Managing for Results: LSS Tariff Renewal — Report

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Legal Services Society

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www.lss.bc.ca

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Acknowledgements

This report is the result of the efforts of many people over the past two years. Although the Tariff Review Project was officially begun in January 2004, the two months before that witnessed significant planning and development of options and recommendations for the board of directors. These led to the board's decision to direct LSS management to form a working group to submit a report to the board by June 2005 on the tariff and how it might be restructured to address the most pressing concerns that were leading to the continued rate of lawyer attrition.

We are grateful for the contributions of literally hundreds of people who have participated in this project since January 2004, especially the many participants in both phase 1 and 2 consultations and surveys, many of whom are listed in the appendices to the report. As well, we are grateful for the contribution of each of the working group members, who gave their time and efforts in various capacities during the consultation process and the preparation of this report. We are also grateful to all of our colleagues at the Legal Services Society who have shown support during this time by giving both suggestions and assistance and at times covering for those of us who were actively engaged in the consultations that took up the first 15 months of this project.

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Finally, we apologize to those we have not specifically mentioned. Please be assured that this does not indicate any lack of appreciation but rather reflects the fact that there were so many who contributed that mentioning everyone would have taken a chapter in itself. Although the report was a group effort, which has contributed to its significant value, we take full responsibility for any errors contained herein.

We hope that all who read the report will find it useful and that the research contained within the appendices will prove valuable to those who are similarly interested in the development of adequate compensation systems to support the provision of quality legal services for low-income persons.

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October 17, 2005

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Executive Summary

I. Introduction

The Legal Services Society (LSS or the society) initiated the tariff review in January 2004 in response to growing concerns about the steady decline in the number of lawyers accepting legal aid cases, and the lack of new lawyers entering the legal aid system. There has been no comprehensive review of the tariff system since the Task Force on Public Legal Services issued its report (the *Hughes Report*) in 1984. With a new service delivery model in place following the budget reductions and restructuring of 2002, and Legal Aid Ontario's tariff review as a precedent, the LSS board directed that staff form a Tariff Review Working Group (the working group) to evaluate the tariffs and recommend necessary changes to ensure that the tariff system meets the needs of low-income people in British Columbia. The board identified the following objectives for the tariff review —

- to establish and maintain tariffs that attract private bar lawyers who will provide quality services to meet the legal needs of LSS clients;
- to establish and maintain tariffs that promote efficiency and effectiveness within the legal aid system and the larger justice system; and
- to establish methods and criteria for regular evaluation of the tariffs as an integral part of LSS administration to ensure that the legal aid system is sustainable and responsive to changing needs.

Between February 2004 and April 2005, the working group consulted widely with stakeholder groups around the province, including private bar lawyers, justice system participants, and community representatives, to elicit a broad spectrum of information and opinions. It collected and analyzed a large body of research material regarding compensation for lawyers and other comparator groups; the tariff rates and structures of other jurisdictions; trends within the tariff system itself; and models for so-called results-based compensation and

management. LSS also commissioned in-depth surveys of particular groups, such as former tariff lawyers, new lawyers, and legal educators, and completed its first-ever compensation survey of tariff lawyers.

This report summarizes the key findings of the working group and outlines its recommendations for tariff renewal. It forms part of a larger legal and policy context that includes the government's obligations and objectives regarding access to justice, the LSS mandate and strategic objectives, and a range of current and expected justice system reforms. The goal of this report is to provide timely information and analysis that will enable the board and LSS staff to assess the current state of the tariff system and evaluate proposals for change to meet the objectives of fair and reasonable compensation, quality service for clients, and systemic efficiency and effectiveness.

II. Key findings

History of the tariff system

Key milestones in the evolution of the LSS tariffs include —

1979 LSS was established and inherited the existing criminal and family tariffs, both of which used block fees. The June 1980 tariff provided for payment of extra fees in cases that did not proceed to trial at an hourly rate of $25. The September 1981 family tariff introduced some hourly tariff items at a rate of $40, but this was reduced to $35 between 1982 and 1986.

1984 The *Hughes Report* recommended a "75% rule" as a long-term goal that would set tariff fees at 75% of the fees an average lawyer would charge a private client of modest means. Achieving this goal would have required a tariff increase of over 100%. As a medium-term goal, the report proposed a 70% increase, to be implemented within 18 months, and charged LSS with responsibility for annual reviews thereafter to meet the long-term goal.

1986 Between 1986 and 1991, LSS implemented substantial tariff increases to block fees and maximum hours, and raised the hourly rate to $50 for family cases in 1988.

1991 Tariff lawyers temporarily withdrew services to protest poor compensation. The government implemented a 100% increase in tariff funding, raising the hourly rate to $80. This was the last rate increase and, from 1992 onward, cost pressures forced LSS to implement holdbacks and reductions that generally ranged from 5% to 15%.

2002 The provincial government redefined the LSS mandate and imposed a 38.8% budget cut that forced LSS to reinvent its delivery model. In the new system, LSS had to rely even more heavily on private bar lawyers to deliver legal aid services.

Stakeholder perspectives on the tariff system: Themes from consultations and surveys

The consultations and surveys the working group conducted with tariff lawyers and other justice system participants identified a range of common themes —

- Inadequate tariff compensation is driving lawyers away from the legal aid system, compromising the quality of service, and reinforcing the perception that legal aid means second-rate service. Legal aid work is unattractive because of the unpaid hours lawyers must work to fulfill their professional responsibilities to clients. To attract more lawyers, LSS should increase the rates to keep pace with the private market, other public sector professionals, and inflation.
- LSS should retain the block and hourly fee structures, improve funding for non-trial resolution, expand coverage and hours for family cases, and avoid system-wide block contracting.
- LSS must simplify administration to ease the burden on tariff lawyers, improve its communication with the tariff bar and other justice system groups, and do outreach to recruit young lawyers into the legal aid system.
- Results-based compensation will be unworkable because outcomes are subjective and often outside the lawyer's control. LSS should avoid a costly, bureaucratic process.
- Low tariff compensation, restrictive coverage, and limited preparation time have a negative impact on clients. Overworked legal aid lawyers may not spend adequate time on cases, and cuts to family and poverty law services mean that the most vulnerable clients may not get help.
- Unrepresented litigants cannot properly assert and protect their rights, and clog up the court system.

The current tariff system: Trends and analysis

There are a number of noteworthy trends regarding tariff lawyers, tariff expenditures, and case costs —

- Since 1993/1994, the number of lawyers accepting referrals has declined by 50%. The percentage of practicing BC lawyers accepting legal aid cases has dropped from a peak of 36% in 1993 to 17% in 2004. Since

1990/1991, the average years of experience among tariff lawyers has increased from 8.9 to 15.9.

- Average annual billings per lawyer were about $30,000 in 2004/2005, and have been in that range for the past five years. Seventy-eight percent of tariff lawyers bill less than $50,000 per year, but a small number of lawyers bill a disproportionate share of total fees.
- Since the early 1990s, funding for LSS has steadily declined while funding for other justice system participants has generally increased.
- Across all tariffs, average case costs have increased slowly in recent years. In the criminal tariff, the proportion of tariff costs taken up by a small number of expensive cases has grown steadily.
- For criminal cases, there has been a long-term decline in the number of cases going to trial, and an increase in the number of cases being resolved without a trial. In 2002/2003, 16% of LSS cases went to trial, and about 83% were resolved without a trial.

Comparative analysis of tariff compensation

The working group evaluated compensation data for comparator groups and, in April 2005, conducted an online survey of 268 tariff lawyers about their typical fees and hours for clients of modest means. The working group retained a compensation consultant, who advised that the primary comparative marketplace for the tariff system should be private bar rates, rather than other legal aid rates or public sector comparators. Key research findings include the following —

- The survey found that the median hourly rate tariff lawyers charge private clients of modest means was $175. There was a strong correlation between experience and median rates: the differentiated median rates were $125 (less than 4 years of experience), $150 (4 – 10 years), and $180 (over 10 years).
- The current $80 tariff rate is 46% of the median private rate of $175, and *below* the average overhead rate of $85 per hour. It thus falls well short of the *Hughes Report*'s 75% rule.
- The total funding allocated under the criminal and family tariffs for typical services is generally a fraction of the fees a private client of modest means would pay.
- The current tariff rate is at the low end of the range for publicly funded lawyers and other professionals, and is 32% below the Ministry of Attorney General's average hourly cost for legal services of $118.
- Since the last increase in 1991, tariff compensation has stagnated while inflation has increased by over 26%, so the current $80 tariff rate represents a rate of $63 in constant 1991 dollars, a decline in real terms of

21%. During the same period, Crown counsel and Provincial Court judges have received salary increases of 19 – 37% and 56.5%, respectively, and will receive further substantial increases effective April 1, 2006. Since 1991, the LSS tariff rates for medical experts have increased about fourfold: the hourly rates for general physicians and psychiatrists went from $40 to $166, and $50 to $194, respectively.

Legal aid in other jurisdictions: Compensation rates and structures

The working group's review of legal aid tariffs in other Canadian and foreign jurisdictions suggests the following —

- At first glance, the LSS tariff rate compares favourably with other Canadian jurisdictions. The $80 rate ranks as one of the highest in Canada, along with Alberta and Ontario. This is somewhat misleading, however, as the legal aid plans in the Prairie and Maritime provinces rely heavily on staff delivery models, and their tariff rates are generally regarded as inadequate. Moreover, a substantial majority of BC legal aid lawyers have 10 or more years of experience, which means that the LSS $80 rate lags well behind Ontario's rate for senior counsel ($92.34). Canadian rates are generally quite low compared with those in the United Kingdom, New Zealand, and Australia.
- In many cases, the maximum hours and block fees the LSS tariffs allot are inferior to those in other Canadian jurisdictions.
- Compared with alternatives such as the staff, mixed, or contracting models, the current judicare system has fewer fixed costs, is more flexible, and maximizes choice of counsel. Also, the transaction costs involved in shifting to a different model are likely to be prohibitive.
- The block fees and capped hours in the current tariffs help LSS to predict and control costs. Capped hours are suitable for the family tariff, as LSS can readily adjust hourly allotments depending on funding. For the criminal tariff, block fees reward efficiency and simplify administration for lawyers and LSS staff by avoiding the need for detailed timekeeping.

Results-based management and the tariff system

- In the course of research and consultations, the working group considered results-based approaches to compensation in both the public and private sectors, and among legal aid agencies. The working group later expanded its focus to include results-based management, in which compensation is one component of a broader, performance-oriented strategic framework.
- Results-based management (RBM) shifts the focus from activities undertaken to results achieved, through a systematic and ongoing process

of strategic planning, performance measurement and monitoring, evaluation, and reporting.

- In Canada, both the federal and provincial governments have adopted results-based approaches, including government departments such as the BC Ministry of Attorney General. Legal aid plans in the United Kingdom, Australia, and New Zealand, as well as Legal Aid Ontario, have adopted RBM approaches involving performance planning, measurement, and reporting at the organizational level.
- There are various challenges in implementing an effective RBM framework, including identifying the right performance measures, co-ordinating the RBM process among different departments and levels within an agency, and integrating it effectively into regular activities to promote continuous improvement. Potential pitfalls include creating a costly, complex, and bureaucratic system; failing to integrate it into operational cycles; and pursuing quantifiable performance measures as an end in themselves.
- Results-based compensation (RBC) is a well-established practice in the private sector and a growing trend in the public sector and the legal profession. Typical models include employee performance pay programs and "performance contracting," in which compensation for outside suppliers is tied to contractual performance standards or targets. There are significant challenges in implementing an effective RBC system, and critics have questioned the effectiveness of incentive-based compensation on empirical and theoretical grounds.
- LSS became subject to new performance planning and reporting requirements under the *Budget Transparency and Accountability Act* in 2001. The 2002 restructuring marked a decisive shift towards a "purchaser-supplier" model of service delivery, with increased emphasis on performance management and heavier reliance on external service providers. By extending RBM to the operational level of the tariffs, LSS may develop a more results-oriented system, focused on continuous monitoring and improved services to clients, and integrated into the society's strategic objectives. An RBM system would help LSS establish goals and strategies, and measure progress, in areas of key concern for tariff renewal, such as lawyer recruitment and retention.

III. Recommendations

Recommendation 1: Adopt results-based management for the tariff system

We recommend that LSS develop a goal-driven, results-based approach to tariff management to guide tariff renewal, including lawyer recruitment and retention, and to promote continuous improvement of the tariff system.

Recommendation 2: Adopt a principled approach to tariff compensation

We recommend that LSS —

- adopt the following guiding principle for tariff compensation — "The society will maintain tariffs that provide fair and reasonable compensation to enable lawyers to recover overhead costs and obtain an appropriate level of fees for services rendered";
- retain the block fee tariff for criminal law services, and the hourly tariffs for family, child protection, and immigration law services;
- convert both the block fee and hourly tariffs to a three-tiered system with differential rates based on years of call or experience using the following levels —
  - under 4 years' experience
  - 4 – 10 years' experience
  - 10 or more years' experience
- use different methods to improve compensation for the hourly and block fee tariffs — for the hourly tariffs, LSS should improve compensation by increasing the tariff rate (including experience increases) as well as the hourly allowances permitted under the respective tariffs;
- use a combination of structural changes and increased block fees (including experience increases) to improve compensation in the criminal tariff;
- adopt a target for tariff compensation such as the 75% rule recommended in the *Hughes Report,* which provides that the tariffs should on average yield 75% of the compensation tariff lawyers would receive from a private client of modest means;
- aim to achieve the chosen target through a combination of incremental increases to hourly rates and block fees (including experience increases) and structural changes to the tariffs, so that overall compensation levels approximate the selected target; and

- adopt a five-year plan to meet the compensation target in stages, and use the RBM framework to assess economic trends and ensure that the target keeps pace with inflation and relevant market conditions during the transition period.

Recommendation 3: Adjust the tariff structures to remedy problems, improve compensation, and enhance results

All tariffs

Expanded extra fees process

We recommend that LSS develop a standardized system for *advance* approval of discretionary fee increases for prescribed categories of complex cases or special needs clients.

Administration fee

We recommend that LSS implement a flat administration fee for file opening, routine correspondence, and administrative tasks, as well as incidental overhead expenses.

Disbursement fee

We recommend that LSS implement a block disbursement item to cover incidental disbursements associated with files, such as receiving faxes, photocopies, etc.

Opinion letters for appeal requests

We recommend that LSS add a new item to each of the criminal, child protection, family, and immigration tariffs to permit trial counsel to provide an opinion on the merits of a case when clients are seeking authorization to appeal. This new tariff item would provide up to two hours for preparing such an opinion letter, either when counsel submits an opinion on the client's behalf requesting an appeal after the trial or hearing where the appeal has probable merit, or if LSS requests an opinion from counsel.

Criminal tariff

Early preparation fee

We recommend that LSS create an additional item in the criminal tariff that tariff lawyers can claim by completing specified steps prior to setting a trial date.

Additional funding for resolution of multiple charges at a single court appearance

We recommend that LSS provide additional funding to compensate lawyers when they resolve multiple charges on the same half day.

Tariff changes to promote efficient conduct of trials

We recommend that LSS pay lawyers a bonus for efficiency in completing a trial in less time than was originally scheduled.

Expansion of Strategic Case Assessment Program (SCAP) to long category II and III trials (with simplified case management)

We recommend that LSS extend SCAP to all longer, more expensive cases, regardless of offence category, with a more streamlined administrative process.

Revised offence categories

We recommend that LSS revise offence categories for certain offences to match funding more appropriately to the actual time requirements of the typical case.

New tariff item for interviews of in-custody clients

We recommend that LSS allow a block fee for visits to clients in custody to compensate lawyers for the time and inconvenience of a jail visit.

Family and child protection tariffs

LSS will be in a better position to consider structural changes to the family and child protection tariffs once the government has determined the future direction of family justice reform based upon the report of the Family Justice Reform Working Group.

Preparation for FRA applications that are required to resolve CFCSA referrals

We recommend that LSS add an item to the CFCSA tariff for cases that require FRA or divorce applications in order to resolve the CFCSA proceeding. This would permit counsel to respond to an opposing party's application about the children or to initiate an application in order to resolve a CFCSA matter with an additional seven hours of preparation to deal with the additional application(s) without prior authorization.

Immigration tariff

Currently, the limited and uncertain funding for this service makes it impractical to suggest recommendations for structural change. Once long-term

funding is secured, LSS could develop structural reforms within the proposed RBM framework.

Recommendation 4: Maintain a strategic approach to contracting

We recommend that LSS continue with existing contracting initiatives where they prove to be the optimal delivery systems, but refrain from extending contracting to the tariff system as a whole. Currently, LSS uses contracting effectively in areas such as mental health law, prison law, duty counsel, circuit courts, and the Brydges advice line. We recommend that LSS consider selective use of contracting in other service areas where appropriate, such as the new family services LSS is developing with the enhanced funding it received in 2005 from the Ministry of Attorney General.

2
Overview and Recommendations

It is the view of the Task Force that, as a matter of principle, the ultimate goal must be to ensure that individuals who are eligible for legal aid coverage are to be represented by legal counsel who are paid a reasonable fee. Otherwise, in the medium to long term, the legal aid delivery system will suffer a major crisis.

— Task Force on Public Legal Services in British Columbia, 1984

The recommendations of the 1984 British Columbia Task Force on Public Legal Services urgently require implementation. It perhaps should not be surprising if our legal system falls short of providing equal access to all citizens. Our system of justice has been evolving for centuries and only in the last 30 years have we attempted to make it available to all. Nonetheless, in today's society it is no longer acceptable that the legal system be at the service only of those who can afford it.

— Access to Justice: Report of the Justice Reform Committee, 1988

Providing legal aid to low-income Canadians is an essential public service. We need to think of it in the same way we think of health care or education. The well being of our justice system — and the public's confidence in it — depends on it. [1]

— Right Honourable Beverley McLachlin
Chief Justice of Canada
February 1, 2002

[1] This text was adapted with permission from *Making the Case: The Right to Publicly-Funded Legal Representation in Canada, A Report of the Canadian Bar Association,* February 2002.

I. Why a tariff review now?

LSS initiated the tariff review for several reasons —

- The society was concerned about the steady reduction in the number of lawyers accepting legal aid cases; increasing difficulty in placing cases in some regions of the province, especially family cases; and the lack of young lawyers entering the legal aid system, all of which pose a real risk to the availability of legal aid to low-income people.
- An in-depth examination of the tariff system was long overdue. Although LSS has periodically examined the tariffs as part of other review activities, and has continuously evaluated and adjusted the tariffs at an operational level, the last comprehensive review of the workings of the tariff system was the *Hughes Report.*[2] Its authors recommended that LSS, in consultation with stakeholders, conduct an annual review of the adequacy of the tariff vis-à-vis prevailing market rates for clients of modest means, but this has not occurred.
- In 2002, following budget reductions and the amendment of its enabling legislation, LSS implemented a new service delivery model, featuring much-reduced family and immigration law coverage and elimination of most staff lawyer positions. Thus, the tariff system is even more crucial in what is now almost a purely "judicare" service delivery model.
- In 2000/2001, Legal Aid Ontario (LAO) conducted a tariff review that recommended an increase in legal aid tariff rates and a range of structural changes to the tariffs. The LAO tariff review has served as a model for the LSS tariff review.[3]

The legal and policy context

It is important to understand the tariff review within a broader legal and policy context.

LSS relies on the tariff system as the principal mechanism for delivering representation services to low-income individuals in BC. As such, the tariff system is a key component in the continuum of legal services that LSS provides, and its single largest area of expenditure. The tariff system also plays a vital role in the larger justice system, where it supports the fundamental goal of access to justice and enables government to meet its

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[2] Task Force on Public Legal Services in British Columbia, *Report to the Attorney General by the Task Force on Public Legal Services in British Columbia* (Victoria: Task Force on Public Legal Services in British Columbia, 1984).

