified period. The proposed changes to the minimum experience standards are silent on the matter, except for Extremely Serious Criminal Matters (“ESM”) which no longer permits conditional authorization to provide legal aid services. This could be confusing and could deter competent lawyers from applying. This itself would become a barrier to accessibility for legal aid certificate services.

We recommend that conditional enrolment requirements be clearly indicated on the same page as minimum experience standards.² A clear and consistent route for new lawyer to be added on the roster, such as specifying the type of conditions or requirements that may be imposed by LAO will not only provide transparency for the legal community, it will ensure that opportunities for attracting competent roster members are not lost.

¹ *Legal Aid Services Act 2020* Rules 26(4) and 27.

² *Ibid* at 26(4).



ii. Geographic & Demographic Considerations

In general, the minimum experience standards fail to consider regional and linguistic differences, and they create barriers to accessing legal aid services in small, rural, Indigenous and/or racialized communities where the number of available lawyers, and volume of cases within an area of law, may be lower. For instance, lawyers in Northern jurisdictions may rarely get the opportunity to conduct a jury trial which is a requirement to be on the ESM roster. Certain requirements that LAO may impose for conditional enrolment, such as mentorship, may be too onerous where there is a limited pool of roster members in the region willing and available to mentor. In addition, having an insufficient number of roster members who speak the same language of clients negatively impacts access to justice.

The OBA recommends that applicants be enrolled conditionally, or that there be a clear path set out for conditional enrolment, where there may be a limited pool of roster members, and challenges to meeting the drafted minimum experience standards. These applicants should also be given reasonable and realistic opportunities, such as training programs, to meet their required experience standards. This would enhance legal services, and help to sustain and grow the bar in small, rural, Indigenous and/or racialized communities.

iii. Reading List

In our view, the list of proposed materials required to be reviewed before an applicant can become a roster member is appropriate. While the list serves as a good starting point, there also needs to be a long-term strategy to develop and support roster members.

We recommend that similar educational videos such as the “Gladue at practice CLE” be added to the reading list. As private lawyers are a key part of legal aid service delivery, providing useful resources and support that will allow them to excel in their everyday delivery of high-quality legal services is also fundamental to a strong and sustainable system.

iv. Ensuring High Quality Legal Services

While we recognize the need for maintaining minimum experience standards to ensure legal aid services are of high quality, it is equally important for LAO to attract competent applicants and retain roster members through its compensation model, which is outdated and no longer reflects current



practice realities. The practice of law is constantly evolving, and the tariff system has not adjusted to reflect the growing complexity of files nor the time it takes to carry them. For example, disclosure in many cases can be voluminous, often involving thousands of pages of documents to review as a result of increasing advances in technology (electronic disclosure including cell phone extraction reports; computer analysis; social media; and content of communication apps; etc.). Body cams are also now being more widely used by police officers, taking more time to review than a one-page memo. Judges and decision-makers are increasingly requesting more written submissions at the conclusion of criminal, family and immigration matters. Additionally, in immigration matters, danger opinions require a lot of work that is stretched over months and sometimes years, necessitating legal submissions at least twice in the process with an expectation that practitioners continue to provide updates to country conditions. In refugee matters, the complexity of refugee claims at the Refugee Protection Division of the Immigration and Refugee Board has increased due to the intensified evidentiary demands on claimants from Members. This has resulted in requiring lengthier preparation time.

The OBA continues to advocate for a formal mechanism for regular review of the tariffs and rates at a minimum of every three years, or sooner where there have been significant legislative or rule-based changes impacting the delivery of legal services. Such a requirement would ensure regular and consistent opportunities for LAO to assess whether the tariffs continue to be reflective of the reality in which legal services operate, as well as attract and retain competent roster members.

Specific Recommendations

i. Criminal Law Standards (General)

The proposed changes to the minimum experience standards requiring applicants to complete a minimum of 20 criminal files within the last 3 years, would also be problematic for a lawyer, depending on the criminal files they are dealing with. As an example, if their practice predominantly focuses on homicide matters or other large-scale, complex matters, they would handle a much lower volume practice. These types of matters take longer to run and can go on for months. They also require an enormous amount of time to prepare. And upon being enrolled, the existing continuing obligation to remain on the roster is a challenge (i.e. presently, 15 criminal files in the previous year, which would go up to 20 criminal files within the previous 3 years). If a senior practitioner typically



handles a few long-running, large-scale files a year (for example, homicides), meeting a requirement of 20 completed criminal files in the past 3 years may be challenging.

