



**Submissions of the
Criminal Lawyers' Association
on LSO Call for Input:
Access to Justice &
the Paralegal Scope of Practice**

THE CRIMINAL LAWYERS' ASSOCIATION

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PREFACE

The Criminal Lawyers' Association (CLA) represents more than 1300 members. Our membership consists primarily of criminal defence lawyers in Ontario.

Among our considerable contributions to the justice system, a large portion of our efforts relate to ensuring access to justice in the criminal law context and protecting the civil liberties of Canadians. The majority of our members' clients are part of vulnerable groups in one way or another. Both our organization and our members routinely assist individuals with mental health issues, marginalized racial groups, the impoverished, and the uneducated.

The CLA has routinely made submissions with respect to policy decisions both provincially and federally. The CLA has also intervened as an interested party in significant litigation that concerns important criminal law matters and the concerns of its members, both at the Ontario courts and the Supreme Court of Canada.

INTRODUCTION

The CLA appreciates the opportunity to participate in the Law Society of Ontario's discussion about Access to Justice. These submissions on behalf of the CLA are with respect to a potential increase in the paralegal scope of practice in terms of representing the criminally accused.

While the CLA recognizes that there is a role to play for paralegals in assisting people who are in need of legal services, expanding the scope of paralegal services in the area of criminal law is neither necessary nor will it fill a gap in access to justice for the criminally accused in Ontario.

THE CURRENT SITUATION

Currently, section 802 of the *Criminal Code*, together with s.802.1 of the *Criminal Code*, allow any criminal defendant to be represented by an agent provided that they are not facing a maximum sentence of more than 6 months' imprisonment. Section 802.1 further provides that if the agent is authorized under a program



approved by the lieutenant governor in council of the province the agent may represent the accused on any summary conviction matter. The Ontario government has, wisely, never implemented such a program.

In 2006 the *Law Society Act*, R.S.O. 1990, c.L.8 was amended to create a paralegal class of license. Additionally, no one other than a licensee was permitted to practice law or provide legal services (ss.1 and 26.1 of the *Act*). In order to comply with s.802.1 of the *Criminal Code*, By-Law 4 that regulates paralegal, currently prohibits licensed paralegals from appearing in any summary conviction criminal court proceeding where the maximum sentence exceeds 6 months' imprisonment and/or a \$5,000 fine.

As a result of the amendments to the *Act*, the Law Society created a licensing process for paralegals. The process requires, among other things, that proposed licensees complete an education program at a Law Society accredited Paralegal program (the current list can be found here: <https://lso.ca/becoming-licensed/paralegal-licensing-process/paralegal-education-program-accreditation/accredited-programs>). There are also other requirements including a licensing examination, a self-study, open-book, seven-hour, multiple choice examination. In addition when creating the licensing process for existing paralegals the Law Society also created a program to “grandparent” paralegals who were practicing and wanted to continue providing legal services through introductory provisions of regulation. The “grandparented” paralegals did not have to have the same educational requirements as new licensees. Finally, it was only as early as 2016 that the licensing changed and there were substantive examinations.

As the 5-year statutory review conducted by the Attorney General of Ontario in 2012(https://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/paralegal_review/Morris_five_year_review-ENG.html) noted, concerns have been raised about the adequacy of the educational and training requirements for paralegals and that paralegals were “among the most vociferous of critics” of the same. The report also noted that:

In contrast to paralegal training, a freshly-licensed lawyer will generally have completed an undergraduate degree; three years of law school, during which s/he may have had the opportunity to intern over summer months with a law firm; and a ten-month articling period under the supervision of a lawyer, during which s/he is prohibited from providing the legal advice a paralegal is permitted to offer after two years of community college. This will be topped off with comprehensive, if not grueling, licensing examinations.



EXPANDING THE SCOPE OF PARALEGAL SERVICES WILL NOT IMPROVE ACCESS TO JUSTICE IN CRIMINAL COURT

In the 2005 report, it was noted that of the paralegals surveyed (the number was not available), 13 per cent indicated that they practiced in the area of summary conviction criminal courts. The nature of that work was not identified (support capacity, adjournments, drafting documents for counsel, etc.). There does not appear to be any data (historical or current) as to the number of paralegals who actively take on clients to conduct summary conviction proceedings or trials. The CLA position is that the number of paralegals who currently do criminal trial work in Ontario is negligible.