[3] Legal Aid Ontario, *Tariff Review Task Force Report* (Toronto: Legal Aid Ontario, 2000), online: www.legalaid.on.ca/en/publications/reports/task_force_review.pdf; Legal Aid Ontario, *Legal Aid Tariff Reform Business Case* (Toronto: Legal Aid Ontario, 2001), online: www.legalaid.on.ca/en/publication/reports.asp.

constitutional obligations to provide legal representation in certain types of cases.

The legal and policy context includes the following elements —

- The *Canadian Charter of Rights and Freedoms,* which mandates that government provide publicly funded counsel to an individual who —
  - faces state-initiated proceedings that threaten that individual's liberty or security of the person,
  - lacks the means to obtain representation, and
  - requires counsel to ensure a fair proceeding.[4]
- The government of British Columbia's *Strategic Plan,* which includes as goals and objectives —
  - a supportive social fabric, and
  - a fair and efficient system of justice.[5]
- The *Legal Services Society Act* (*LSS Act*), which specifies that the society's objects are —
  - to help low-income individuals resolve their legal problems and to facilitate access to justice for low-income individuals;
  - to establish and administer an effective and efficient system for providing legal aid to low-income individuals in British Columbia; and
  - to provide advice to the attorney general regarding legal aid.[6]
- The Memorandum of Understanding (MOU) that LSS negotiates with the attorney general pursuant to s.21 of the *LSS Act,* which provides a framework for the allocation of government funding to legal aid services.
- The LSS *Service Plan,* in which LSS has committed itself to pursue strategic objectives that include —
  - developing and continually improving an integrated legal aid system that provides a range of high-quality legal services that are responsive to the needs of low-income individuals;
  - expanding the capacity of professionals and other service providers to help low-income individuals resolve their legal problems; and

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4 *Canadian Charter of Rights and Freedoms,* Part I of the *Constitution Act, 1982,* being Schedule B to the *Canada Act, 1982* (UK), 1982, c.11; see *Regina v. Rowbotham* (1988), 41 C.C.C. (3d) (Ont. C.A.) 1; *J.G. v. New Brunswick* [1999] 3 S.C.R. 46.

5 British Columbia, *British Columbia Government Strategic Plan 2005/06-2007/08*, online: www.bcbudget.gov.bc.ca/stplan/default.htm.

6 S.B.C. 2002, c.30.

- developing, implementing, and evaluating innovative approaches to improve legal service delivery.[7]

- A broad range of justice reform initiatives aimed at improving access to justice, promoting alternatives to litigation, and enhancing the efficiency and effectiveness of the court system. In family law, this includes expanding the range of information and advice services, encouraging early consensual dispute resolution, and streamlining court procedures. In criminal law, there is an emphasis on case management to support early negotiation between the parties, enhance prospects for early resolution, and narrow the range of issues. In 2002, the Law Society of BC initiated a Justice Review Task Force to develop proposals for making the BC justice system more responsive, accessible, and cost-effective.[8] The task force established working groups to focus on different areas, including —

  - the Civil Justice Reform Working Group, which is focusing on improving the accessibility and cost-effectiveness of the Supreme Court civil process;

  - the Family Justice Reform Working Group, which has proposed wide-ranging reforms in the way family and child protection cases are handled in the courts, with an emphasis on alternative dispute resolution and more streamlined and user-friendly court procedures;

  - the Street Crime Working Group, which is exploring innovative, multi-disciplinary responses to persistent street crime in Vancouver's Downtown Eastside to serve as models for other communities; and

  - the Mega Trials Working Group, which is focusing on options for management of large and expensive criminal cases.

The tariff review process

LSS staff members presented options for a tariff review to the board in December 2003, and in January 2004 the board approved a plan for LSS staff to form a Tariff Review Working Group (the working group) to conduct the tariff review. At that time, the board endorsed the following objectives for the tariff review —

- to establish and maintain tariffs that attract private bar lawyers who will provide quality services to meet the legal needs of LSS clients;

- to establish and maintain tariffs that promote efficiency and effectiveness within the legal aid system and the larger justice system; and

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[7] Legal Services Society, *Service Plan 2005/2006 – 2007/2008,* online: Service plans, www.lss.bc.ca/About_lss/service_plans.htm.

[8] See www.bcjusticereview.org.

- to establish methods and criteria for regular evaluation of the tariffs as an integral part of LSS administration to ensure that the legal aid system is sustainable and responsive to changing needs.

The tariff review was divided into two phases. Phase 1 took place between February and May 2004. It consisted primarily of consultation meetings in the seven regional centres, with 108 lawyers representing about 10% of the tariff bar. The working group submitted an interim report on phase 1 to the board in June 2004.[9]

After reviewing the phase 1 report in June 2004, the board endorsed the following principles to guide the working group for the duration of the tariff review —

- LSS will maintain tariffs that provide fair and reasonable compensation to enable lawyers to recover overhead costs and obtain an appropriate level of fees for services rendered.
- LSS will maintain tariffs that reward lawyers for efficient service within the justice system to achieve effective results for LSS clients.
- LSS will maintain tariff management processes that promote efficient and effective allocation of resources and that are cost-effective and simple.
- LSS will actively engage other justice system participants in promoting procedural changes that ensure efficiency and effectiveness in the tariff system and the larger justice system.

In phase 2, from July 2004 to April 2005, the working group engaged in the following activities —

- research on lawyer compensation, tariff rates and structures in other jurisdictions, results-based approaches to public administration and compensation, and analysis of LSS internal management data;
- consultation with a wide variety of justice system participants, including judges, court administrators, social workers, Crown counsel, and community advocates;
- surveys and interviews of LSS staff, former tariff lawyers, newly called lawyers, legal education organizations, and community organizations (LSS retained a consultant to conduct the surveys);
- follow-up meetings with tariff lawyers to report on the results of phase 1 and solicit feedback on some preliminary proposals for tariff renewal;
- a compensation survey of tariff lawyers and consultation with an independent compensation expert; and

[9] The working group's two interim reports are available online at www.lss.bc.ca/For_lawyers/online_resources.htm (under "Tariff resources").

- internal meetings of the working group, other LSS staff members, and contractors to review the information collected and preliminary proposals for tariff renewal.

The working group submitted an interim report on phase 2 to the board in November 2004.

II. Summary of key findings

The history of the tariff system

Here are the key milestones in the history of the LSS tariff system —

- In 1979, the Legal Aid Society and the Legal Services Commission merged under the *Legal Services Society Act,* and the new Legal Services Society inherited the existing criminal and family tariffs, both of which used block fees. The June 1980 tariff provided for payment of extra fees in cases that did not proceed to trial, at an hourly rate of $25.
- In 1981, LSS published revised tariffs after taking over responsibility for paying tariff accounts from the provincial government.[10] The new family tariff introduced a number of hourly tariff items with capped hours at an hourly rate of $40, but a 12.5% reduction cut the effective rate to $35 from 1982 to 1986.
- In 1984, the *Hughes Report* recommended as a long-term goal a "75% rule" that would set tariff fees at 75% of the fees an average lawyer would bill a private client of modest means. The task force based the 75% figure on recovery of lawyers' overhead costs, which were generally 50% of private fees, plus one-half of the balance of fees. The task force recognized that achieving the 75% rule would require an increase "well in excess" of 100% of the existing tariff. As a medium-term goal, it recommended a 70% increase in the tariffs as soon as practicable within 18 months. The task force recommended that LSS, in consultation with the attorney general, the Law Society, and the Canadian Bar Association, develop criteria to assess compensation levels and undertake annual tariff reviews. It also concluded that the judicare system and block fees should be retained, but recommended that LSS allow hourly billing for family law cases that required a great deal of preparation outside court.[11]
- Between January 1986 and January 1991, LSS made substantial increases to tariff funding, including raising the hourly rate for family cases to $50 in 1988. Despite these improvements, the society recognized that "the

[10] Before 1981, the tariffs consisted merely of instructions on the billing forms, and lawyers submitted their accounts to the government for processing and payment.

[11] *Hughes Report* at 71 – 85.

level of the tariff is way below any normal fees … and this poses real problems in meeting one's overhead and other expenses."[12]

- In 1988, the Justice Reform Committee urged the government to provide funding as soon as practicable to implement the *Hughes Report* recommendations.[13]
- In 1990, LSS established an immigration tariff following the BC Supreme Court decision in *Gonzalez-Davi v. Legal Services Society,* which required LSS to provide counsel for individuals facing immigration proceedings that could result in deportation.[14]
- In 1991, tariff lawyers withdrew services to protest low tariff compensation, prompting a dramatic 100% increase in tariff funding, including an increase in the hourly rate to the current rate of $80.
- In 1992, the *Agg Report* stated that "there should be a reasonable, permanent relationship between the legal aid tariff, Crown Counsel wage scales, legal services staff lawyer scales, contract counsel rates, and so on." The report identified some practical difficulties in applying the *Hughes Report*'s 75% rule, and suggested, based on anecdotal accounts, that the criminal tariff was at least competitive with market rates, while the family tariff lagged behind. It proposed that in future tariff negotiations, care would be required "to ensure a tariff that is reasonably competitive and sufficient to maintain an adequate pool of lawyers to do the work."[15]
- In December 1992, LSS implemented a 15% reduction to the criminal tariff and maintained varying levels of reductions, generally ranging from 5% to 15%, until 1994.
- In 1994, LSS created a separate tariff for representation in child protection proceedings. LSS introduced holdbacks in July to manage its cash flow. In subsequent years, the holdbacks ranged from 5% to 15%, and LSS repaid a portion of the holdbacks when its year-end finances permitted.[16]
- In February 1998, LSS introduced fee caps, which provided for termination of legal aid coverage when the total fees for a criminal case (excluding disbursements) reached $50,000.

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[12] LSS Board Chair M. McEwan, *Legal Aid Bar,* December 1990.

[13] Justice Reform Committee, *Access to Justice: Report of the Justice Reform Committee* (Victoria: Queen's Printer, 1988).

[14] (1989) 42 B.C.L.R. 232 (B.C.S.C.), aff'd (1991), 55 B.C.L.R. (2d) 236 (B.C.C.A.).

[15] Timothy D. Agg, *Review of Legal Aid Services in British Columbia* (Victoria: Queen's Printer, 1992) at 122 – 124.

[16] LSS deducted the holdback amounts from lawyers' accounts at the time of payment. At the end of each fiscal year, the board of directors determined whether sufficient funds were available in individual tariff budgets to pay some or all of the holdbacks from that year.

- Between 1999 and April 2005, a 10% holdback kept the effective tariff hourly rate at $72.[17]
- In June 2001, LSS implemented the Strategic Case Assessment Program (SCAP) to manage large and expensive criminal cases.
- In February 2002, the provincial government imposed a budget cut of 38.8% over three years, which reduced LSS funding from $88.3 million in 2001/2002 to just under $54 million in 2004/2005. The government required that LSS absorb the costs of court-appointed counsel (i.e., *Rowbotham*) cases and large cases that exceeded the $50,000 fee cap. The government committed to funding immigration legal aid services only until March 31, 2004, eliminated poverty law representation, and restricted family law to child apprehension and emergency services in cases involving domestic violence. A Memorandum of Understanding (MOU) negotiated with the BC attorney general defined the terms under which LSS could provide legal aid services using provincial funding. LSS reduced staff by 68%, and replaced its province-wide network of 60 community law offices with a new delivery model using 7 regional centres, 22 local agents, and a centralized call centre. The restructuring represented a marked shift from a mixed model of service delivery to a judicare system.
- In 2004, LSS secured funding for limited refugee assistance until March 31, 2005, based upon the federal-provincial cost-sharing agreement. The limited services aimed at helping eligible clients initiate refugee claims and obtain representation at hearings in meritorious cases. Also in 2004, LSS commenced the tariff review and conducted a tariff lawyer satisfaction survey.
- In February 2005, the BC attorney general approved a funding increase of $4.6 million to expand services for family clients who are most at risk, as well as continued funding for immigration services consistent with the level of service in the previous fiscal year. In April 2005, LSS reduced the holdback from 10% to 5%, making the effective tariff hourly rate $76.
- On June 24, 2005, LSS eliminated the holdback, making the published tariff hourly rate ($80) and block fees payable without any deductions.

Stakeholder perspectives on the tariff system: Themes from consultations and surveys

The following themes emerged from the phase 1 and phase 2 consultations with tariff lawyers and justice system participants, as well as from several surveys conducted as part of the tariff review —

[17] The holdbacks for family and immigration appeals remained at 5% from 1999 to April 1, 2002, after which they increased to 10%.

Tariff lawyer perspectives

- **Tariff compensation** — Inadequate tariff compensation is driving lawyers away from the legal aid system, compromising the quality of service, and reinforcing the perception that legal aid means second-rate service. Low tariffs have pressured lawyers to cut corners or increase case volumes to generate adequate earnings. Hourly and block fees do not allow sufficient preparation time and have not kept pace with inflation. In setting tariff compensation, LSS should take into consideration private market fees paid by clients of modest means, government and Crown counsel rates (defence should be on par with the Crown), fees paid to other professionals under the tariffs, and lawyer overhead costs. LSS should eliminate holdbacks or substitute a straight deduction. There was no clear consensus on adopting differential rates, but any rate should allow for regular cost-of-living increases.
- **Tariff structure** — The tariffs do not reflect the time and court appearances required to properly represent a client, and lawyers sacrifice their financial interests to fulfill their ethical obligations. The tariffs are geared towards going to trial, and penalize lawyers who opt for early resolution rather than litigation. LSS should "front-end load" funding to encourage early preparation and resolution. Family lawyers felt they could only "half solve" clients' problems due to limited coverage and hours. They are not compensated for non-trial resolution or the increased time required for Supreme Court proceedings. Lawyers generally favour retaining the hourly tariff for family law and block fees for criminal matters, and generally oppose system-wide block contracting.
- **Results-based compensation (RBC)** — Lawyers were concerned that RBC would place too much emphasis on case outcomes or create a bureaucratic and costly administrative process. Case results are too subjective to be readily measured, and are often outside counsel's control. Instead of individual incentives, LSS should focus on improving compensation for existing services, and expand on the quality enhancement measures it already provides, like continuing legal education (CLE) discounts, electronic case digests, etc.
- **Removing obstacles to participation** — LSS must increase tariff rates to reduce the amount of unpaid work, and further simplify authorization and billing processes to alleviate the administrative burden on lawyers. Lawyers approved of e-billing and supported flat administration and disbursement fees. LSS should improve its communications with tariff lawyers to demonstrate trust, respect, and appreciation for their work.
- **Lawyer recruitment and attrition** — Both former tariff lawyers and new lawyers were dissatisfied with the hourly rate and the amount of unpaid time required to properly serve clients. Family lawyers did not necessarily want to reduce legal aid work but had little choice due to tariff restrictions.

LSS should sponsor mentoring programs so new lawyers receive training for legal aid work.

Justice system participants and community organizations

- **Inadequate tariff compensation** — Poor tariff compensation is the main reason that lawyers reduce the number of legal aid cases they accept or stop taking legal aid cases altogether. LSS should raise tariff compensation rates to reflect private market rates currently charged to clients of modest means. LSS should also improve compensation for preparation in both family and criminal cases to promote early preparation and resolution.
- **Impact on clients** — Limited hours for family cases mean that clients may feel pressured to accept unfair settlements, proceed without counsel, or abandon meritorious claims. There are quality-of-service concerns because some lawyers take on too many files and fail to interview or communicate adequately with clients or prepare properly for their cases. This reinforces the perception that legal aid lawyers are second-rate.
- **Impact of unrepresented litigants on the court system** — An unrepresented person may —
  - ♦ enter a guilty plea despite the availability of a defence;
  - ♦ encounter language barriers;
  - ♦ find it difficult to represent himself or herself due to mental health and addiction problems, or lack of education; or
  - ♦ be frustrated by the process due to his or her lack of legal training.

  This poses a dilemma for judges and registry staff who must try to help unrepresented people without creating an appearance of unfairness to other parties. Crown counsel are also reluctant to deal directly with unrepresented people. Overall, unrepresented litigants encounter difficulties that cause delay and waste court time. LSS publications and websites are useful for lay advocates, but the average legal aid client still needs assistance from duty counsel or legal information outreach workers to understand and use these materials effectively.
- **Results-based compensation** — A performance-based system may not reward lawyers who take on difficult clients or do good work but fail to achieve early resolution. It may also encourage lawyers to "cherry pick" relatively simple cases to improve their performance statistics. Any RBC initiatives for family law should be more client-focused, particularly when it comes to the needs of children.
- **Restrictions on poverty law and other services** — Community organizations, pro bono advice clinics, and lay advocates are overwhelmed. They now have increased costs for staff time, training, and

new programs to meet the increased demand for legal information and services that LSS no longer provides.

- **Disproportionate impact on the most vulnerable clients** — Cuts to other social services, combined with restricted access to legal aid, impose additional stress on people with serious mental health problems, and may exacerbate their disabilities. The cuts have a disproportionate effect on women (and their children), who may be forced to remain in abusive situations or abandon legitimate custody, support, and property claims.
- **Less reliance on government funding and better communications** — LSS must become more autonomous and self-sustaining to continue providing valuable legal aid services for low-income British Columbians. It must improve communication with the BC attorney general to anticipate and negotiate changes to policy and funding, and involve the tariff bar and other stakeholders in its efforts. There is a perception that LSS is not proactive in disseminating information regarding pilot projects and coverage changes to those who rely on it. Legal educators advised LSS to host information sessions at the professional legal training course, student legal clinics, and law schools to attract new lawyers.

The current tariff system: Trends and analysis

Overview of tariffs

LSS provides selected services in criminal, family, child protection, and immigration law in accordance with the *Legal Services Society Act* and the MOU with the attorney general of British Columbia.[18] LSS also funds services in mental health and prison law, and provides a range of duty counsel services in criminal, family, and immigration law. In general, the family, child protection, and immigration tariffs are hourly tariffs, under which LSS pays lawyers at an hourly rate of $80, with maximum hours allotted for different types of service.[19]

For criminal cases, LSS pays lawyers based on a block fee system, which allocates a lump sum fee for each type of service. There are four categories of offences, which vary according to the seriousness of the offence, so that the lowest fees apply to category I offences (e.g., failure to appear, breach of probation) and the highest fees apply to category IV offences (e.g., murder, kidnapping). In theory, block fees represent payment at the prevailing hourly rate for the average amount of time required for each service, so that losses in some cases will be offset by gains in others ("swings and roundabouts").[20]

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[18] Links to the *Legal Services Society Act,* the MOU, and the *Guide to Legal Aid Tariffs,* which contains all the individual tariffs, can be found on the LSS website at www.lss.bc.ca.

[19] As noted previously, as of June 24, 2005, LSS eliminated the remaining holdback, making $80 the applicable rate for the hourly tariffs.

[20] The concept of "swings and roundabouts" is described more fully in Chapter 7.

LSS uses SCAP to manage expenditures in the most serious criminal cases (mainly category IV offences) if the preliminary hearing or trial is expected to exceed five days of court time. Under SCAP, LSS case review lawyers (private bar lawyers retained on contract) and trial counsel discuss the case, and LSS sets a budget for preparation and court time. Rather than using block fees in SCAP cases, LSS pays counsel at the hourly rate for all authorized preparation and court attendance. The MOU also allocates separate funding for certain classes of exceptional cases that fall outside the tariffs; for example, cases involving court-appointed counsel. These "exceptional matters" include a small number of the most serious and complex criminal cases, in which LSS pays senior counsel at an "enhanced" hourly rate of $125.[21]

LSS has an extra fee policy that enables tariff lawyers to request additional funding at the conclusion of a case. Case review lawyers evaluate each request according to standard criteria (including complexity, time required, etc.), and decide whether extra fees are warranted and, if so, to what extent. Most extra fee requests arise in more serious criminal cases.