We recommend that there be a clear path set out for conditional enrolment where there may be challenges to meeting the drafted minimum experience standards. We also recommend that an exemption be added to the draft standards to permit a lawyer to demonstrate their competency through alternative experience and beyond the number of files. For example, lawyers who typically handles more serious matters can be required to submit a resume or list of cases and the results. This is similar to what applicants need to provide to be enrolled on the “Extremely Serious Criminal Matters” (“ESM”) roster. In addition, if a lawyer is required to be authorized under the “Criminal Law (General)” roster before being considered to be on the ESM roster, there should be no reason why a practitioner engaged in homicide and similarly complex cases, particularly those who meet the minimum experience standards for ESM, would not be competent to be under the “Criminal Law (General)” roster.

The OBA also urges expanding the second chair program to cover non-homicide matters so that new lawyers can get real world experience. Requiring and compensating new lawyers to second chair would go much further to ensuring competency than any reading list or panel standard.

In making these changes to the minimum experience standards, these lawyers would be encouraged to apply to be on the roster, increasing accessibility to legal services and enhancing access to justice.

ii. Youth Criminal Matters & Criminal Mental Health Matters

The two new minimum experience standards for “Youth Criminal Matters”, as well as “Criminal Mental Health Matters” are too onerous and create barriers to quickly access high-quality legal services. Vulnerable individuals are often referred to criminal lawyers who have either assisted a friend or family member, and many accused persons may have underlying mental health issues. It is important that they receive consistent help and access to legal aid.

We are also concerned with the proliferation of specialized panel standards, which are unnecessary as the LSO *Rules of Professional Conduct* provides that if a lawyer does not feel they can competently to handle these matters, their professional obligation requires that they not undertake these cases.



We recognize that different rules and laws apply to youth and mental health matters, and that these individuals have high and complex needs. However, criminal lawyers do not require direct or extensive experience in these types of cases to competently take on a youth or mental health client. These cases require the same evidence of rules and burdens of proof. Where there are differences (e.g., dispositions, access to youth records when a trial is held), and a desire to ensure a roster member has the necessary experience before taking on a matter, additional resources and supports can be available and provided to roster members.

The OBA recommends removing these two minimum experience standards and instead require applicants to attest to having reviewed the reading list materials, as well as providing useful training tools and supports. Effective resources and training materials can be used as a foundation for more robust panel standards, providing opportunities to increase the capacity and number of lawyers working effectively with youth and mental health clients.

iii. Family Duty Counsel and Advice Lawyer FLSC

We support the proposal that roster members be required to complete CPD hours in family law in lieu of maintaining a minimum number of family law matters each year. However, if the intention is to ensure that applicants have a minimum level of experience before becoming roster members, then there should be no reason why a lawyer new to the practice area be required to complete the same number of CPD hours as an experienced counsel.

We recommend that an applicant be required to complete several required CPD hours proportionate to their experience. As the *LASA 2020* Rules already require roster members to complete a minimum of three hours of CPD each year and in the area of law they are authorized to provide legal aid services,³ requiring an experienced applicant to meet the same standard before being enrolled as a roster member would be appropriate and make the enrolment process less onerous.

³ *Ibid*, at 27(4).



iv. Family Law and Child, Youth and Family Services Act (“CYFSA”)

While the OBA generally supports the proposed changes to the CYFSA minimum experience standards, it would be near impossible for an applicant to meet them through privately retained work. Most of these cases are received through legal aid certificate work.

We recommend that the draft standards be amended to require roster members to be mentored or supervised in a manner and for a specified period. Such a requirement would benefit lawyers seeking to obtain advocacy opportunities while ensuring vulnerable clients access to legal services.

v. Refugee and Immigration (General and Appellate)

The minimum experience standards do not recognize experiences gained from completing an Immigration Appeal Division (“IAD”) hearing. As LAO provides certificates to roster members to represent clients on their immigration appeals before the IAD, and the IAD Rules are included on the required reading list, there should be no reason why this experience would not be recognized and considered in determining an application.

We recommend that the draft minimum experience standards be amended to include “Immigration Appeal Division hearings” to the list, which would support accessibility for refugees and immigrants who get legal aid certificates.

Conclusion

We appreciate the opportunity to provide this submission in response to LAO’s proposed changes to the minimum experience standards for prospective roster members. The legal aid system in Ontario is a vital aspect of our justice system. The bar is committed to working with LAO to ensure a system that provides high quality legal representation to some of the most vulnerable members of our society, and the OBA looks forward to opportunities to continue to engage with LAO to provide the insights from the front-line service providers.