There are a number of reasons for this which all suggest that expanding the scope of paralegal services would not increase access to justice in criminal law.

Availability of duty counsel services

Throughout Ontario, Legal Aid Ontario provides duty counsel services for unrepresented litigants. This includes assistance at administrative court appearances, securing adjournments, arranging for disclosure provided and otherwise assisting accused persons before the Ontario Court of Justice. Additionally, duty counsel can assist unrepresented litigants at bail hearings, in negotiating bail variations, and at guilty plea proceedings provided that the accused meets the financial eligibility requirements (income less than \$22,720 for an individual up to \$50,803 for a family of 5 without significant assets: <https://www.legalaid.on.ca/en/publications/downloads/Financial-Eligibility-Test-for-Duty-Counsel-Services.pdf>). Accused people who cannot afford counsel for these types of services can use duty counsel even if they do not qualify for a Legal Aid certificate.

Duty counsel offices provide front-line legal services for criminal accused

Availability of legal aid to defend criminal charges

Additionally, low-income Ontarians can qualify for a legal aid certificate through Legal Aid Ontario (LAO). Only licensed lawyers can accept legal aid certificates. Those lawyers must be in good standing with the Law Society of Ontario and meet panel requirements established by LAO. Although there has been a



significant cut to the Ontario transfer payment to LAO commencing in 2018, the current income eligibility thresholds for legal aid in Ontario remain unchanged. Legal Aid Ontario offers two types of certificates: full indemnification or contribution agreement. Individuals who make less than \$14,453 up to \$35,749 (family of 5+) can qualify for full indemnification where jail is a likely outcome if convicted. Individuals who make up to \$16,728 or \$45,466 (family of 5+) may qualify for a legal aid certificate.

If accused persons qualify for legal aid certificates they are free to choose any lawyer they want who is on a legal aid panel and is willing to accept the certificate. As of today, there are 2854 criminal lawyers on the Legal Aid Ontario Criminal Panel (that number is consistent with the public figures published in 2014: http://www.legalaid.on.ca/en/publications/disclosure_legalaidpanels.asp).

In the unusual situation where an accused person is unable to find a lawyer to accept a legal aid certificate, LAO offers staff counsel offices where senior lawyers are available to conduct trials for those accused who otherwise qualified for a certificate. There is no suggestion that there is a crisis of legal aid certificates not being accepted.

Criminal lawyers who accept legal aid certificates are required to adhere to LAO billing policies which include (depending on the services provided) “block fees” or capped hours at an hourly rate cap of between \$109.14 and \$136.43 depending on the year of call of the lawyer.

The 2018 Auditor General’s Report indicated that for all criminal legal aid certificates (i.e. not only summary conviction matters), the average cost per certificate was \$2,260.00. In comparison, the average cost per legal aid certificate for family law matters was \$3,224.00.

Poor Ontarians will qualify for legally aided legal services provided by lawyers



Affordable lawyers

A significant number of criminal lawyers throughout Ontario accept legal aid certificates on the understanding that they will either be subject to a block fee and/or capped hours and significantly reduced hourly rates (as set out above).

Generally, lawyers who are prepared to accept summary conviction legal aid certificates with those restrictions are also be prepared to accept private clients who are unable to pay their posted hourly rates but are in a position to pay for legal services consistent with what LAO would pay through the certificate system (an average hourly rate of \$122.79). In comparison, the average hourly rate for lawyers taking on family law work has been noted to be \$355.00 (http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/family_legal_services_review/).

Criminal lawyers offer affordable legal services in Ontario

Articling students & law students

Students who are articling with criminal lawyers and acting under their supervision are entitled to appear and represent clients in summary conviction matters where the maximum sentence does not exceed 6 months imprisonment. Additionally, where a legal aid certificate has been issued, the work of a student can be billed on the certificate (if being billed hourly) at a rate of \$64.74 per hour. Similarly, law students working at accredited law school clinics in Ontario can also do this work under the direct supervision of a lawyer within the clinic.