Declining lawyer participation

In absolute terms, the trend over the past two decades shows a relatively steady increase in lawyer participation rates through the 1980s and early 1990s, followed by an uninterrupted decline in the last 10 years. In 1983/1984, 1,036 lawyers billed LSS for services rendered. The number increased, with some minor fluctuations, through the late 1980s. The 1991 tariff increase had an immediate impact, and the number of lawyers billing LSS peaked in 1994/95 at 1,931. Since then, LSS has lost lawyers each year, and the current number of 1,049 essentially equals the figure for 1983/1984.

Since lawyer billings may relate to work done in a previous period, another approach is to consider the number of lawyers who have accepted referrals in a given year. Between fiscal years 1993/1994 and 2004/2005, the number of lawyers accepting referrals dropped from 1,987 to 1,000, a decline of almost 50%.

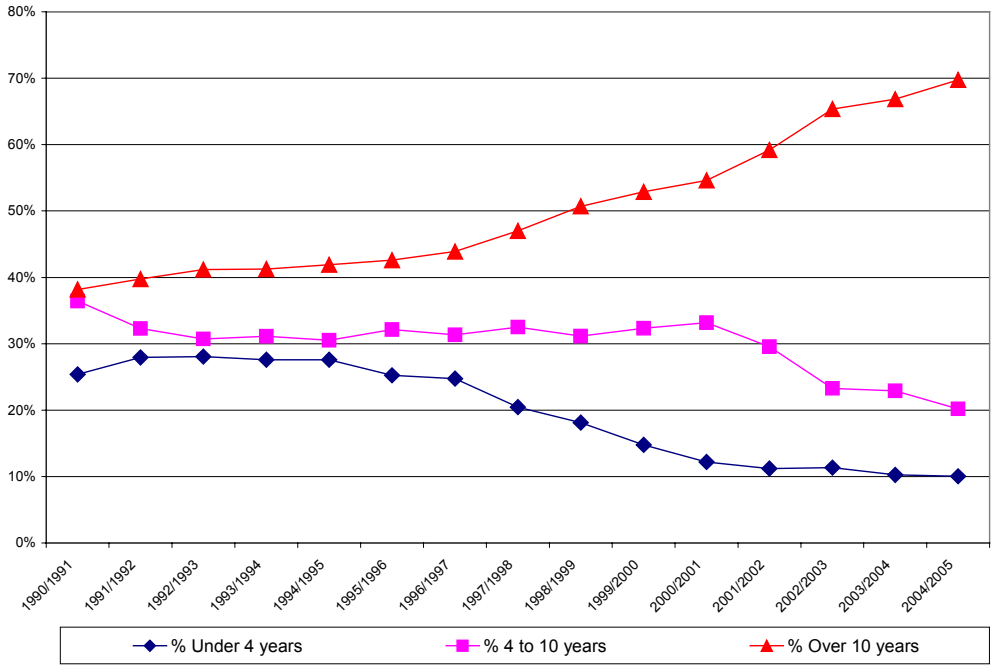
The proportion of practicing BC lawyers accepting legal aid cases has dropped by half in the past 10 years. In 1990, 1,508 of the 5,200 BC lawyers

[21] With the attorney general's approval, LSS established its "enhanced fee policy" in 2003 following a series of court applications in which lawyers sought judicial orders directing payment of counsel fees at rates in excess of the LSS tariffs. LSS created the policy in consultation with the Criminal Tariff Committee, an advisory panel of private bar lawyers jointly appointed by the Association of Legal Aid Lawyers, the Canadian Bar Association (BC Branch), and the Law Society of BC. Under the policy, lawyers may apply to an outside review panel, drawn from a roster of senior criminal lawyers from around the province, which advises LSS on which cases warrant enhanced fees. To be eligible, applicants must have at least 12 years of criminal law experience and a track record as lead counsel in a number of complex category IV trials. Since adopting the policy in September 2003, LSS has approved enhanced fees in about nine cases each year.

then in full-time practice accepted a legal aid referral, or about 29%. The participation rate increased after the 1991 tariff increase, reaching 36% in the peak year of 1993.[22] Since then, participation has declined each year, so that in 2004 only 1,005 out of 6,000 practicing BC lawyers accepted a legal aid referral, a participation rate of just 17%.[23]

In a related trend, assuming that years of experience is a reliable proxy for age, those lawyers who accept legal aid cases are getting older: in 1990/1991, the average years of lawyer experience was 8.9, and in 1997/1998, it was 11.2. By 2004/2005, it had reached 15.9. The pattern is similar across all tariffs and all regions of the province. Figure 1 illustrates the change in the experience profile of the tariff bar between 1990/1991 and 2004/2005.

Figure 1: Lawyers' years of experience at interview date



[22] Another feature of the change in lawyer participation rates is the change in case volumes that may occur as the tariff rates change. The volume of cases referred on the tariffs in 1984/1985 was approximately the same as the number referred in 2004/2005. However, after LSS substantially increased the tariffs in 1991, case volumes reached a peak by 1993/1994 that was more than double the 1984/1985 numbers. This may suggest that improvements to the tariff rates cause lawyers to resume taking legal aid referrals and reduce pressure on clients to retain them privately, although it is difficult to draw firm conclusions.

[23] The Law Society of BC provided the figures for the number of practicing lawyers in BC.

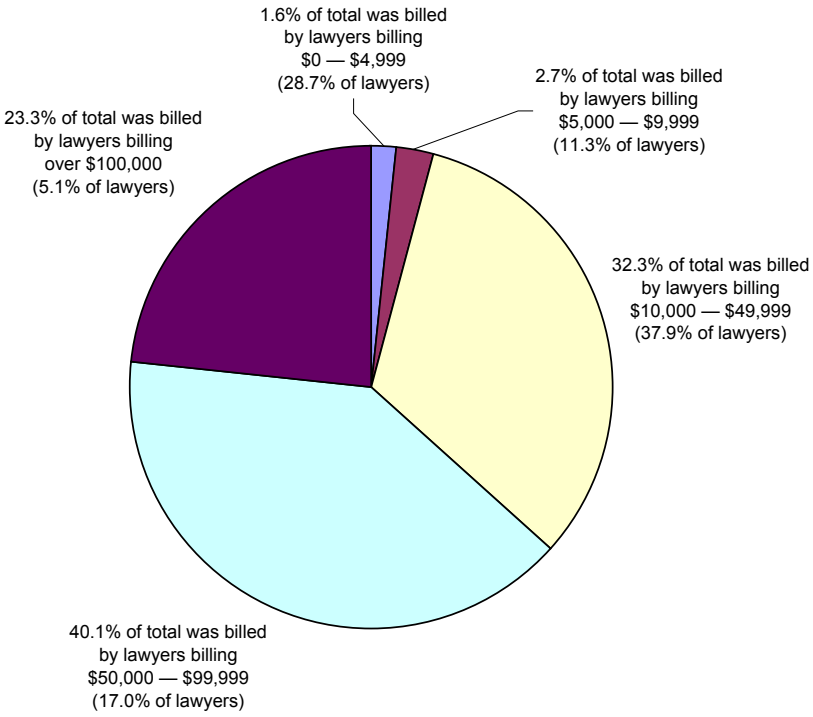
Tariff lawyer billings (fees)

Some of the key trends in annual fee billings are as follows —

- In 2004/2005, average billings per lawyer were just over $30,000. Average billings peaked at about $36,000 in 1993/1994, following the tariff increase of 1991. They declined in the late 1990s, reaching a low of $23,517 in 1998/1999. From 2000/2001 to 2004/2005, they have generally hovered between $30,000 and $33,000.
- In 2004/2005, median billings were $16,747. Since the 1991 increase, median billings have ranged from a low of $10,157 in 1998/1999 to a high of $17,524 in 2001/2002.
- In criminal law in 2004/2005, average billings were $26,840, and median billings were $11,305. Among criminal lawyers, 48% billed under $10,000 and 82% billed under $50,000. Further, 14% of lawyers billed between $50,000 and $100,000 (with their billings accounting for 36% of all lawyer billings), while 4% billed over $100,000 (with their billings representing about one-quarter of total billings).
- In family law in 2004/2005, average billings were $14,526 and median billings were $6,130. Among family lawyers, 60% billed under $10,000 and 93% billed under $50,000. Further, 6% of lawyers billed between $50,000 and $100,000, with their billings accounting for 26% of total billings. Only 1% of lawyers billed over $100,000, with their billings accounting for about 10% of total billings.

The following chart shows the distribution of billings for all tariffs in 2004/2005.

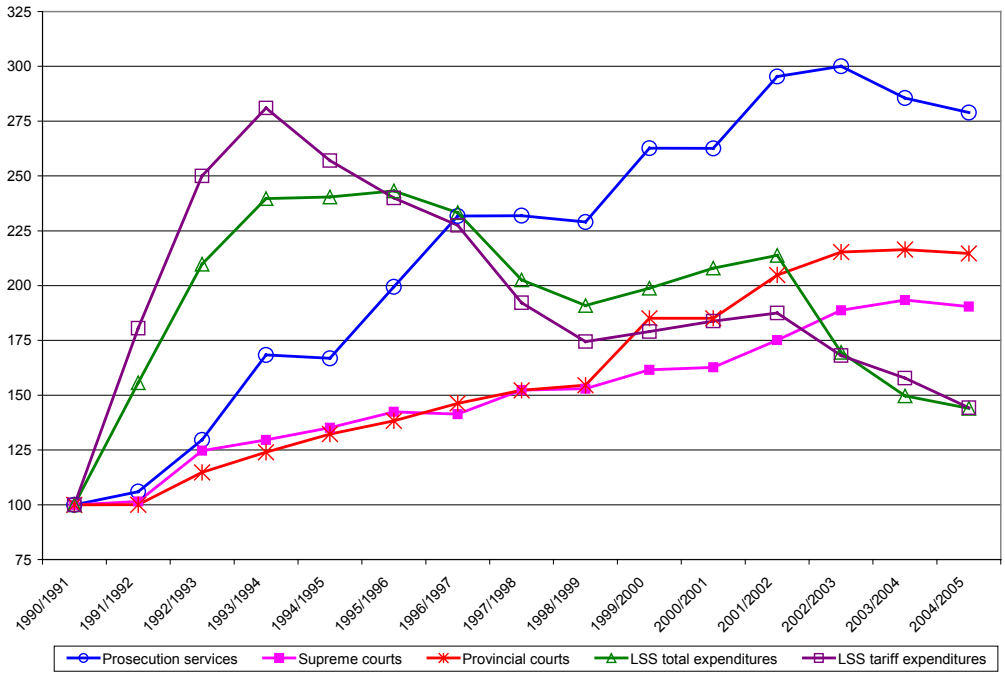
Figure 2: Private bar lawyer billing, fiscal year 2004/2005



Tariff expenditures and case volumes

As the following graph indicates, after a brief peak in the wake of the 1991 tariff increase, the LSS budget and tariff expenditures steadily declined, while funding for other parts of the justice system generally increased.

Figure 3: Comparison of BC expenditures on prosecution services and the judiciary with LSS expenditures, 1990/1991 – 2004/2005 (1990/1991 = 100)[24]



[24] The Ministry of Attorney General's responsibilities are organized into five core business areas: court services, prosecution services, justice services, legal services to government, and executive and support services. The cost drivers of prosecution services and the judiciary are likely closest to those applicable to LSS; accordingly, expenditures on prosecution services and the judiciary have been chosen for purposes of comparison. Prosecution services assesses and conducts all prosecutions and appeals of offences under the *Criminal Code of Canada,* the *Youth Criminal Justice Act,* and a number of provincial statutes. The Supreme and Provincial Courts function at arm's length from government and are funded through separate appropriations in the ministry's budget. The budget for the Provincial Court includes the budget of the Office of the Chief Judge. LSS total expenditures are the expenditures reported in the LSS audited financial statements. The totals include restatements where totals have been restated in the following years' audited statements for comparative purposes only, to be consistent with the presentation of those years. LSS tariff expenditures include expenditures on the child protection, criminal, family, immigration, duty counsel, human rights, and pro bono tariffs. LSS tariff expenditures also include expenditures on transcripts, Brydges line services, prisoners' services, staff disbursements, and mental health disbursements (to 2002/2003).

On a per capita basis, LSS expenditures in constant 1992 dollars (i.e., with effects of inflation removed) at key junctures in its history were as follows (see Table 1).

Table 1: Funding for legal aid per capita (constant 1992 dollars)

Year	80/81	84/85	89/90	91/92	93/94	98/99	04/05
$ per capita	9.40	7.60	11.82	19.94	27.33	18.34	11.76

Thus, on a per capita basis, current LSS expenditures have returned to a level that is slightly below that of 1989/1990, just before the last tariff increase.

With respect to case volumes, the number of referrals in criminal and family law rose dramatically in the 1980s and early 1990s, and then declined sharply, so that case volumes in recent years have returned to the levels of the mid-1980s. With cutbacks, immigration case volumes have also declined significantly.

Case costs

Average case costs for 2002/2003, the most recent year for which complete data are available, were as follows.

Table 2: Average case costs, 2002/2003

	Criminal ($)	Criminal appeal ($)	Family ($)	Child protection ($)	Immigration ($)
Total (with disbursements)	1,064.84	4,639.31	1,402.54	1,679.00	1,381.31
Fees only	972.34	2,491.13	1,180.08	1,556.03	1,011.90

Criminal case costs (2002/2003 data)

Some key points regarding criminal case costs are as follows —

- Average costs (fees and disbursements) by offence category were $269 for category I, $501 for category II, $1,050 for category III, and $12,962 for category IV.
- The top quartile of criminal cases represented 75% of total criminal costs, while the top 5% of criminal cases represented 53% of total costs. The long-term trend has been for these cases to consume an increasing proportion of criminal tariff expenditures.
- Average fees for cases where trials were held were $3,763. Differentiating by offence category, the average fees for trial cases were $647 for category I, $1,143 for category II, $2,842 for category III, and $24,621 for category IV. There was a substantial jump in average trial fees from 2001/2002 to 2002/2003, largely due to a spike in category IV trial costs.

- Average fees for cases where the accused entered guilty pleas were $492, and ranged from $246 for category I to $1,431 for category IV. For all offence categories, the average fees for cases resolved by guilty pleas were well below the historical peaks of the early 1990s.
- Average fees for cases involving stays at hearings were $457, and for cases involving stays before hearings, $338.
- For criminal cases involving trials, the average number of half days required was 5.61. Differentiating by offence category, the average number of half days required was 1.74 for category I, 2.32 for category II, 4.82 for category III, and 28.58 for category IV. For all offence categories, the average number of half days per trial case was well below the historical peaks.

Clearly, the case costs for most criminal cases are relatively modest, but a small number of longer, more serious cases take up a disproportionate share of tariff expenditures.

Family and child protection case costs (2002/2003 data)

Some key points regarding family and child protection case costs are as follows.

- Average case costs (fees and disbursements) in family cases were $1,403 in 2002/2003. In 1990/1991, the year before the last tariff rate increase, average costs were $641. In 1991/1992, following the rate increase, the average costs jumped to $1,201. The peak year was 1998/1999, when family case costs reached $1,891. They declined in each subsequent year.
- In 2002/2003, the top quartile of family cases represented 53% of total costs, and the top 5% of cases represented about 20% of total costs.
- For child protection cases, the average case cost (fees and disbursements) in 2002/2003 was $1,679. Average costs have been in this general area since 1997/1998. The peak year was 1996/1997, when average costs were $1,932. Like the family tariff, in 2002/2003 the top quartile of child protection cases represented over half (about 56%) of costs, and the top 5% of cases represented about 21% of total costs.

Criminal case outcomes[25]

Some key points regarding trends in criminal case outcomes are as follows —[26]

- LSS statistics disclose long-term trends in which the proportion of cases going to trial has gradually declined, while the proportion of cases resolving without trials has slowly increased.

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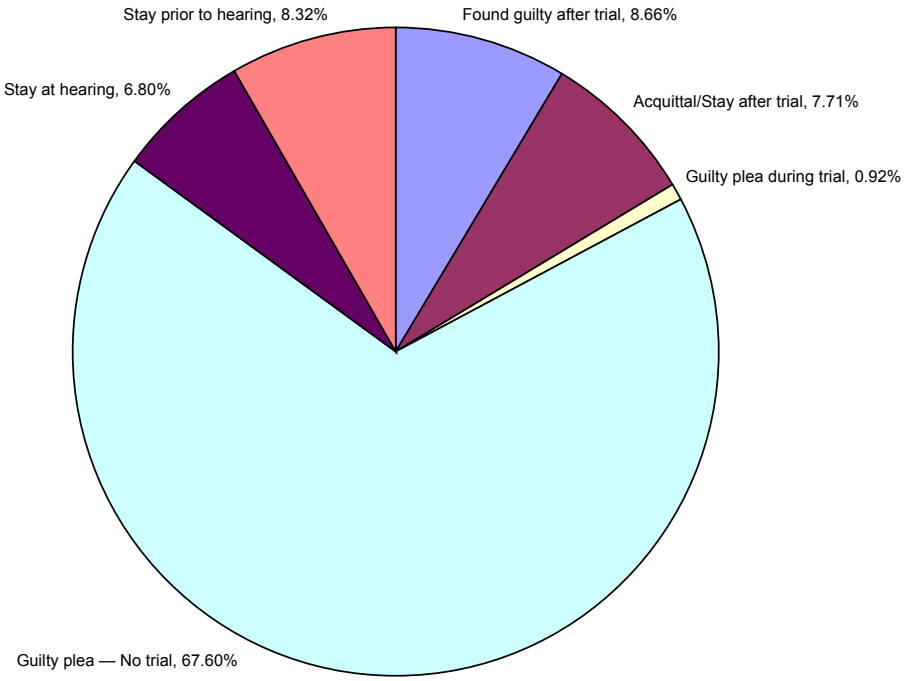
[25] LSS has more statistical information on case outcomes in criminal cases because outcomes in family cases are much harder to categorize, and LSS has not tracked the information consistently over time.

[26] Some of the figures cited here exclude cases with indeterminate outcomes, which in 2002/2003 represented about 13.24% of total cases.

- For example, in 1983/1984, about 35% of cases involved trials and only 65% were resolved without trials (through guilty pleas or stays). In 1993/1994, the figures were 20% and 80% for trial and non-trial resolution, respectively.
- In 2002/2003, about 16% of criminal cases went to trial. Of those trial cases, about 46% resulted in guilty verdicts, 41% in acquittals or stays, and 5% in guilty pleas after the commencement of trial (the remaining 8% of trial cases had indeterminate outcomes).
- In the same year, about 83% of cases funded by LSS were resolved without trial. Also, 68% of all cases resulted in guilty pleas, and about 15% resulted in stays of proceedings, either before trial (8%) or at trial (7%).

The following chart shows the distribution of criminal case outcomes for 2002/2003.

Figure 4: Criminal case outcomes, fiscal year 2002/2003



As for sentencing outcomes in LSS criminal cases, with some exceptions, the patterns conform to expectations based on general sentencing principles and practices — the likelihood of jail and length of sentence vary according to the seriousness of the offence and the method of resolving the case.

In family cases, even before the 2002 cutbacks, only a small percentage of cases went to trial, and that number has dropped even further in the past two

years. The average number of hours that lawyers claim for different services remains quite modest.

Comparative analysis of tariff compensation

To assess the adequacy of current tariff compensation, the working group collected information on prevailing private market rates as well as compensation rates for other publicly funded lawyers and comparator groups.

The working group retained a compensation expert, Western Compensation and Benefits Consultants (WCBC), to provide advice regarding the appropriate methodology for evaluating tariff compensation and selecting the proper range for tariff rates. WCBC indicated that to identify the appropriate comparative marketplace, the key questions are —

- From which sectors and organizations do we recruit staff or service providers?
- To which sectors and organizations do we lose staff or service providers?
- Which sectors and organizations have similar characteristics, and utilize staff or service providers for similar functions?

WCBC found that for the tariff system, the most relevant comparison is with the private marketplace for BC lawyers. Information on legal aid rates in other jurisdictions is not particularly helpful, because BC lawyers do not base their decisions about LSS tariff work on legal aid rates elsewhere. Similarly, rates for staff or contract lawyer positions in other public sector agencies are less relevant, because of differences in roles, responsibilities, and employment circumstances.

Accordingly, WCBC recommended that LSS proceed with its plans to survey tariff lawyers to collect more current information on private market rates for comparable services. WCBC reviewed the LSS survey instrument and methodology in advance and considered it well designed.

Tariff lawyer compensation survey

In April 2005, the working group retained Isis Communications to conduct an online tariff lawyer compensation survey of 268 current tariff lawyers, representing about one-quarter of the present tariff bar, regarding —

- demographic information (experience, firm size and type, region, and gender);
- private market rates for clients of modest means;
- overhead costs;
- typical private fees and time expended for selected criminal and family services; and

- billing practices for early resolution and bonuses for good results.

Demographic highlights

The demographic profile of the survey respondents was as follows —

- 74% had over 10 years of call, 21% had between 4 and 10 years, and only 4% had less than 4 years of call. The mean years of call was 16;[27]
- 69% were male and 31% female;
- 91% were in firms of five lawyers or less, while 69% were sole practitioners; and
- 39% were from the Lower Mainland, 29% from Vancouver Island, 18% from the southern Interior, 8% from the central Interior, 4% from the northwest, and 2% from the northeast.

WCBC opinion of survey validity

WCBC found the survey results to be the most relevant and comprehensive measure for assessing tariff compensation, because the survey data —

- focused on the most pertinent information (i.e., hourly rates charged to clients of modest means for the types of services provided by LSS);
- were the most current available;
- drew on a larger sample of BC lawyers than any of the other research material available;
- reflected a representative cross-section of BC lawyers, by experience, region, firm size, and practice status; and
- focused on private lawyers in BC, the relevant marketplace for compensation comparisons.

[27] The experience profile of the survey sample is somewhat higher than that of tariff lawyers as a whole. Lawyers with less than 4 years of call were 4% of the sample but made up 10% of the lawyers who accepted referrals in 2004/2005. Lawyers with over 10 years of call made up 74% of the sample, but comprised 70% of the lawyers who accepted referrals in that year. Lawyers with between 4 and 10 years of experience made up 21% of the sample, and comprised 20% of referral holders in 2004/2005.

Average hourly rates and overhead costs

Table 3 sets out the key survey results for rates and overhead costs.

Table 3: Survey results for tariff lawyer hourly rates and overhead costs

	All			Criminal			Family		
	Hourly rate ($)		Overhead (%)	Hourly rate ($)		Overhead (%)	Hourly rate ($)		Overhead (%)
	Mean	Median	Mean	Mean	Median	Mean	Mean	Median	Mean
All lawyers	172.89	175.00	48.53	175.36	177.50	47.25	169.45	175.00	51.23
Years of call									
< 4 years	138.89	125.00	51.57	142.86	125.00	55.17	125.00	125.00	30.00[28]
4 – 10 years	169.09	150.00	49.66	174.08	175.00	48.79	162.27	150.00	51.33
> 10 years	175.92	180.00	48.12	178.16	200.00	46.44	172.92	175.00	51.58

These rates are consistent with those reported in other recent surveys of BC lawyers and law firms, although the other surveys used considerably smaller samples than LSS did and did not focus on tariff lawyers.[29] It is noteworthy that the median rates for criminal and family lawyers as a group were quite similar, despite some moderate variances at the upper experience levels, where criminal lawyers reported slightly higher rates.

The survey results suggest that —

- median hourly rates vary significantly by experience level, but not by firm size or region (with the partial exception of the northeast, which had only six survey respondents);
- the current tariff hourly rate of $80 is 46% of the median private rate of $175, well below the 75% target recommended in the *Hughes Report;* and
- the current tariff hourly rate is 64% of the median rate ($125) for lawyers with less than 4 years of call, 53% of the median rate ($150) for lawyers with between 4 and 10 years of call, and 44% of the median rate ($180) for lawyers with more than 10 years of call.

Comparison of tariffs and private fees for selected services

As part of the compensation survey, LSS asked lawyers to indicate their typical hours and rates for legal services commonly provided to clients of

[28] Only one lawyer provided a response in this category.

[29] As discussed in Chapter 6, the 2004 *Canadian Lawyer* survey reported average rates between $173 and $234 per hour depending on year of call, but included only 16 BC lawyers: see K. McMahon, "The Going Rate 2004" *Canadian Lawyer* (September 2004) at 48. The BC Branch of the Canadian Bar Association, in conjunction with the Vancouver Association of Legal Administrators, commissions annual surveys of standard charge-out rates among BC law firms. The reported ranges for different firm sizes, experience levels, and regions are largely consistent with the results of the LSS tariff lawyer compensation survey.

modest means. The results demonstrate not only the inadequacy of tariff rates but also the failure of tariff compensation to reflect the actual time involved.

Table 4 sets out the average private fees for selected criminal law services for clients of modest means, along with comparable tariff rates.

Table 4: Average private fees for criminal law services

Criminal law	All lawyers	Year of call			Tariff fees by offence category[30]			
		Under 4 years	4 – 10 years	Over 10 years	Category I	Category II	Category III	Category IV
Show cause hearing — Provincial Court								
Fees (mean)	$618.33	$518.75	$558.04	$640.13	$80.00	$120.00	$120.00	$150.00
Hours (mean)	3.42	3.31	3.37	3.45	3.42	3.42	3.42	3.42
Effective hourly rate	$180.64	$156.60	$165.75	$185.67	$23.39	$35.08	$35.08	$43.85
Guilty plea, sentencing — Provincial Court								
Fees (mean)	$1,048.72	$950.00	$1,014.06	$1,065.09	$238.00	$375.00	$413.00	$650.00
Hours (mean)	5.21	5.00	5.34	5.19	5.21	5.21	5.21	5.21
Effective hourly rate	$201.41	$190.00	$189.73	$205.41	$45.68	$71.97	$79.27	$124.76
Trial — Provincial Court								
Fees — 1st day of trial (mean)	$2,396.23	$2,593.75	$2,394.64	$2,382.27	$500.00	$600.00	$800.00	$1,400.00
Hours — 1st day of trial (mean)	14.31	17.44	16.63	13.46	14.31	14.31	14.31	14.31
Effective hourly rate	$167.47	$148.75	$144.04	$177.05	$34.94	$41.92	$55.90	$97.83
Trial — Supreme Court								
Fees — 1st day of trial (mean)	$3,280.52	$2,958.33	$3,155.77	$3,331.53	n/a	$690.00	$890.00	$1,490.00
Hours — 1st day of trial (mean)	19.48	31.43	23.73	17.53		19.48	19.48	19.48
Effective hourly rate	$168.38	$94.13	$132.98	$190.03		$35.42	$45.68	$76.48

Clearly, with the exception of some category IV fees, tariff compensation falls well below the total compensation for a private client of modest means, and yields effective hourly rates that do not appear to cover overhead costs.[31]

[30] This table uses the full block fees since LSS eliminated the holdbacks in June 2005. Maximum tariff fees are calculated based on the following assumptions: guilty plea and sentencing includes an arraignment court fee, and Supreme Court trial fees include a block fee for one fixed date but not for jury selection.

[31] Note that the LSS compensation survey asked respondents to provide average fees in a "typical" case for a client of modest means. Category IV offences, which involve the most serious criminal charges, are likely not "typical," so comparisons between the survey

A comparison of tariff fees for early resolution (guilty plea and sentencing) and trials suggests that a one-day trial offers greater compensation in absolute terms, but a lower effective hourly rate due to the additional preparation time required for a trial. Trial earnings increase, however, if a trial extends beyond one day.

It is worth noting too that the LSS block fees are intended to cover all pre-trial court appearances. Tariff lawyers have frequently complained that the tariffs fail to compensate them for the repeated court appearances they are required to make. Statistics from the BC Provincial Court bear this out. In 2004, the average number of appearances per completed criminal case was 5.5.[32]

A similar pattern of inadequacy is evident in the family tariff, where the combination of a low hourly rate and capped hours makes tariff compensation a fraction of the comparable private fees in most cases. Table 5 sets out average private fees for selected family law services for clients of modest means.

Table 5: Average private fees for family law services

Family law	All lawyers	Years of call			Family tariff fees[33]
		Under 4 years	4 – 10 years	Over 10 years	
Early resolution					
Fees (mean)	$1,515.24	$1,375.00	$1,568.42	$1,503.47	$847.20
Hours (mean)	10.59	10.50	11.53	10.32	10.59
Effective hourly rate	$143.05	$130.95	$136.06	$145.69	$80.00
Case settlement conference — Provincial Court					
Fees (mean)	$868.95	$500.00	$853.57	$887.24	$472.00
Hours (mean)	5.90	3.75	5.71	6.04	5.90
Effective hourly rate	$147.25	$133.33	$149.37	$146.82	$80.00
One-day hearing for interim orders — Provincial Court					
Fees (mean)	$1,820.91	$1,562.50	$1,735.71	$1,860.00	$1,017.60
Hours (mean)	12.72	12.50	12.97	12.64	12.72
Effective hourly rate	$143.17	$125.00	$133.79	$147.10	$80.00

responses and category IV tariff rates may be invalid. The one possible exception is Supreme Court trial fees, which would generally involve either a category III or IV offence.

[32] Statistics provided by the Court Services Branch, Ministry of Attorney General. A completed case is one in which a disposition was entered against at least one count. The number of appearances is a count of all the appearances that were scheduled throughout the life of the completed case, excluding sworn appearance dates (which are administrative only) and progress hearings in drug treatment court.

[33] The quoted tariff fees use the rate of $80 per hour and the average hours reported in the survey.

Family law	All lawyers	Years of call			Family tariff fees[33]
		Under 4 years	4 – 10 years	Over 10 years	
1 day hearing for interim orders — Supreme Court					
Fees (mean)	$2,442.71	$1,850.00	$2,132.14	$2,559.34	$1,252.80
Hours (mean)	15.66	15.00	14.42	16.08	15.66
Effective hourly rate	$155.94	$123.33	$147.85	$159.20	$80.00

Together, the tables for criminal and family law services confirm the views that tariff lawyers expressed during the various consultations: tariff rates are considerably below market levels, and the total funding allotted generally fails to reflect an amount approaching market compensation.

Overhead analysis

The *Hughes Report* accepted that, on average, lawyer overhead costs are about 50% of revenues, which figure is confirmed by the compensation survey. Indeed, at 48.3%, the mean overhead rate tariff lawyers reported in the April 2005 survey is precisely the same result reported in the Legal Aid Ontario Tariff Review Task Force survey of 801 Ontario legal aid lawyers in July 2000. Other surveys and studies also suggest that average overhead costs are 50% of gross revenues.[34]

The *Hughes Report* proposed a target rate of 75% of market rates for clients of modest means, which would mean that government and the private bar would each bear half the cost (25%) of legal services above the basic cost of service delivery. A 75% target would represent a reasonable return for the lawyer, and an appropriate discount, given the element of public service and the security of payment.

The current tariff rate of $80 is below the average hourly overhead costs of $85 reported in the compensation survey.

[34] Legal Aid Ontario, *Tariff Review Task Force Report* at 167; K. McMahon, "The 2004 *Canadian Lawyer* Compensation Survey" *Canadian Lawyer* (September 2004) at 35; Canadian Superior Court Judges Association/Canadian Judicial Council, "Report on the Incomes of Canadian Lawyers Based on Income Tax Data" (Submission to the Judicial Compensation and Benefits Commission, January 2003) at 11.

Comparator groups

Table 6 shows the hourly rates and salary increases for relevant comparator groups.

Table 6: Hourly rates and salary increases for other professionals[35]

Comparator group	Hourly rate/Salary increases
LSS tariff rates for experts	
Psychiatrists	$194
General practitioners	$166
Psychologists	$114
Blood-alcohol experts	$65
Ministry of Attorney General[36]	
Average cost of legal services (internal/external blended rate)	$110 (2002/2003) $118 (2003/2004)
Ministry of Attorney General	
Legal Services Branch Tariff	$80 (up to 1 year of call), increasing by $10 per year up to 7 years of call $140 – $200 (over 7 years of call)
Ministry of Attorney General	
Contracted services under RFP (child protection/FMP/YCJA cases)	$80 (standard rate) $100 – $110 (average negotiated rate)
Ministry of Attorney General	
Legal Services Branch ad hoc counsel	$80 (Provincial Court) $95 (Supreme Court) $105 (Court of Appeal)
Ministry of Attorney General	
Criminal Justice Branch ad hoc counsel	$65 (Provincial Court, maximum $500 per diem) $75 (Supreme Court, maximum $750 per diem)
Special prosecutor	$125 – 250 (few counsel receive the highest rate)
ICBC — Strategic Alliance	
Outside counsel	$90 – $130 (0 – 5 years) $130 – $175 (6 – 10 years) $175 – $300 (over 10 years)

[35] Unless otherwise noted, the figures cited in this table were provided by the relevant government agency.

[36] BC Ministry of Attorney General, *Annual Service Plan Report 2002/2003* at 53; *Annual Service Plan Report 2003/04* at 67.

Comparator group	Hourly rate/Salary increases
Department of Justice (Canada)	
Federal Prosecution Service	$60 (under 5 years)
Legal agents	$71 (5 – 10 years)
Maximum 10 hours per diem for all levels	$82 (over 10 years)
	$125 – $150 in complex cases
Department of Justice (Canada)	
Legal agents — civil cases involving routine property transactions	$60 (under 5 years)
	$71 (5 – 10 years)
Maximum 10 hours per diem for all levels	$82 (over 10 years)
Department of Justice (Canada)[37]	
Legal agents — all other civil cases	$60 – $85 (1 – 3 years)
Maximum 10 hours per diem for all levels	$85 – $100 (4 – 7 years)
Rates negotiated on an ad hoc basis within these guidelines	$100 – $125 (8 – 12 years)
	$125 – $150 (13 – 20 years)
	$150 – $200 (over 20 years)
BC Crown counsel salaries[38]	
Salary increase 1991 – 2004	19 – 37% (depending on position)
Increase effective April 1, 2006	13%
Provincial Court judges' salaries[39]	
Salary increase 1991 – 2004	56.5%
Increase effective April 1, 2006	22.7%
Supreme Court judges' salaries[40]	
Salary increases 1991 – 2004	48.4%
BC Consumer Price Index	
1984 – 2004	66%
1991 – 2004	26%

[37] See the discussion in Chapter 6, section IV, for more details regarding the criteria the Department of Justice considers in negotiating rates within these guidelines.

[38] See the discussion in Chapter 6, section V, for more information regarding the calculation of BC Crown counsel salary increases.

[39] Judges Compensation Commission, *Final Report of the 2004 British Columbia Judges Compensation Commission* at 20, online: www.ag.gov.bc.ca/public/judges-compensation/FinalReport.pdf; BC Public Service Agency, "Excluded Salary Information," online: www.bcpublicservice.ca/salary_admin/index_judges.html.

[40] Judicial Compensation and Benefits Commission, *Report* (Ottawa: Judicial Compensation and Benefits Commission, 2000) at 30, online: www.quadcom.gc.ca/archives/1999/reports/final/index_en.html; Judicial Compensation and Benefits Commission, *Final Report of May 31 2004*, online: www.quadcom.gc.ca/rpt/report.20040531.html.

Some key points are as follows —

- The large disparity between tariff fees for non-legal experts and tariff rates for lawyers is a profound irritant to the tariff bar. Since 1991, there has been a 415% increase in the hourly legal aid rates for medical doctors (GPs) (from $40 to $166), and a 388% increase for psychiatrists (from $50 to $194).
- The province of BC pays a variety of rates depending on the type of service and area of law. Some of these rates — for example, the rates for ad hoc Crown counsel — are slightly below the current tariff rates (although they provide for hourly billing of actual time with daily caps of 10 hours), while others are well above the tariff rates. The current $80 tariff rate is 32% lower than the Ministry of Attorney General's average hourly cost for legal services of $118 per hour.
- Since the last tariff increase in 1991, tariff compensation has stagnated while inflation has increased by 26%, so the current $80 tariff rate represents a rate of $63 in constant 1991 dollars, a decline in real terms of about 21%. During the same period, salaries for Crown counsel and Provincial Court judges have increased significantly, and both groups are scheduled to receive further substantial increases effective April 1, 2006.

Legal aid in other jurisdictions: Compensation rates and structures

The working group reviewed the legal aid plans of other Canadian jurisdictions, the United Kingdom (England and Wales, and Scotland), Australia, and New Zealand to compare legal aid tariff rates and structures. The working group focused on jurisdictions with a strong judicare component similar to that of LSS.

Delivery models

There are various models of legal aid service delivery. In a judicare model, the legal aid plan pays private bar lawyers for legal services based on a tariff of fees. In a staff lawyer system, the legal aid plan directly employs lawyers to perform services. A mixed model combines private bar and staff lawyers, while a complex mixed model integrates a variety of service delivery mechanisms, including community law clinics, legal information and advice services, staff lawyers, and private practitioners. In a contracting system, the legal aid plan contracts with firms or individual lawyers for a specific amount of work to be performed at a fixed price.

The current LSS judicare model can quickly adapt to changing financial circumstances and client needs without requiring substantial new infrastructure or staffing; promotes choice of counsel; and offers the most stability for LSS, clients, and lawyers alike. In contrast, a staff delivery model would involve substantial start-up costs, plus relatively fixed costs to maintain

infrastructure and staffing over time, while system-wide block contracting would benefit a few firms or individuals at the expense of the majority of tariff lawyers, who are unlikely to return to legal aid work if contracting is unsuccessful. The staff and contracting models also limit choice of counsel, and may be perceived as less independent of government than a judicare model that relies on a large number of self-employed lawyers.

Tariff structure

In a judicare model, there are three basic tariff structures available —

- an hourly system, in which counsel is paid on a "time-and-line" basis with no cap on hours;
- a capped hourly system, in which lawyers bill for their hours up to a designated maximum (e.g., the LSS hourly tariffs); or
- a block fee system (e.g., the LSS criminal tariff).

A tariff based on open-ended hourly billing is expensive and arguably rewards inefficiency. The current structure of the family and criminal tariffs — capped hours and block fees, respectively — helps LSS predict and control costs. A system of capped hours enables LSS to adjust the family tariff in response to increases or reductions in tariff funding.

Block fees are suitable for the criminal tariff because they are easy to administer and do not require detailed timekeeping. Criminal lawyers are accustomed to block fees, because this is the most common billing method for private clients. A block fee system also rewards efficiency and has a built-in experience increase, since more efficient lawyers will require less time to provide a service and thereby earn a higher effective rate. It thus provides good value for the money expended. In the past, LSS considered converting the criminal tariff to an hourly system, but a costing analysis suggested that this would lead to higher tariff costs, especially in less serious cases. Feedback during the tariff review indicated that most criminal lawyers preferred to retain the block fee system, and would react negatively to introduction of an hourly tariff because of the administrative burden of tracking time for billing purposes.

Low remuneration is a key issue. The LSS family tariff is very limited compared with most provinces. For criminal fees, BC tends to fall short in comparison with Alberta, Ontario, and Manitoba. Poor compensation is one of the major causes of lawyer dissatisfaction, which in turn affects recruitment and attrition.