Articling students & Law students under the supervision of lawyers fill a gap

The demands of doing criminal trials & the constitutional context

The practice of criminal law has become more complicated over the past 20 years as a result of expanding procedural and evidentiary amendments to the *Criminal Code*, constitutional & *Canadian Charter of Rights and Freedoms* (the "Charter") considerations, substantive changes to the law and expanding rules of practice requirements. A criminal finding of guilt and/or a conviction can have significant consequences including: restraint on liberty (through imprisonment), a fine, probationary conditions, and collateral consequences (including employability and immigration removal).



As previously noted, paralegals have not undergone the same level of education or training as lawyers have. Many of the current regulated paralegals were permitted to be licensed without having to undergo any educational requirements whatsoever as a result of the grandparenting provisions put in place in 2006. Additionally, substantive examination requirements for new paralegals is a more recent requirement.

There may be qualified paralegals who currently undertake a limited amount of criminal law work. However, they are not lawyers and are not qualified nor trained in the same way.

The right to retain and instruct “counsel” when detained or arrested is enshrined in s.10(b) of the *Charter*. The right has been interpreted to include the right to have “counsel” represent you at a criminal trial. There is no constitutional right to retain or instruct a “paralegal”¹. The Court of Appeal for Ontario had occasion to discuss this distinction in *R. v. Romanowicz*²,

The constitutional right to the effective assistance of counsel recognizes that counsel, by virtue of their professional training, will bring to their task an expertise which others, including the accused, do not possess. An accused who chooses to seek the assistance of legally trained counsel is entitled to assistance which reflects that expertise.

An accused is also entitled to proceed without counsel. The accused may choose self-representation, or if the Crown has proceeded summarily, the accused may choose to be represented by an agent. By choosing to proceed without counsel, an accused elects to forego the right to the effective assistance of counsel...

If an accused chooses self-representation, he or she cannot be heard to complain that the conduct of the trial did not rise to the level of a competent counsel. We see no reason why the same conclusion would not follow when an accused chooses to be represented by an agent who is not a lawyer. Nor does the fact that the agent is paid create any presumption as to the agent’s competence. Just as where an accused chooses self-representation, an accused who chooses to be represented by an agent who is not a lawyer has decided against exercising the right to

¹ *R. v. Miller* [2018] O.J. No. 3820 (C.J.) and cases cited therein particularly at para 37.

² (1999), 138 CCC (3d) 225.



effective assistance of counsel, and cannot be heard to contend that the agent's performance should be tested against the standard reserved to counsel trained in the law.³

Expanding the scope of paralegal practice raises concerns about constitutional rights

CONCLUSION

Access to justice is inextricably linked with access to legal services to assist in navigating through what are unfamiliar and, at times, very choppy waters. Having access to legal services is fundamentally important in any free and democratic society and in some cases, is essential to due process and a fair trial.⁴

Notwithstanding what has been set out above, it cannot be denied that there is an increase in the number of self-represented litigants that come before criminal courts. There remains a gap between those that qualify for legal aid, those that can utilize student services, and those that can afford to retain affordable private counsel. But the gap will not be met by expanding the scope of paralegal practice.

As previously noted, few paralegals are regularly practicing criminal law in the areas that they are currently permitted to do so. They do not offer competent legal services at a more affordable price than lawyers and articling students. Additionally, paralegals have neither the constitutional status nor the necessary education and training to expand their services into a complicated and challenging area of the law.

The CLA is committed to finding ways to increase access to justice for all individuals who are charged with a criminal offence. Ensuring adequate and proper funding to LAO including increasing the financial eligibility criteria and making sure that those funds are utilized for the private certificate delivery model is what is needed. LSOs efforts are better suited to advancing those objectives.

³ (1999), 138 C.C.C. (3d) 225 at paras. 27 – 29 (citations omitted)

⁴ *Christie v British Columbia (Attorney General)*, 2007 SCC 21, [2007] 1 SCR 873, at para 23