Hourly rate

While BC's $80 rate appears to place it near the top in Canada along with Alberta and Ontario (Table 7), this is somewhat misleading. The lower hourly rates in the Prairie and Maritime provinces reflect a lower cost of living. The legal aid plans in these provinces rely heavily on staff delivery models, and their tariff rates are generally regarded as inadequate. The Nova Scotia Legal

Aid Commission recently raised its hourly rate and will be increasing hours for preparation as part of its own tariff review. Both the Manitoba and New Brunswick governments recently announced funding increases to improve their tariffs, and by 2007 New Brunswick will aim to achieve parity with its rates for ad hoc prosecutors (which currently stand at $80 for lawyers with less than five years of experience and $100 for those with more than five years of experience). In addition, the majority of BC legal aid lawyers have 10 or more years of experience, which means that BC's $80 rate lags considerably behind comparable rates for senior lawyers in Ontario ($92.34). Canadian rates are generally quite low compared with the United Kingdom, New Zealand, and Australia.

In general, tariff rates in other jurisdictions have limited relevance in determining the appropriate tariff rate in BC. Ultimately, local market conditions, not legal aid rates elsewhere, influence private lawyers' decisions about whether or not to accept legal aid cases.

Table 7: Hourly rates in Canada

Legal aid plan	Hourly rate ($)	
BC	80.00	
Alberta	80.00	
Saskatchewan	60.00 (not to exceed 600/day)	
Manitoba	53.00	
Ontario	73.87 (less than 4 years)	
	83.10 (4 – 10 years)	
	92.34 (10 or more years)	
Quebec[41]	…	
Nova Scotia	60.00 (less than 5 years)	
	70.00 (5 years +)	
	85.00 (10 years +) (for offences carrying a mandatory life sentence)	
New Brunswick	43.00 (domestic law matters)	
	48.00 (less than 2 years)	
	54.00 (2 full years, less than 5)	
	60.00 (5 years +)	
PEI	60.00	
Newfoundland and Labrador	**Less than 5 years**	**5 years +**
	50.00 (offences within the exclusive jurisdiction of the Trial Division, jury trials, dangerous offender applications, and appeals before Nfld. C.A. and S.C.C.)	60.00
	45.00 (criminal matters before a judge alone, and all civil matters)	55.00

[41] Quebec uses primarily block fees.

Legal aid plan	Hourly rate ($)
Northwest Territories	70.00 (less than 4 years)
	81.00 (4 – 7 years)
	99.00 (7 – 11 years)
	117.00 (11 years +)
Yukon	60.00 or 70.00 (less than 4 years)
	67.00 or 78.00 (4 years + in criminal law, depending on offence or type of application)
	75.00 or 88.00 (10 years + in litigation and at least 4 years in criminal law, depending on offence or type of application)
Nunavut[42]	…

Results-based management and the tariff system

In the course of research and consultation, the working group considered results-based approaches to compensation in both the public and private sectors, and among legal aid agencies. The working group later expanded its focus to include results-based management (RBM), in which compensation is one component of a broader, performance-oriented strategic framework.

Results-based management in the public sector

In the last decade or so, governments in developed countries have adopted RBM techniques as part of the broader trend towards "new public management," which aims to make government smaller and more efficient by applying market principles to public administration. RBM attempts to shift the focus of public sector managers from activities undertaken to results achieved through a systematic and ongoing process of strategic planning, performance measurement and monitoring, evaluation, and reporting.

There are various challenges in implementing an effective RBM framework, including identifying the right performance measures, co-ordinating the RBM process among different departments and levels within an agency, and integrating it effectively into regular activities to promote continuous improvement. Organizations must be aware of some of the pitfalls in this approach: implementing a system that is too costly and administratively complex; failing to integrate it properly so that managers and staff treat it as a useless paper exercise; and focusing too much on meeting quantifiable targets so that performance measurement becomes an end in itself, rather than a tool for achieving better results. In Canada, both the federal and provincial governments have adopted results-based approaches, as have a wide range of public agencies, including the BC Ministry of Attorney General.

[42] Nunavut employs primarily staff lawyers.

Results-based compensation

The focus on RBM has led many organizations to reassess their compensation practices. For many organizations, compensation is the largest area of expenditure and an important motivator for pursuing organizational objectives. Compensation encompasses both monetary and non-monetary rewards. To be effective, an organization must provide fair rewards using equitable procedures, link compensation clearly and consistently to organizational goals, and tie compensation to activities or outcomes that are within workers' control.

Results-based compensation (RBC) is a well-established practice in the private sector and a growing trend in the public sector. In an employment context, many organizations have shifted away from standard tenure-based salary scales to variable pay systems that combine elements of base salary with incentives tied to individual, departmental, or organizational performance. In addition to employee performance pay, many organizations have adopted "performance contracting," in which the purchaser contracts with an external supplier for delivery of services, with payment partially linked to meeting specified performance standards or targets.

While the proponents of RBC suggest that incentive-based pay motivates good performers and sends a clear message that excellence is valued and rewarded, the empirical evidence supporting its effectiveness is mixed at best. Critics of performance-based pay suggest that it is based on the flawed premise that people work only, or primarily, for money, and encourages a short-term focus and emphasis on "looking good" rather than performing well. From this critical perspective, if the existing compensation system is otherwise equitable, organizations should focus less on tinkering with monetary incentives and more on using effective management strategies to motivate people.

Results-based compensation in the legal profession

In the legal profession, the trend towards RBC is reflected in performance-pay practices for lawyers and staff in private law firms and corporate law departments. It is also evident in the shift away from the traditional "billable hour" approach to so-called alternative fee arrangements, including flat fees, project billing, and results-based fees, in which lawyer compensation is tied more directly to efficiency and results. In the US, an increasing number of large corporations are moving to performance contracting models, through which they integrate outside law firms more closely into their operations, and use performance management techniques and alternative fee arrangements to manage service delivery. In the BC justice system, the Federal Prosecution Service, the Legal Services Branch of the Ministry of Attorney General, and the Insurance Corporation of BC all employ forms of performance contracting to manage relations with outside law firms.

Results-based management among legal aid agencies

The fiscal challenges of the past two decades and the ascendancy of new public management principles led many legal aid agencies to shift from their original "mutual interest" model of legal aid to a market-oriented, "purchaser-supplier" model.[43] Many legal aid plans, including those in the United Kingdom, Australia, and New Zealand, have adopted RBM approaches involving performance planning, measurement, and reporting at the organizational level. In Canada, Legal Aid Ontario has been developing its RBM framework since 2001, and is currently extending its performance measurement system across its core service areas.

Even before the advent of the current market-oriented reforms, legal aid agencies focused on the assessment of efficiency and effectiveness in the context of earlier debates on staff-versus-judicare delivery models. More recently, results-based approaches have been a key feature in the move towards contracting mechanisms, and the related emphasis on quality assurance. The legal aid authorities in England and Wales have done the most work in this regard, implementing a system-wide contracting model with complex systems for intensive monitoring of suppliers. These far-reaching reforms have been highly controversial, have produced mixed results, and have ultimately failed to contain spiralling costs. Other legal aid plans have tended to adopt more modest, incremental approaches to quality assurance for legal aid services, setting entry-level criteria for lawyer credentials, contractual practice standards, and requirements for periodic audits.

Legal aid plans have yet to implement RBC on a broad scale. The contracting model in England and Wales has included incentives such as enhanced billing and streamlined administration to encourage participation in different phases of its development, but such incentives are not tied to results per se. Those legal aid plans that until recently retained relatively open-ended hourly billing systems are shifting to block fee arrangements to control costs and encourage efficiency. Currently, there is a trend towards "front-end loading" of funding to encourage early preparation and increase the likelihood of early resolution.

Finally, a primary feature of RBM among legal aid plans is a renewed emphasis on applied research, which has become an essential tool to meet their information needs. Common areas of focus include assessing legal needs, improving justice system efficiency, and exploring links between compensation and the supply of lawyers.

Implications for LSS

LSS became subject to new performance planning and reporting requirements under the *Budget Transparency and Accountability Act* in 2001, just prior to

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[43] Don Fleming, *The Purchaser-Supplier Approach in Legal Aid* (Ottawa: Department of Justice, 2002), online: canada.justice.gc.ca/en/ps/rs/rep/2003/rr03lars-6/rr03lars-6.pdf.

the provincial government's decision to redefine the LSS statutory mandate and substantially reduce its budget.[44] The 2002 restructuring marked a decisive shift towards a "purchaser-supplier" model of service delivery, with an emphasis on performance management and increased reliance on external service providers. To date, LSS has engaged in performance management primarily at an organizational level. By extending RBM to the operational level of the tariffs, LSS should develop a more results-oriented system, focused on continuous monitoring and improved services to clients, and integrated into LSS strategic objectives. The system it adopts, however, will have to be cost-effective and administratively efficient to avoid straining capacity and alienating the tariff bar. A key area of focus within an RBM strategy would be recruitment and retention of tariff lawyers.

In terms of RBC, the tariff system already reflects elements of RBC through its reliance on block fees and capped hours, which exemplify the alternative fee arrangements gaining popularity in the legal profession. Developing an effective system for measuring and rewarding individual performance is fraught with difficulty, however, given the subjectivity inherent in assessing "quality" or "results," and the mixed record of performance pay systems. Also, given the general inadequacy of tariff compensation, prioritizing individual incentives may represent too narrow a focus. LSS should address compensation as part of an overall RBM strategy, making structural changes to the tariffs to promote efficient and effective service for clients. Quality assurance will play an important role within this overall framework.

With respect to contracting, LSS already uses performance contracting strategically, to deliver specific types of services, but there are sound reasons to avoid implementing system-wide contracting that are set out at the conclusion of this chapter.

III. Recommendations

The Tariff Review Working Group is proposing four recommendations —

- RBM for the tariff system;
- a principled approach to tariff compensation, including experience increases and setting targets for tariff rates;
- structural changes to remedy existing problems, improve compensation, and create a more results-oriented tariff system;
- retention of current contracting models where they continue to provide quality service in a cost-effective manner, and selection of such models for new services where appropriate.

[44] S.B.C. 2000, c.23.

Recommendation 1: Adopt results-based management for the tariff system

We recommend that LSS develop a goal-driven, results-based approach to tariff management integrated with the society's "results-based and client-focused" strategic plan to promote continuous improvement of the tariff system.

We propose a framework that —

- involves LSS staff in a regular cycle of goal setting, collection and analysis of relevant performance data, adjustment of both the tariff system and the RBM framework itself, and reporting on results;
- integrates performance planning for the tariff system with performance planning for the society as a whole;
- incorporates the principles the board has endorsed for the tariff review as the core objectives of the tariff system;
- applies a logic model to identify tariff system inputs, activities, outputs, and outcomes and to select related performance measures and targets;
- uses the data and analysis from the tariff review as a foundation to identify key strategies, performance measures, and targets. Performance measures would focus as much as possible on outcomes, although measures for inputs, activities, and outputs could also be adopted; and
- employs results-based compensation as one component of the overall management approach.

The working group believes that the RBM framework would —

- provide a systematic method for evaluating the tariffs, designing and implementing tariff changes, and evaluating those changes;
- offer an overall framework for meeting the stated objectives of the tariff review regarding compensation mechanisms, service quality, justice system efficiency, and periodic review to ensure tariff system sustainability;
- enable LSS to integrate strategic planning at the organizational level with strategic planning at the operational level of tariff management;
- bring LSS tariff management into line with current best practices in public administration, including performance management strategies adopted by legal aid authorities in other jurisdictions;
- demonstrate to funders and the public the LSS commitment to forward-thinking strategic management;
- enable LSS to link tariff management to overall objectives for the justice system; and

- assist LSS in setting goals, developing strategies, and measuring progress in tariff lawyer recruitment and retention.

The experience acquired in developing performance measures and targets for the tariff system as a whole could provide a platform for introducing RBC in the future.

Implementation

We recommend that LSS consider the following in designing and implementing the RBM framework —

- **Focus on results for clients** — The RBM framework should use goal setting, performance measurement, and reporting not as ends in themselves but as ways to assess the effectiveness of the tariff system in achieving results for clients.
- **Build capacity** — Developing and implementing the RBM framework will require a multi-disciplinary approach involving staff from various parts of the organization. LSS may need to consider retaining outside assistance in the design of the RBM framework, including the performance measures.
- **Start small** — In the initial stages, after establishing the strategic vision for the tariff system, LSS should select a limited number of relatively straightforward performance measures in order to gain experience with the framework, limit demands on LSS capacity, and avoid imposing new information-reporting requirements on tariff lawyers in the short term.
- **Keep it practical** — LSS must design and implement the RBM system so that it is integrated effectively into the regular operation of the tariffs. Data collection, analysis, and reporting activities should be useful tools for LSS staff and tariff lawyers, not additional bureaucratic burdens that they regard as a waste of time and energy.
- **Keep it simple** — An RBM system can be costly to design and implement. LSS should avoid developing an elaborate process that places excessive demands upon staff capacity, fosters the perception that LSS is investing in administration rather than service delivery, or alienates tariff lawyers by imposing onerous requirements for collecting and reporting performance information.
- **Encourage a culture shift** — Over time, to maintain the focus on continuous improvement, RBM is likely to require a change in thinking within both the LSS departments responsible for the tariff system and the tariff bar.
- **Find new ways to evaluate** — In the present tariff system, LSS has few available mechanisms to obtain performance data from service providers, and attempts to increase reporting requirements for lawyers may meet

resistance due to the additional administrative burden. LSS will need to find cost-effective ways to expand its ability to collect performance information beyond the principal contact points in the current system (intake, authorization, and billing). This may involve changes to intake procedures; expansion of survey activities for clients, lawyers, and intermediaries; refinement of billing forms; and applied research into samples of legal aid cases to determine patterns of case progression and outcomes, etc.

- **Prioritize tariff lawyer recruitment and retention** — The dramatic decline in the number of lawyers willing to take legal aid cases was a major impetus for the tariff review. In adopting RBM to guide the tariff renewal process, LSS will have a framework for developing and coordinating its strategies for lawyer recruitment and retention, which may include a mentoring program, expanded opportunities for junior counsel appointments, and outreach activities targeting law schools and law firms.

Table 8 offers examples of the types of objectives, performance measures, and performance targets that an RBM framework might involve.

Table 8: Sample objectives and performance measures

	Objective	Strategy	Performance measure	Performance target
1	Attract private bar lawyers	Recruit and mentor new lawyers	Number of requests for vendor number/percentage of referrals issued to junior lawyers	10% above baseline
2	Promote efficiency and effectiveness in the justice system	Tariff items to promote efficient litigation	Trial days saved via bonus for reducing trial length	10% above baseline
3	Ensure sustainable tariff system	Provide fair compensation	Tariff rate as a percentage of market	75% of market rate

Recommendation 2: Adopt a principled approach to tariff compensation

We recommend that LSS —

- adopt as a guiding principle for tariff compensation the following — "The society will maintain tariffs that provide fair and reasonable compensation to enable lawyers to recover overhead costs and obtain an appropriate level of fees for services rendered";
- retain the block fee tariff for criminal law services, and the hourly tariffs for family, child protection, and immigration law services;
- convert both the block fee and hourly tariffs to a three-tiered system with differential rates based on years of call or experience using the following levels —

  - under 4 years' experience
  - 4 – 10 years' experience
  - 10 or more years' experience
- use different methods to improve compensation for the hourly and block fee tariffs. For the hourly tariffs, LSS should improve compensation by increasing the tariff rate (including experience increases) as well as the hourly allowances permitted under the respective tariffs;
- use a combination of structural changes and increased block fees (including experience increases) to improve compensation in the criminal tariff;

We believe a principled approach to tariff compensation is appropriate because it would —

- make the compensation principle that the board endorsed for phase 2 of the tariff review a guiding principle for the tariff system;
- set a clear objective for tariff renewal, consistent with the overall RBM approach;
- retain the basic structures of the existing tariffs in accordance with the preferences of most tariff lawyers;
- incorporate experience increases that reflect prevailing market conditions; and
- improve compensation through a mix of changes that are tailored to the requirements of the hourly and block fee tariffs.

Setting an appropriate target for tariff rates

With respect to the appropriate level of tariff compensation, we recommend that LSS —

- adopt a target for tariff compensation such as the 75% rule proposed in the *Hughes Report,* which recommended that the tariff rate should on average yield 75% of the compensation tariff lawyers would receive from a private client of modest means;
- aim to achieve the chosen target through a combination of incremental increases to hourly rates and block fees (including experience increases) and structural changes to the tariffs, so that overall compensation levels approximate the selected target; and
- adopt a five-year plan to meet the compensation target in stages, and use the RBM framework to assess economic trends and ensure that the target keeps pace with inflation and relevant market conditions during the transition period.

Table 9 sets out the experience levels, hourly rates, percentage increases, and projected costs using the 75% rule as a target for tariff compensation.

Table 9: Recommended experience levels, target rates, and projected costs

Lawyer years of experience	Proposed rate ($)	% over $80	Market rate ($)	% of market rate
Level 1 (under 4 years)	94.00	17.25	125.00	75
Level 2 (4 – 10 years)	113.00	41.25	150.00	75
Level 3 (10 or more years)	135.00	68.75	180.00	75

Five-year implementation plan	Year 1 ($)	Year 2 ($)	Year 3 ($)	Year 4 ($)	Year 5 ($)
Estimated range of cumulative annual costs	2.471 million	6.265 million	10.417 million	14.755 million	19.253 million

We believe that the 75% rule represents a reasonable target that would —

- satisfy the guiding principle the board set for phase 2, namely, that the tariffs should provide fair and reasonable compensation to enable recovery of overhead costs plus an appropriate level of income;
- be consistent with the generally accepted premise that lawyer overhead costs average about 50% of gross revenues, a level confirmed by the tariff lawyer compensation survey and other independent assessments; and
- reflect the partnership between the private bar, LSS, and the government in sharing the cost of legal services for low-income individuals.

Given the disparity between current tariff rates and private market rates for clients of modest means, the compensation expert, WCBC, recognized that selecting an appropriate range was difficult. WCBC considered the 75% rule to be a reasonable method, and recommended that LSS adopt the above framework for a principled rate in order to meet the objectives of attracting and retaining lawyers to perform legal aid work. Given the realities of LSS funding, however, it is appropriate to identify alternate targets that are below 75% of market rates, but still enable recovery of overhead costs plus a reasonable level of income.

Table 10 sets out the hourly rates and projected costs for each tariff using alternate targets ranging from 60% to 75% of average market rates.[45]

[45] The projected costs for each tariff are based on percentage increases over current tariff costs and do not include adjustments for inflation (the five-year cost figures in Table 9 include an increase of 2% annually for expected inflation).

Table 10: Alternate percentage targets — Rates and estimated costs by area of law ($ millions)

% of market	Rates ($)	Total ($)	Criminal ($)	Family ($)	Child protection ($)	Immigration ($)
75	94 – 113 – 135	16.6	11.79	2.7	1.8	0.25
70	88 – 105 – 126	13.5	9.65	2.18	1.46	0.20
65	81 – 98 – 117	10.5	7.6	1.7	1.1	0.15
60	75 – 90 – 108	7.4	5.4	1.1	0.8	0.10

We consider that the proposed rate changes would —

- address the fundamental problem raised by tariff lawyers and other stakeholders during the tariff review, most of whom identified improving tariff compensation as the single most important step to attract more lawyers, including younger lawyers, to legal aid work;
- establish greater equity vis-à-vis the private market and publicly funded justice system comparator groups;
- improve the quality of service to clients by encouraging experienced lawyers to take more legal aid cases;
- reduce quality-of-service problems by relieving some of the financial pressure on tariff lawyers, thereby limiting the need to cut corners or carry unreasonable caseloads;
- confirm that LSS has listened to the concerns lawyers expressed during the tariff review, restore tariff lawyers' trust in LSS, and demonstrate that LSS values the tariff bar's contribution as a partner in supporting access to justice for low-income people in BC;
- recognize that current tariff rates are inadequate even to cover basic overhead costs for many tariff lawyers;
- rely on the best available data regarding private market conditions;
- provide fair payment for services rendered and recognize the professional training, experience, skill, and expertise that tariff lawyers possess — the corollary of "value for money" is "money for value"; and
- remedy the erosion of tariff compensation in real terms after 14 years without an increase.

Recommendation 3: Adjust the tariff structures to remedy problems, improve compensation, and enhance results

We recommend that LSS implement structural changes to the tariffs to remedy existing problems and allocate funding to encourage quality service. Within the RBM framework, LSS can use its compensation strategy to support a results-based tariff system that meets clients' needs, promotes systemic efficiency, and ensures tariff sustainability. The working group has identified

a range of structural changes that reflect a results-based approach to compensation, some of which are described below.

In the longer term, once LSS has developed effective methods for performance measurement, it may incorporate rewards and incentives for individual lawyers who achieve good results, but the immediate priority should be to address existing problems and promote better results through structural change that will affect all tariff lawyers.

All tariffs

Expanded extra fees process

LSS should implement an expanded extra fees process to compensate lawyers for the extra preparation time required for complex cases and special needs clients.

The expanded extra fees process would introduce a standardized system for *advance* approval of discretionary fee increases for prescribed categories of complex cases or special needs clients without requiring counsel to submit a request. In qualifying cases, counsel could presumptively claim an extra percentage of total fees or additional hours according to levels of complexity, which would be set out in the tariff guide.

The expanded extra fees process would complement the existing system of extra fees, which is based on post-disposition authorization of additional funding in meritorious cases.

For example, LSS might allow automatic authorization for extra fees in cases with one or more of the following features —

- clients with mental health problems;
- clients with mental or physical disabilities that affect their ability to participate in the court process;
- clients who require the assistance of an interpreter;
- cases that require review of voluminous documents;
- cases involving expert witnesses;
- family cases where the client is residing in a transition house (as an indicator of domestic violence); and
- criminal cases where the information or indictment contains multiple counts involving discrete transactions and/or multiple victims.

An expanded extra fees process would —

- improve services to clients because lawyers will spend more time on cases when needed;
- save administrative time for lawyers and LSS staff;

- respond to the real needs of each case and mitigate the losses that block fees or capped hours otherwise impose in time-consuming cases;
- offer a level of certainty to lawyers through advance authorization;
- improve trust between LSS and the tariff bar;
- provide budget flexibility, since LSS could reduce or increase the percentages or hours as needed; and
- encourage lawyers to take difficult, complex cases and clients with special needs.

Administration fee

LSS should introduce a flat fee for administration to compensate for lawyer and support staff time spent on file opening, routine correspondence, and administrative tasks, as well as incidental overhead expenses. An administration fee would be simple to administer, and would recognize that every file involves costs for overhead and routine administration time that are not otherwise recoverable.

Disbursement fee

LSS should introduce an optional fee that lawyers could claim to cover low-cost disbursements (e.g., receiving faxes, photocopies, etc.) without requiring tedious and time-consuming itemization of minor expenses. Lawyers would retain the option to track their disbursements and submit itemized claims in excess of the flat fee. LSS might face reduced costs if lawyers opt for the flat disbursement fee as a simple alternative to tracking small expenses that might otherwise exceed the flat fee.

Opinion letters for appeal requests

We recommend that LSS add a new item to each of the criminal, child protection, family, and immigration tariffs to permit trial counsel to provide an opinion on the merits of a case when clients are seeking authorization to appeal. This new tariff item would provide up to two hours for preparing such an opinion letter, either when counsel submits an opinion on the client's behalf requesting an appeal after the trial or hearing where the appeal has probable merit, or if LSS requests an opinion from counsel.

Criminal tariff

Early preparation fee

LSS should create an additional item in the criminal tariff to encourage early work that will enhance the quality of service to clients. This fee would cover initial file review, client interviews, disclosure requests, negotiation with Crown counsel, preliminary legal research, and early appearances.

Adding an early preparation fee to the criminal tariff assumes that early preparation by counsel is intrinsically beneficial and ought to be encouraged, even if it does not lead directly to early resolution. To claim this fee, lawyers would certify on the billing form that they took specific steps prior to setting a trial date, such as —

- reviewing particulars,
- conducting a thorough interview of the client,
- sending a disclosure letter to Crown counsel,
- conducting initial legal research, and
- attempting to negotiate with Crown counsel.

The early preparation fee would be available if the matter was resolved at any time up to trial commencement, provided the lawyer took those steps before setting a trial date. If the case went to trial, counsel would not receive the early preparation fee because they would already be compensated for early preparation and appearances through the block fee for the first two half days of trial. In this sense, the early preparation fee serves as a mechanism for "front-end loading" of funding.

An early preparation fee would —

- promote better quality of service to clients, and may reduce client complaints;
- communicate clear quality assurance expectations to lawyers and emphasize the factors LSS aims to reward, such as early file review and negotiations with Crown counsel;
- support the objectives of the criminal case flow management rules, and thus improve justice system efficiency and co-ordination between LSS and other justice system participants;
- increase the likelihood that the defence and the prosecutor could achieve early resolution or narrow the issues in the case, thus reducing costs for LSS and the justice system;
- allow for relatively simple administration by LSS and tariff lawyers, since lawyers would certify steps taken on their e-billing forms and thus avoid the need for additional case management;
- reduce lawyer dissatisfaction by compensating the bar for the early preparation work it already performs, and reduce the disparity between block fees for non-trial resolution and trials; and
- counter the perception that the tariff encourages lawyers to proceed to trial.

Additional funding for resolution of multiple charges at a single court appearance

LSS should provide additional funding for resolution of multiple charges at a single court appearance. The improved funding would —

- recognize that in criminal cases good practice often involves consolidating outstanding charges to improve the prospects for a more favourable global disposition than if the charges are resolved separately;
- reduce the justice system costs associated with repeated appearances on different files on different days (often in different courts);
- liberalize a restriction in the current tariff that lawyers regard as an unfair penalty for providing efficient and effective service;
- recognize the additional work often involved in dealing with multiple charges, especially if the client is waiving in charges from other jurisdictions; and
- enable LSS to define the circumstances in which the additional fees would be available and adopt appropriate restrictions to avoid unreasonable billing practices.

Tariff changes to promote efficient conduct of trials

LSS should pay lawyers bonuses for efficiency if they complete a trial in less time than was originally scheduled. The incentive would be available whether or not a case was subject to SCAP —

- For non-SCAP cases (i.e., cases where a trial is scheduled for less than five days), the incentives would apply to trials between two and five days in length. LSS could allow lawyers to bill a reduced block fee bonus for each day or half day by which the trial has been shortened with reference to the allocated trial time.
- For SCAP cases, LSS would pay the lawyer a bonus based on a percentage of the cost savings (in fees) resulting from a trial that is completed in less time than originally scheduled.

A bonus system for shorter trials would —

- address in part the perception that the tariff encourages lawyers to extend trials to maximize compensation;
- reward lawyers for doing good counsel work, for example, by narrowing the issues in the case and making admissions;
- offset the income lost when lawyers lose trial dates they had previously set aside; and
- reduce overall justice system costs.

Expansion of SCAP to long category II and III trials (with simplified case management)

LSS should modify its policies to make SCAP mandatory for long cases, regardless of offence category. Currently, SCAP is mandatory only for category IV offences that will exceed the 10 half-days threshold. In cases involving lower category offences, lawyers may opt in to SCAP or remain on the block fee tariff.

To limit LSS case management costs and reduce the administrative burden on tariff lawyers, LSS could implement a more streamlined process than it applies to category IV cases, one that forgoes a formal budget meeting and relies instead on submission of a standard form. LSS could evaluate whether to maintain block fees for these lower category SCAP cases or convert them to an hourly tariff.

Expanding SCAP to all long cases would —

- enable LSS to monitor cost and service quality in higher-cost cases;
- give counsel certainty of payment for preparation even where a trial collapse occurs; and
- offer a streamlined case management process that would limit the administrative burden for LSS staff and tariff lawyers.

Revised offence categories

LSS should revise the offence categories for certain offences to match funding more appropriately to the actual time requirements of typical cases. In phase 1, a substantial number of lawyers suggested that the current categorization of some offences did not reflect their seriousness, complexity, or time requirements. Revising the offence categories would —

- provide fair compensation for the actual work involved in a case;
- respond to criticism from tariff lawyers in phase 1 about the outmoded classification of certain offences;
- encourage lawyers to accept referrals in complex cases;
- be easy to administer, and simpler than moving to a more complex system of multiple offence categories like that used in the United Kingdom; and
- address the problem that current category I compensation, even for a simple trial, is inadequate and in most cases likely fails to cover the time required for basic intake, preparation, and court appearances.

New tariff item for interviews of in-custody clients

LSS should allow lawyers to claim a block fee once per referral for visits to clients in custody to compensate for the time and inconvenience a jail visit entails.

By definition, an in-custody client cannot visit a lawyer's office for an interview. Since the provincial government has centralized its detention facilities, clients are often held in jails that are greater distances from lawyers' offices and courthouses, thus increasing out-of-office time. The extra time and lack of compensation may encourage lawyers to postpone meetings or conduct only brief interviews in conjunction with court appearances. This limits the lawyer's ability to prepare the case properly at an early stage.

Adding a tariff item for interviewing in-custody clients would —

- encourage lawyers to conduct thorough interviews with in-custody clients at an early stage of the case, thereby improving service quality and efficient handling of the case;
- recognize that interviewing in-custody clients involves substantial time requirements, including travel and waiting time;
- remove a deficiency in the current tariff that is an irritant to many lawyers; and
- help reduce the frequency of client complaints.

Family tariff

LSS should refrain from making structural changes to the family tariff until the provincial government has considered the recommendations of the Family Justice Reform Working Group and determined the future direction of family justice reform. The working group has developed a range of options for improving the family justice system, including a unified family court and renewed emphasis on alternative dispute resolution to promote settlement and avoid litigation. If the provincial government adopts its recommendations, it will have significant implications for structural change in the family justice system.

It is important to emphasize that, throughout the tariff review, LSS has heard a clear message from lawyers, justice system participants, and community organizations that the restricted coverage and limited hours available under the current family tariff are a fundamental problem. Many family lawyers have either reduced or eliminated legal aid work because they view the tariffs as wholly inadequate. The MOU with the attorney general imposes real limits on changes to family law coverage. In 2005, however, LSS received additional funding that has enabled it to expand family law services to partially address these concerns.

Child protection tariff

The Family Justice Reform Working Group has developed reform proposals that, if accepted, will affect child protection cases. As with the family tariff, it would be premature to propose any significant structural changes to the child

protection tariff pending the implementation of expected reforms to the family justice system.

In March 2005, LSS and the Ministry of Children and Family Development (MCFD) co-sponsored a continuing legal education conference on child protection law and practice that generated a number of proposals for operational changes to the existing system, most of which concerned increased support for alternative dispute resolution. Until the government has clarified its plans for reform in this area, LSS should focus on making incremental adjustments to the current child protection tariff based on the feedback it received at the conference.

Preparation for FRA applications that are required to resolve CFCSA referrals

We recommend that LSS add an item to the CFCSA tariff for cases that require FRA or divorce applications in order to resolve the CFCSA proceeding. This would permit counsel to respond to an opposing party's application about the children or to initiate an application in order to resolve a CFCSA matter with an additional seven hours of preparation to deal with the additional application(s) without prior authorization.

Immigration tariff

LSS should refrain from introducing any structural changes to the immigration tariff.

Over the past three years, LSS has dramatically restructured the immigration tariff to cope with reduced and uncertain funding. The current tariff structure is designed to allocate very limited funding to the most essential services in priority cases. LSS will continue to monitor the tariff to identify opportunities for operational improvements, but until the society receives a long-term commitment to fund immigration services, it should not invest substantial time and resources to develop structural changes in this area. Once long-term funding is secured, LSS could develop structural reforms within the proposed RBM framework.

Recommendation 4: Maintain a strategic approach to contracting

We recommend that LSS —

- continue with existing contracting initiatives in areas such as mental health law, prison law, duty counsel, circuit courts, and the Brydges advice line;
- consider selective use of contracting in other service areas where appropriate, such as the new family initiatives that LSS is developing with the additional Ministry funding it received in 2005; and

- refrain from extending contracting to the tariff system as a whole.

The existing tariff system is a contracting model in which contractual relations are defined by the *Guide to Legal Aid Tariffs,* including the "General Terms and Conditions," and the individual referral. It does not, however, involve competitive bidding or intensive monitoring of lawyers. We consider that the current approach to contracting —

- employs competitive bidding where it is cost-effective to do so — this provides both LSS and the lawyer with greater predictability of costs, ensures that services are available, and allows enhanced monitoring of the quality of service;
- avoids the high administrative costs LSS would incur using system-wide contracting, including building the necessary capacity to conduct a large-scale bidding process, manage contracts, and monitor and evaluate lawyers;
- limits bureaucratic processes for lawyers, thereby ensuring that sole practitioners and small-firm lawyers continue to participate; and
- permits a wider, albeit qualified, choice of counsel for clients.

3
A Short History of the Tariff System

I. Timeline

In this chapter, we offer a brief chronology of the development of the legal aid tariff in BC from its beginnings up to the present day.

Before 1964

- Legal aid in BC began as volunteer work by lawyers and local bar associations, performed as part of their professional obligations.

1964

- Lawyers conducting criminal cases received a daily honorarium of $30 (minor indictable matters) or $50 (serious indictable matters), which the Law Society negotiated with the attorney general.[46]

1970

- The Law Society established the Legal Aid Society to administer the legal aid program. The Law Foundation, using the interest from lawyers' trust accounts, paid for operating costs, while the provincial government paid directly for the tariff.

1972

- The federal Department of Justice agreed to contribute 50% of criminal legal aid costs in a federal-provincial cost-sharing agreement.

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[46] David Tupper, "The Legal Services Society: Its History and Present Function" (1981) 39 *Advocate* 483 at 484.

1973

- The Legal Aid Society established a tariff for some family law matters.

1974

- Peter Leask wrote a report that recommended a new and more decentralized legal aid program to provide a wider range of services. He estimated that the legal aid tariffs did not cover three-quarters of the legal problems poor people faced.
- The tariff for criminal matters was increased by 25%.

1975

- The provincial government established the Legal Services Commission, a Crown corporation, to administer legal aid funding and to plan the delivery of legal services to low-income people. The Legal Aid Society was required to apply to the commission for funds.

1979

- The Legal Aid Society and the Legal Services Commission merged under the *Legal Services Society Act.* The new Legal Services Society inherited the existing criminal and family tariffs, both of which used block fees.
- On January 1, LSS increased the fees for criminal and family law (which then included child protection matters) by 8%.

1980

- On June 1, LSS increased the criminal and family tariffs by 8%.
- The 1980 tariff paid extra fees for cases that were resolved without proceeding to trial at an hourly rate of $25. It also offered lawyers a $30 fee for interviewing in-custody clients to discover whether there were good grounds for appeals and to provide LSS with reports. The tariff also provided a $25 fee per visit to interview in-custody clients.

1981

- LSS published revised tariffs after taking over responsibility for paying tariff accounts from the provincial government. The tariff rate increased by 38%.[47] The new family tariff introduced a number of hourly tariff items with capped hours at an hourly rate of $40. Otherwise, criminal and family law matters (including child protection) generally paid block fees.
- The 1981 tariff divided criminal matters into “Most offences” and “Item 6 offences” (murder, attempted murder, rape, criminal negligence causing

[47] Before 1981, the tariffs consisted merely of instructions on the billing forms, and lawyers submitted their accounts to the government for processing and payment.

death, armed robbery, importing narcotics, and conspiracy to commit an offence). The tariff also provided an $80 fee for criminal matters where there were more than three court appearances on separate dates not claimed under other tariff items. In addition, there was a fee for settlement without trial or premature termination fee for civil (family) cases at $40 per hour up to a maximum of $280. If a lawyer claimed that item, no other tariff item could be claimed.

1982

- The government instituted an economic restraint program aimed at reducing all government expenditures. The society cut services and programs, implementing restrictions on family and criminal coverage and reducing the tariffs by 12.5% in October (so that the effective hourly rate dropped to $35). Even with these service cuts, the society faced an unmanageable deficit. As lawyers' bills arrived in late 1982 and 1983, the society struggled to cope with the impact of the tariff increase of 1981 and increased demand.
- A public campaign and the establishment of a Legal Aid Liaison Committee maintained pressure on the government to restore funding.

1983

- In *Mountain v. Legal Services Society,*[48] the BC Court of Appeal confirmed an order that the society was required to make legal services available when a person's liberty, safety, health, or livelihood were in real jeopardy.

1984

- The government advised LSS that its funding would be reduced to $12 million. The *Mountain* decision helped forestall that reduction, however.
- The Justice Department's *Evaluation of Legal Aid* defined the society's services as essential. It emphasized that services had to be expanded to meet minimum needs.
- The Task Force on Public Legal Services released its report (the *Hughes Report*), unanimously affirming the Justice Department's finding that the society's services were essential. It also found that the level of coverage for every type of urgent legal problem was inadequate to ensure that minimum needs were met. The task force recommended introducing a more realistic tariff, noting that the tariff level had increased by only 40% since 1973 while inflation had increased by 146.5%. It recommended as a long-term goal that tariff fees be set at 75% of the fees an average lawyer would bill a private client of modest means. The task force based the 75%

[48] (1983), 9 C.C.C. (3d) 300 at 306 (B.C.C.A.).

figure on recovery of lawyers' overhead costs, which were generally 50% of private fees, plus one-half of the balance of fees. The task force recognized that achieving the 75% rule would require an increase "well in excess" of 100% of the existing tariff. As a medium-term goal, it recommended a 70% increase in the tariffs as soon as practicable within 18 months. The task force also recommended that LSS, in consultation with the attorney general, the Law Society, and the Canadian Bar Association, develop criteria to assess compensation levels and undertake annual tariff reviews. It concluded that the judicare system and block fees should be retained, but advised LSS to allow hourly billing for family law cases that required a great deal of preparation outside court.[49]

1985

- The society began administering a human rights tariff for the Human Rights Council.

1986

- A special grant from the Law Foundation restored the tariff to its 1981 level, and LSS removed the 12.5% tariff reduction on January 1. LSS published new tariff guides establishing the same rates as in September 1981.

1987

- LSS increased the criminal and family tariffs by 25%, effective August 1.
- On November 1, the society implemented a new criminal tariff that incorporated the 25% increase. The new tariff was the result of extensive discussions between bar representatives (appointed by the Canadian Bar Association, BC Branch) and LSS that aimed to produce a better tariff costing 25% more than the previous published tariff. If the new tariff ended up costing less than the old tariff plus 25%, the tariff would be adjusted upward to return savings to counsel (conversely, the tariff would be adjusted downward if it cost more than the old tariff plus 25%). The new structure consisted of a simplified block tariff with fewer types of distinctions. As a result of the restructured tariff and the 25% increase, LSS indicated that it would rarely grant extra fees.
- The new criminal tariff was divided into "Most offences" and "Major offences" (murder, attempted murder, aggravated sexual assault, criminal negligence causing death, armed robbery, importing narcotics, and all conspiracies). The tariff still permitted higher fees for two or more sets of facts for guilty pleas and sentencing (so-called "multiple sets of facts"), and the tariff fee per date for visits to in-custody clients (visits in local

[49] *Hughes Report* at 71 – 85.

lock-ups were billable only where counsel had to travel at least 16 kilometres each way).

1988

- On January 1, LSS added 65% automatically to family fees in lieu of the 25% increase of August 1, 1987, for an effective compound increase of 32%.
- The Justice Reform Committee report *Access to Justice* urged the government to provide funding as soon as practicable to implement the *Hughes Report* recommendations.[50]
- On April 1, LSS implemented a new family tariff incorporating the 65% increase that included fees for preparation. The new family tariff changed substantially from a block to an hourly tariff. The hourly rate for family law was $50 and the tariff allocated four hours for general preparation.
- LSS increased the tariff by 10% in October and increased the general preparation allocation to six hours.
- Despite these improvements, the society recognized that "the level of the tariff is way below any normal fees … and this poses real problems in meeting one's overhead and other expenses."[51]

1989

- LSS increased the tariffs by 5% effective October 1. The new criminal tariff included a collapse fee to compensate counsel for fees lost when a case did not proceed as expected on the trial date, provided the trial was set for a minimum of five days and the reasons for collapse were beyond counsel's control.
- The society expanded family law coverage, and extended duty counsel to all criminal courts. The allocation for general preparation for family law cases was increased to seven hours.

1990

- LSS established contracts with the Community Legal Assistance Society to provide mental health legal aid services.
- LSS established an immigration tariff following the BC Supreme Court's decision in *Gonzalez-Davi v. Legal Services Society,*[52] which required the society to provide counsel for individuals facing immigration proceedings that could result in deportation.

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[50] Justice Reform Committee, *Access to Justice, supra* note 13.
[51] LSS Board Chair M. McEwan, *Legal Aid Bar,* December 1990.
[52] (1989) 42 B.C.L.R. 232 (B.C.S.C.), aff'd (1991), 55 B.C.L.R. (2d) 236 (B.C.C.A.).

- In *R. v. Brydges,*[53] the Supreme Court of Canada ruled that police must promptly and properly inform detainees about the availability of legal aid services in the area and allow them an opportunity to access legal aid where it exists. At the request of the attorney general, LSS created a toll-free province-wide telephone service (the *Brydges* project) to ensure that people had prompt access to legal aid advice.
- The federal government froze its contribution level to criminal legal aid and capped civil legal aid.

1991

- On January 1, LSS increased the tariffs by 6%. It also increased the allocation for general preparation in the family tariff to eight hours.
- LSS extended services to individuals who were detained under the *Mental Health Act* or faced fitness hearings or reviews under the *Criminal Code.*
- In April, tariff lawyers temporarily withdrew services to protest low tariff compensation. *Update,* the legal aid bar newsletter, observed that a chronically low tariff was leading to a breakdown in services. In particular, it attributed the society's difficulties in placing family cases to poor remuneration. *Update* stated that the areas of greatest need were still those outlined in the *Hughes Report,* which recommended the introduction of a reasonable tariff of fees. It also noted that Statistics Canada figures released in February demonstrated that BC spent less per capita on legal aid than Ontario, Quebec, Manitoba, the Northwest Territories, and the Yukon, and was below the national average despite its very high criminal and family breakdown rates.[54]
- The withdrawal of services prompted a dramatic 100% increase in tariff funding, including an increase in the hourly rate to $80. LSS increased the allocation for general preparation for family cases to 16 hours. These increases followed negotiations between the Legal Aid Liaison Committee, the attorney general, the Law Foundation, and the Legal Services Society. The government provided an additional $6 million for the fiscal year, half of the estimated cost increase for 1991/1992, and informed LSS that it planned to review models of delivering legal services. A one-time grant of $6 million from the Law Foundation supported the 100% increase in the legal aid tariff for fiscal year 1991/1992.
- In September, the LSS board retained Deloitte & Touche to review the society's management structure.

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[53] [1990] 1 S.C.R. 190.
[54] *Update,* No. 2, May 1991.

- In November, LSS received a report prepared by the Ministry of Attorney General (*Legal Aid Models: A Comparison of Judicare and Staff Systems*), which favoured a public defender system.

1992

- LSS implemented a new criminal tariff, effective January 1, that was divided into four categories of offences with different levels of payment applicable to each category. The offences were grouped according to their relative similarity in terms of the consequence, seriousness, and amount of work required.
- The *Review of Legal Aid Services in British Columbia* (the *Agg Report*) stated that "there should be a reasonable, permanent relationship between the legal aid tariff, Crown Counsel wage scales, Legal Services staff lawyer scales, contract counsel rates, and so on." Furthermore, the government should "develop a comprehensive framework for publicly-funded lawyer compensation and the Legal Services Society should be included in that process." The report identified some practical difficulties in applying the *Hughes Report*'s 75% rule, and suggested, based on anecdotal accounts, that the criminal tariff was at least competitive with market rates, while the family tariff lagged behind. It proposed that in future tariff negotiations, care would be required "to ensure a tariff that is reasonably competitive and sufficient to maintain an adequate pool of lawyers to do the work."[55]
- Following receipt of the *Agg Report,* the LSS board affirmed that the tariff should provide fair and equal compensation for all services provided by the private bar. The board submitted to the government a budget for its 1993/1994 funding that included provision for 70 teams of staff lawyers and support staff. The budget submission did not signify board approval of a staff model, but rather was simply a way of ensuring that the budget would cover any decisions that might be made. The board indicated its approval "in principle" for the *Agg* recommendations, but intended to review them at greater length. It approved the implementation of six "pilot teams" in New Westminster, Abbotsford, and Burnaby. The board invited submissions from the Law Society, the Association of Legal Aid Lawyers, and the Canadian Bar Association to assist in its review of the mixed staff–private bar model.
- In December, LSS implemented a 15% tariff reduction to the criminal tariff, and, with input from the Association of Legal Aid Lawyers, designed a new tariff to effect the reduction.
- Deloitte & Touche made numerous recommendations for restructuring the management of the society. LSS recruited a new management team,

[55] Agg, *Review of Legal Aid Services in British Columbia, supra* note 15 at 122 – 124.

including a new executive director, and established its Audit and Investigations Department.

1993

- On April 1, LSS increased the family tariff by 10% and the allocation for general preparation for family law to 26 hours.
- The board hired 11 poverty lawyers and 10 family lawyers for various locations in the province that lacked sufficient lawyers to take referrals. The board also approved expanding the "pilot" office staff by 6 additional lawyers. LSS held public consultation on community needs and service delivery in 55 BC communities over 10 months.
- On October 1, LSS reduced all criminal tariff fees by 4.3%, all family tariff fees by 1%, and the immigration tariff by 3.2%. It achieved a further 1% reduction in criminal fees by reducing the amount paid for drinking and driving offences. In December, the board directed staff to undertake consultations with "stakeholders," including the private bar, to obtain their views on the implementation of a mixed model of service delivery that used staff lawyers along with the private bar.

1994

- Deliberations on implementing a mixed model of service delivery continued throughout the year. The private bar withdrew services in July, and LSS and the bar resolved the dispute in September with an agreement on the number of staff lawyers to be deployed (discussions continued until the end of December on the precise numbers and locations for staff). During the year, the board addressed the issue of exactly what services the society should be delivering. LSS widely circulated a discussion paper about "core services" to staff and community groups, inviting their input. A board subcommittee reviewed the feedback and proposed resolutions to the full board on core services policies. LSS also arranged for an independent review of the mixed-model delivery system.
- LSS introduced holdbacks of 22.5% on July 1 to manage its cash flow. The board determined that it would repay a portion of the holdbacks if its year-end finances permitted. On August 1, LSS reduced the holdback to 15% for the criminal tariff, 10% for the family tariff, and 12% for the immigration tariff. On September 1, it reduced the holdback to 10% for the criminal and duty counsel tariffs. LSS designed a new criminal tariff to yield a 12.5% saving in total criminal tariff fees, in addition to the savings from the 10% holdback.
- The 1994 criminal tariff guide stated the three major objectives of the criminal tariff —
  - to reasonably remunerate the members of the bar providing services;

  - ♦ to be internally consistent so that payments to counsel were proportionate to the work involved; and
  - ♦ to allow LSS to efficiently process accounts from the bar.
- The new criminal tariff eliminated separate billings for visits to in-custody clients and billing for multiple sets of facts. It allowed, however, a travel fee when counsel travelled in excess of 160 kilometres (round trip) to interview in-custody clients. LSS also reduced general preparation in the family tariff to eight hours.
- In the fall, LSS established the Policy, Planning, and Information Technology Department to provide internal advice and support to the LSS executive and board. The department's other responsibilities included corporate and business planning, policy development and research, information technology, and program evaluation. LSS retained the firm of Chris Green and Associates to review the society's organizational structure and make recommendations, since the Deloitte & Touche study did not resolve all the issues concerning the society's management structure.
- On October 1, LSS reduced the holdback for the family tariff to 5%.
- In October, LSS implemented the Family Case Management Program (FCMP) to direct resources to those cases likely to result in an immediate tangible benefit to the client or his or her family. At intake, LSS staff determined whether or not the case was an emergency, and either referred it to counsel or determined that the client could resolve the problem independently or with the assistance of alternative services. If no such services were available, the intake worker referred the client to a lawyer for non-emergency services. If counsel could not resolve the case within the limits of the initial referral, both emergency and non-emergency referrals typically authorized a fee for an opinion letter about what additional services were necessary to resolve the case. A case review lawyer examined the file to determine whether a reasonable person would continue to retain a lawyer to pursue the matter, and, when appropriate, granted authorization for further "approved services."
- LSS restructured the family tariff to support FCMP, and divided it into emergency services, non-emergency services, and approved services. The 1994 *Guide to Legal Aid Tariffs* declared that legal aid family clients deserved proper representation, which LSS sought to ensure by providing adequate preparation time. The society also introduced a separate tariff for representation in child protection proceedings: the *Family and Child Service Act* (FCSA) Tariff. The Family Case Management Program did not apply to FCSA cases.

1995

- The government amended the *Legal Services Society Act* to require that expenditures not exceed revenues in any fiscal year without prior government approval.
- In April, LSS adopted the mixed-model system, in which both private bar and staff lawyers delivered legal aid services.
- For the 1994/1995 fiscal year, LSS paid 100% of the immigration holdback.

1996

- The Legal Aid Review Committee (LARC) examined the role of legal aid within a changing justice system, and recommended, with the board's approval, that LSS refrain from any budget and service cuts. LARC became the Policy and Planning Council (PPC), which had the following mandate —
  - ♦ to make recommendations concerning the delivery of legal aid services;
  - ♦ to provide policy and planning advice to the board; and
  - ♦ to liaise between the board and community groups, the legal profession, government, and the courts.
- In February, the board approved the mandate for PPC to consider alternatives for reducing the costs of legal aid service delivery without compromising the quality of existing services.
- In March, the board proposed a moratorium on legal aid referrals until LSS resolved its budget situation. To avoid service disruption, LSS and the ministry concluded a Memorandum of Understanding (MOU), which provided for interim funding, approval to carry a deficit, and continued operations at existing levels of service until the fall.
- LSS completed an interim evaluation of FCMP in October. It concluded that the program had succeeded in eliminating less meritorious cases, thereby reducing costs and improving efficiency.
- In December, BC's auditor general completed a management review of LSS.

1997

- In February, the government froze LSS funding at $81.5 million for 1996/1997 and 1997/1998, and instructed LSS to retire its accumulated deficit by 2001. Budget cuts affected coverage and eligibility for family and criminal matters and the tariff of fees paid to the private bar.

- LSS implemented pilot projects for contracting out blocks of criminal and youth cases. Facing strong private bar opposition, however, the board opted not to proceed with further contracting.
- In the absence of a special funding arrangement with the provincial government for large and costly criminal cases, the board approved "fee caps" to cope with the rising costs in such cases. Under this policy, LSS terminated legal aid coverage for a client in a criminal proceeding when the total fees for a case (excluding disbursements) reached $50,000.
- For the 1996/1997 fiscal year, LSS paid 32.3% of family law holdbacks. In May, the society increased the holdbacks to 15% for the criminal and duty counsel tariffs, 10% for the family tariff, and 17% for the immigration tariff.

1998

- The society's expenditures dropped to $85.3 million for 1997/1998, a decrease of $12.9 million from the previous fiscal year.
- On February 1, LSS implemented the fee caps policy.
- In April, private bar lawyers protested government underfunding of legal aid by withdrawing from duty counsel services and by refusing to accept new category I cases and new category II and III sexual assault cases.
- LSS completed a restructuring of head office management. The new structure consisted of four directors reporting to the chief executive officer, with different areas of responsibility: deputy executive director (responsible for the Client Services Department), director of the Judicial Appeals/Tariff Department, director of the Finance, Administration, and Human Resources Department, and director of the Information Technology/Management Information Services Department.
- For the 1997/1998 fiscal year, LSS paid 95.74% of the family law holdbacks.

1999

- On January 1, LSS increased the criminal appeals holdback from 5% to 15%, which made it the same as the criminal holdback.
- The society's expenditures dropped to $80.3 million for 1998/1999, a decrease of about $5 million from the previous year. The cumulative deficit declined to $10.3 million.
- LSS issued a revised and fully consolidated *Guide to Legal Aid Tariffs,* and implemented a new computerized billing system.
- In May 1999, LSS relaxed criminal coverage for applicants with mental or emotional disabilities.

- For the 1998/1999 fiscal year, LSS paid 5.43% of the criminal and 26.27% of the family law holdbacks. On July 1, the society reduced the holdback to 10% for criminal, criminal appeals, duty counsel, and immigration tariff fees. The holdbacks for family and immigration appeals remained at 5%.
- In *Winters v. Legal Services Society,*[56] the Supreme Court of Canada ruled that the former *Legal Services Society Act* required the society to provide legal services to prisoners facing disciplinary proceedings in prisons. It also confirmed that the society had the discretion to determine the level of services to provide based on the "reasonable person of average means" test.

2000

- LSS expanded family coverage to include variations of access and custody orders when an existing relationship between a parent and child was in jeopardy, and variations of Supreme Court orders for child maintenance when there had been a significant change in circumstances and the client was likely to benefit by at least $100 per month.
- For the 1999/2000 fiscal year, the society paid 26.30% of the criminal and duty counsel holdbacks.

2001

- LSS received $1.85 million on top of its core funding to resume duty counsel services, cover the tariff costs for arraignment court (under the Provincial Court's new case flow management rules), and undertake a duty counsel pilot project for out-of-custody duty counsel. In March, the provincial government announced a $6.8 million increase in the society's base budget for 2001/2002, avoiding the need for cuts in services.
- In June, LSS implemented the Strategic Case Assessment Program (SCAP) to manage large and expensive criminal cases. SCAP replaced block fees with an hourly tariff and an advance budgeting process.
- LSS began a three-year project to implement quality assurance measures to enhance the quality of tariff services to clients and identify and remedy substandard service.
- For the 2000/2001 fiscal year, LSS repaid 17.16% of the criminal and duty counsel holdbacks and 80.17% of the immigration holdbacks. It did not repay family tariff holdbacks, since that tariff exceeded its budget in 2001/2002.

[56] [1999] 3 S.C.R. 160.

2002

- In February, the provincial government imposed a budget cut of 38.8% over three years, which reduced LSS funding from $88.3 million in 2001/2002 to just under $54 million by 2004/2005. The government required that LSS absorb the costs of court-appointed counsel (i.e., *Rowbotham*) cases and large cases that exceeded the $50,000 fee cap. The government committed to funding immigration services only until March 31, 2004, eliminated poverty law representation, and restricted family law to child protection and emergency services in cases involving domestic violence. When the board of directors refused to approve a budget consistent with this level of funding, the attorney general appointed a trustee to replace the board. The attorney general required LSS to enter an MOU defining the terms under which it could provide legal aid services using provincial funding. LSS reduced staff by 68%, and replaced its province-wide network of 60 branches, community law offices, Aboriginal community law offices, and area directors with a new delivery model using 7 regional centres, 22 local agents, and a centralized call centre. The restructuring represented a marked shift from a mixed model of service delivery to a judicare system. LSS negotiated contracts with the West Coast Prison Justice Society to provide prison law services and with the Community Legal Assistance Society to continue providing mental health law services.
- On April 1, LSS increased the holdbacks for family and immigration appeals from 5% to 10%, which meant that holdbacks were 10% for all tariffs.
- In November, LSS completed a new strategic plan, which envisaged collaborating with other service providers to help low-income people participate in the justice system and to develop new ways to serve clients.
- In December, the provincial government approved a new three-year budget based on the reduced funding.

2003

- On March 5, LSS and the ministry finalized the first MOU, covering the period from April 1, 2002, to March 31, 2005. LSS allocated funding to specified criminal, family, child protection, immigration (only to March 31, 2004), mental health, and prison law matters, and exceptional matters falling within the society's mandate, such as *Rowbotham*s and large, complex cases.
- On March 31, LSS fully retired its accumulated deficit one year ahead of schedule.
- In a one-time initiative, LSS set aside limited funding for a maximum of 250 family cases where counsel believed the issues were amenable to mediation, all parties were willing to participate, and the process could be

completed by March 31, 2004. LSS designed a similar initiative for extended family services to provide up to 50 additional hours of service to approximately 500 clients at greatest risk if their trials could be completed by March 31, 2004.

- In June, the new board of directors took responsibility for operating LSS.
- In the summer, LSS completed an evaluation of SCAP, which concluded that the program was meeting its goals and was largely accepted by the private bar. LSS also launched E-billing province-wide.
- For the 2002/2003 fiscal year, LSS paid 75.68% of the holdbacks deducted for all tariffs.

2004

- LSS secured funding for limited refugee services until March 31, 2005, which aimed to help eligible clients initiate refugee claims and obtain representation at hearings in meritorious cases.
- LSS commenced the tariff review and participated in several committees examining justice reform issues, including the Supreme Court Self-Help Centre Advisory Committee, the Supreme Court Pro Bono Civil Duty Counsel Project, and the BC Justice Review Task Force's Family Justice Working Group.
- In the summer, LSS completed a tariff lawyer satisfaction survey. Sixty-eight percent of respondents indicated that they were satisfied with the level of support they received from the society.
- For the 2003/2004 fiscal year, LSS paid 51.04% of the holdbacks deducted for all tariffs.

2005

- In February, the attorney general approved a funding increase of $4.6 million to expand services for family clients who are most at risk, as well as continued funding for immigration services consistent with the level of service in the previous fiscal year.
- Effective March 1, LSS authorized lawyers to apply for an additional 40 hours for court attendance and preparation time for high-conflict family cases where there would be extreme prejudice to the client if additional services were refused. The society also increased the number of general preparation hours for emergency family law services from 8 to 14. In addition, LSS provided limited funding for clients who have no alternative to litigating in Supreme Court, as well as funding for Supreme and Provincial Court family duty counsel programs.
- On April 15, LSS reduced the holdback from 10% to 5%, making the effective tariff hourly rate $76.

- On June 24, LSS eliminated the holdback, making the published hourly tariff rate ($80) and block fees payable without deductions.

II. Select criminal tariff rates, 1974 – 2005

Tables 11 to 13 summarize the criminal tariff rates for selected services between 1974 and 2005. Table 5B-1 in Appendix 5B provides a more detailed history of criminal tariff rates in this period.

Table 11: Criminal tariff rates, 1974 – 1980

Date	Type of hearing	Provincial Court ($)	Jury trial ($)
April 1, 1974	Guilty plea	75	
	1st day of trial	150	200
January 1, 1979	Guilty plea	80	
	1st day of trial	165	215
June 1, 1980[57]	Guilty plea	85	
	1st day of trial	180	230

Table 12: Criminal tariff rates, 1981 – 1991

Date	Type of hearing	Most offences ($)	Major offences ($)
September 1, 1981[58]	Guilty plea	110/155[59]	110/155
	1st half day of trial	235	360
November 1, 1987	Guilty plea	150/225	250/375
	1st half day of trial	300/450[60]	500/750
October 1, 1988	Guilty plea	150/225	250/375
	1st half day of trial	300/450	500/750
January 1, 1991	Guilty plea	180/260	275/400
	1st half day of trial	300/450	500/750

[57] Up to this period, no additional fee was paid for multiple charges except through extra fees in rare cases.
[58] An additional fee for multiple charges was introduced this year.
[59] The second, higher rate for guilty pleas is for multiple charges for two or more sets of facts.
[60] The second, higher rate for trials is for multiple charges for two or more sets of facts.

Table 13: Criminal tariff rates, 1992 – 1994

Date	Type of hearing	Category I ($)	Category II ($)	Category III ($)	Category IV ($)
January 1, 1992[61]	Guilty plea	250/350	300/400	350/450	550/800
	1st half day of trial[62]	400	500	600	800
December 1, 1992	Guilty plea	180/260	220/300	260/340	400/600
	1st half day of trial	360	450	540	720
September 1, 1994[63]	Guilty plea & sentencing	200	300	300	500
	1st 2 half days of trial[64]	500	600	800	700 per half day

III. Select family tariff rates, 1974 – 2005

Tables 14 and 15 summarize family tariff rates for selected services between 1980 and 2005. For more detail regarding family tariff rates in this period, see Table 5B-2 in Appendix 5B.[65]

Table 14: Family tariff rates, 1980 – 1981

Date	Type of hearing	Hourly rate ($)	First day or half day of trial ($)
June 1, 1980	FRA[66]	25	180[67]
	Contested trials	25	350
	FCSA[68]	25	230
September 1, 1981	FRA	40	235[69]
	Contested trials	40	325
	FCSA	40	260

[61] LSS introduced offence categories in 1992.
[62] Fees were payable per information.
[63] The tariffs for the above services have remained unchanged until now, other than changes in the percentage holdback reductions. All the above tariff changes, except the reduction in holdbacks in 2005, were effective for dates of assignment on or after the dates shown above. (The date of assignment is the date the client is interviewed and a file is opened for the case.)
[64] The fee for subsequent half days after the first two half days of trial is $300 for category I, $400 for category II, and $500 for category III offences.
[65] All the above tariff changes were effective for dates of assignment on or after the dates shown above, except the change on February 8, 2005.
[66] *Family Relations Act.*
[67] The 1980 rates are for the first day of trial.
[68] *Family and Child Services Act.*
[69] The 1981 rates are for the first half day of trial.

Table 15: Family tariff rates, 1988 – 2005[70]

Date	Hourly rate ($)	General preparation hours available
April 1, 1988	50	4
October 1, 1988	50	6
October 1, 1989	50	7
January 1, 1991	50	8
June 1, 1991	80	16
April 1, 1993	80	26
September 1, 1994	80	8[71]
February 8, 2005	80	14

For more historical information regarding the increases and decreases in tariff funding, see Table 5B-3 in Appendix 5B. Table 5B-4 in Appendix 5B sets out the history of holdback repayments between 1994/1995 and 2004/2005.

[70] The hourly rates are the full amounts before holdbacks are deducted.

[71] These eight hours were allotted for preparation under the emergency initial services family tariff, as distinct from the non-emergency initial services and approved services family tariffs.

4
Stakeholder Perspectives on the Tariff System: Themes from Consultations and Surveys

I. Introduction

Between February 2004 and April 2005, the working group consulted widely with stakeholder groups around the province, including private bar lawyers, justice system participants, community representatives, and legal education organizations, to canvass their views on the tariffs. LSS also commissioned several in-depth surveys, including its first online compensation survey of tariff lawyers. This chapter summarizes the themes that emerged from the phase 1 and 2 consultations and surveys conducted as part of the tariff review.

II. Phase 1 consultation process

The main purpose of the phase 1 consultations was to obtain input from lawyers about the tariffs. LSS staff convened a series of focus groups in each of the seven regional centres. Local office staff helped organize the meetings and select invitees in order to gather, as much as possible, a representative sample of tariff lawyers from surrounding communities. LSS staff also organized a focus group during the Family Duty Counsel Conference in Vancouver, targeting lawyers from more remote communities outside the regional centres. A total of 108 lawyers, representing about 10% of the tariff bar, attended focus groups on various dates between February 26 and May 13, 2004.

At each session, participants discussed specific questions and afterwards LSS staff prepared meeting summaries and circulated them to participants.

III. Phase 2 consultation process

In phase 2, LSS conducted follow-up consultations between January and April 2005 with tariff lawyers in various local Canadian Bar Association sections to obtain input on potential tariff changes identified in phase 1 and developed in phase 2. LSS also expanded the scope of consultation beyond tariff lawyers to include other justice system participants and community and legal education organizations. The goals were to obtain information about justice system trends and the impact of the tariffs on clients, the legal aid system, and the justice system, and to elicit suggestions about the types of changes that might be required. In keeping with lawyer feedback from phase 1, during consultations with justice system participants, LSS did not seek direct input on the appropriate level of lawyer compensation, focusing instead on system-wide problems and options for improvement.

Appendix 1 contains a list of groups consulted during phases 1 and 2.

IV. Tariff lawyer perspectives

Phase 1 discussion questions

Tariff lawyers were asked the following questions in the phase 1 consultations —[72]

- What is the most effective method of structuring compensation for referral lawyers?
- What is the most effective method for determining the rate of compensation?
- What would help you to enhance your ability to deliver quality services to legal aid clients?
- What steps should LSS take when it identifies substandard services from referral lawyers?
- What obstacles do tariff lawyers encounter and what can LSS do to encourage lawyer participation in the legal aid system?
- What is the impact of the current tariffs on clients and the justice system?

[72] The question format varied somewhat between meetings, and the last question was added for the last three meetings, in Prince George, Terrace, and Vancouver.

Phase 2 discussion questions

After the phase 1 consultations, the working group conducted further research and identified options for tariff renewal. The working group consulted with tariff lawyers about these proposals during the phase 2 follow-up consultations, and asked them the following questions —

Principled rate

- What input do you have on a principled rate?
- What is the bar's role in supporting a principled rate?

Tariff structure

- What feedback do you have on the options for changing the tariff structure?
- Do you have any other suggestions for tariff structure?
- What are the priorities?

Results-based compensation

- What feedback do you have on the concept of results-based compensation?
- What would work about this approach, and what are the potential obstacles?
- What other suggestions do you have for promoting better results?

Themes

The following themes emerged during the phase 1 and 2 consultations with tariff lawyers —

1. Lawyer attrition

- Many lawyers have either eliminated or reduced legal aid cases as a component of their practices.
- Younger and newly called lawyers are tending to avoid legal aid cases due to inadequate compensation.
- There is no formal mentoring system for young lawyers in the legal aid system. Remuneration is so low that established legal aid lawyers no longer hire articled students. As a result, young lawyers do not gain the experience with legal aid cases that gave previous generations of lawyers the ability to start their own practices. Attrition may also be occurring

because most young lawyers now seek articles with larger firms that do not participate in the legal aid system.

- Attrition does not stem only from the failure to attract new lawyers. For more senior lawyers, LSS work becomes less appealing as they gain experience and raise their rates for private clients. They have to make a hard decision whether to continue with LSS work or to devote all their time to private clients.
- It is difficult to find lawyers to take legal aid work in smaller communities.
- LSS should provide incentives for lawyers to take more legal aid cases, such as bonuses or an increased rate once they reach a prescribed number of cases.

2. Removing obstacles to participation

- To reverse attrition, LSS must increase the tariff rates and allotted hours and reduce the amount of unpaid work lawyers are required to perform. The current rates fail to attract new lawyers and cause LSS to lose experienced lawyers once they become established.
- Lawyers urged LSS to reduce their administrative burden by simplifying the tariffs and procedures for authorization and billing. Some lawyers proposed flat fees for administration and disbursements since tracking minor expenses is tedious and time-consuming.
- LSS should ensure that disbursement rates match the actual costs. For example, the current tariff rates for hotels are significantly below typical rates in northern communities. Some lawyers recommended adopting per diem meal allowances to eliminate the need to keep receipts, and allowing lawyers to bill for lunch if they are travelling a long distance even if they are not staying overnight.
- LSS should provide more intake information to lawyers so they understand more about a new case. The current referral forms often do not provide sufficient background information about clients.
- LSS should adopt policies for appeals that allow lawyers to take certain limited steps — for example, filing a notice of appeal and seeking bail on an expedited basis — since it can take a long time to assess applications for appeals.
- LSS should improve its communications with tariff lawyers, demonstrate trust in their judgment, and show appreciation and respect for their work.
- Lawyers strongly approved of LSS innovations such as e-billing and expedited payment.

- There was frustration over having to make repeated requests to obtain extra hours to do necessary work.
- LSS should have some mechanism that enables lawyers to report or deal effectively with clients who are being unreasonable.

3. Tariff compensation

General

- Tariff rates for both hourly and block fees are inadequate and have failed to keep pace with the cost of living.
- The tariffs do not allot sufficient preparation time; the actual time requirements regularly exceed what lawyers may bill. For some family lawyers, increased preparation time was more important than higher rates.
- Lawyers feel that the tariffs do not recognize the value of the services they provide as skilled professionals, in contrast to other professionals, such as psychiatrists and psychologists, who receive much higher rates under the tariff.
- Since lawyers currently absorb unpaid hours, any tariff increases may not improve the quality of representation because they would only compensate for the previously unpaid time.
- To assess the appropriate tariff rates, LSS should consider the following factors —
    - ♦ private market rates (legal aid rates need not be on par with market rates, but at present are a mere fraction of the market);
    - ♦ government and Crown corporation rates for ad hoc or per diem counsel;
    - ♦ LSS tariff rates for other professionals;
    - ♦ Crown counsel compensation (making allowances for benefits and the absence of overhead costs); defence lawyers should be on par with Crown counsel;
    - ♦ lawyer overhead costs;
    - ♦ the cost of living; and
    - ♦ the average cost of legal services to the attorney general.
- LSS should eliminate the holdbacks, or at least replace them with a straight reduction. Lawyers regard them as a de facto deduction, even though LSS has made periodic holdback repayments.
- There was strong support for a flat-rate administration or file-opening fee as well as a flat-rate disbursement fee.

- Counsel should be permitted to bill for articled students' time at a reduced rate, as the Alberta and Ontario tariffs allow.

The principled rate

- There was no clear consensus on whether to adopt a differential rate based on seniority or region, although many lawyers did support it. LSS should follow the model of Legal Aid Ontario, which does not use simply years at the bar but requires lawyers to certify their years of experience in the particular practice area. Lawyers also said, however, that it is not necessarily the case that senior lawyers are always better than more junior lawyers, and some five- to seven-year calls have gained substantial trial experience in serious cases.
- Some family lawyers felt that a differential rate should also reflect case complexity, years of experience as a tariff lawyer, and the level of court (Provincial or Supreme).
- Even if differential rates are implemented, a baseline principled rate is needed. The principled rate should be reviewed annually, with yearly increases to keep pace with the cost of living.
- Lawyers recognized that LSS may need a multi-year plan to reach the principled rate.

The role of the bar

- The bar has historically perceived LSS as part of the problem, but now sees the government as the real problem, since the government uses divide-and-conquer strategies between LSS and the bar. In the past, LSS was perceived as lacking independence from the Ministry of Attorney General. This has had a significant effect on the society's relationship with the bar.
- LSS requires publicity and more money. Some lawyers felt that the only way to pressure the government into increasing legal aid funding is to grind the court process to a halt. The bar needs to do a better job of creating public awareness of the value of legal aid services to the poor and disadvantaged, including alleged criminals. There was some support for the idea of LSS conducting a promotional campaign to create a more positive image of legal aid work.
- Tariff lawyers do not have a strong collective voice like the Crown Counsel Association and are not well organized as a group. Moreover, if lawyers are willing to take referrals at the current tariff rates, the government will think there is no reason to increase funding.

4. Tariff structure

General

- The tariffs do not recognize the time and court appearances required to properly represent clients. Too often, lawyers must sacrifice their own financial well-being to fulfill their ethical duties to clients.
- There is an opportunity cost associated with legal aid cases, insofar as accepting a referral means losing the opportunity to bill private clients at a significantly higher rate for the hours worked. This has forced many lawyers to eliminate or significantly reduce the number of legal aid cases they take so they can be available for private clients.
- The tariffs are geared towards going to trial, and effectively penalize lawyers when they opt for early resolution rather than litigation.
- LSS should investigate methods for "front-end loading" the funding to encourage early work by lawyers and, if appropriate, early resolution. Both criminal and family lawyers indicated that the current tariffs do not provide sufficient incentives to promote early resolution, because the available fees do not reflect the significant work often required to achieve a good result early in the case.
- Lawyers generally opposed system-wide block contracting since it restricts clients' choice of counsel. They favoured retaining the hourly tariff for family law and block fees for criminal matters.
- Many lawyers suggested reinstating client contributions to raise funds for increased compensation and expanded services.
- There should be recognition for special needs clients who may have other problems, such as mental health issues, in addition to their legal problems. The tariffs do not recognize that legal aid clients can be more time-consuming than ordinary private clients since they often face greater hardships and have more serious and urgent needs.
- LSS should play an active role in lobbying for changes in the justice system.

Family/Child protection tariffs

- Family tariff coverage is far too limited. Coverage restrictions and inadequate hours mean that lawyers can only half-solve their clients' family law problems. The tariffs do not reflect the complexity of cases or the multiple challenges often facing clients. Moreover, the coverage restrictions mean that cases involve more complex and extreme circumstances. The inadequacy of the family tariff encourages lawyers to refuse legal aid referrals or to withdraw at an early stage of the proceedings. LSS must therefore increase the billable hours allotted.

- LSS sends a message that family lawyers can provide all services to clients. This creates unrealistic expectations given the limited hours of preparation time.
- The family tariff is based on hearings, which encourages litigation, rather than compensating lawyers for the time they invest in negotiation, alternative dispute resolution, and settlement.
- The current tariff unduly restricts the ability to proceed in Supreme Court, and fails to reflect the increased time required for Supreme Court proceedings.
- The tariffs should also reward good results. One family lawyer noted that the tariff will pay $80 for one consent order per referral. Counsel can work very hard, however, to negotiate three or four consent orders in a case, thereby resolving all the issues. The tariff fails to reward lawyers for effective, efficient representation.
- The duty counsel program in Provincial (Family) Court has been very successful, and a similar program should be implemented in Supreme Court for unrepresented people.
- LSS should consider reinstating the model of non-emergency and approved services to ensure that adequate funding is allocated to more complex cases. The Family Case Management Program was helpful because oversight by an objective third party placed limits on client expectations and enabled lawyers to request more hours when needed.
- The current child protection tariff does not provide adequate compensation for the presentation hearing. If the parent does not mount a significant challenge at this early stage, the outcome of the presentation hearing can strongly influence the future of the case. If more funding were available at this stage, the parent could effectively oppose the Ministry of Children and Family Development and perhaps avoid a more challenging situation down the road.
- The current criteria for funding family cases encourages some clients to make spurious claims of violence just to qualify for legal aid.
- Enhancing rates for judicial case conferences (JCCs) or consent orders will save money in the long run. Improving funding for negotiation would encourage a co-operative approach and narrow the issues at an early stage. One option would be to offer rewards or bonuses for resolution at the first court appearance or the JCC, or through a consent order.
- Views were mixed on whether the family and child protection tariffs should be block or hourly, but on balance lawyers favoured the hourly tariff. Some lawyers suggested a hybrid model, combining hourly preparation and block fees for hearings.

- Family lawyers cannot put pressure on the attorney general because there is little public concern about family clients. In contrast, a withdrawal of services by criminal lawyers would be effective because the public would be upset if criminals were released from custody.
- To ensure more money for the family tariff, LSS should explore obtaining a waiver of court filing fees for legal aid family cases.

Criminal tariff

- LSS must reduce unpaid services in the criminal tariff. Lawyers are not compensated for necessary prison visits and, in particular, the numerous court appearances required under the Criminal Case Flow Management Rules in Provincial Court. There is no funding for trial confirmation hearings, Crown or defence adjournments, or appearances to vacate bench warrants.
- Instead of paying for repeat appearances in Provincial Court, LSS should focus on convincing judges that there are problems with the Criminal Case Flow Management Rules and that too many appearances are unnecessary.
- Lawyers generally supported block fees for criminal cases, which effectively incorporate an experience increase since more experienced counsel can usually perform the work more efficiently. Block fees for some services (e.g., complex bail hearings or breaches of conditional sentence orders) do not reflect the time involved, however.
- One lawyer noted that in youth court much of the work involves dealing with breaches. If LSS paid more for lower-category offences, it would encourage lawyers to do more of this work. Also, youth court cases tend to be more time-consuming because there are other parties involved (social workers, parents, etc.), but block fees often do not reflect the hours required.
- Compensation under the criminal tariff is geared towards trials, and does not compensate lawyers for the substantial work they must do to negotiate a plea agreement, a stay, or diversion.
- Lawyers agreed that increased compensation for early resolution should be a priority, and felt that any increase in the volume of guilty pleas would not foster a perception of "assembly-line justice," provided the fee structure for trials was still well supported. There was some concern, however, that fees for early resolution could affect the quality of plea agreements.
- Lawyers noted that the tariff imposed significant penalties where a trial collapsed at the last minute due to a Crown stay or adjournment. The fees allowed in such circumstances are a small fraction of the expected trial fee, and the lawyer receives little or no compensation for the preparation and court time he or she has invested. At that point, the lawyer has

reserved a whole day or more for trial and has already done the preparation work because one can never assume that a stay or plea agreement will in fact occur on the trial date. For private clients, the lawyer would bill for all the time set aside. The situation is different where there is a last-minute guilty plea, as this may reflect a tactical decision by the defence.

- There should also be increased compensation to reflect the time spent preparing for cases that do proceed to trial.
- Lawyers commented that an hourly rate for the criminal tariff would risk swinging the pendulum the other way — for example, lawyers might be overcompensated for delays such as waiting time in court.
- LSS should review the offence categories in the criminal tariff, which in certain cases fail to recognize the seriousness and complexity of the offence (e.g., impaired driving, sexual assault, aggravated assault).
- Many lawyers are not interested in doing category I or II cases without a rate increase.
- The $125 rate under the enhanced fee policy is restricted to lawyers in a "special circle." Some lawyers criticized the government for paying lawyers on high-profile cases at much higher rates than prevailing legal aid fees. They suggested that this creates a double standard and implicitly denigrates the value of services that the average lawyer provides in ordinary legal aid cases.
- Some lawyers criticized LSS for refusing to compensate lawyers properly when they resolve multiple charges at the same court appearance, even though this often involves much more work. LSS should reinstate its former rule allowing lawyers to bill per information or for multiple sets of facts.

5. Quality assurance

Quality control

- Low tariff compensation puts pressure on lawyers to "cut corners" or increase case volumes in order to generate adequate earnings. This increases the risk that service quality will suffer.
- Setting tariff compensation so far below market rates reinforces the impression that referral lawyers are "second rate," and that the services they provide are not of high quality.
- Lawyers had divided opinions about whether LSS should engage in quality control. Some advised LSS to leave it to the Law Society, while others thought that LSS has a legitimate role in ensuring that clients receive proper representation given that LSS contracts for these services.

There were concerns about the difficulty of establishing objective standards, potential duplication of the Law Society's function, and the expenditure of scarce resources on quality control activities. Generally, tariff lawyers felt that LSS should emphasize education and professional development rather than discipline.

- Lawyers recognized, however, that in some cases LSS should be able to impose remedial measures and, if necessary, suspend or restrict billing numbers or impose probationary periods. LSS should develop detailed standards for lawyer conduct, treat client complaints cautiously, and focus on patterns of behaviour (i.e., repetition of similar complaints) rather than isolated incidents. Where action is required, LSS could also conduct file or practice reviews, send warning letters, and involve peers in remedial measures such as mentoring. Although lawyers do not have a "right to referrals," LSS should justify any restrictions it imposes.
- There was some discussion about whether LSS is obliged to provide a fair administrative procedure and whether it is subject to administrative law remedies in relation to any quality control decisions. If LSS prevents lawyers from receiving referrals due to quality concerns, it must make the standards and guidelines known in advance and provide proper notice to lawyers facing potential suspension.
- One alternative is for LSS to refer all quality concerns to the Law Society. LSS could establish protocols with the Law Society to obtain an expedited or interim report on the status of a complaint to aid in LSS decision making. LSS could leave the investigative function to the Law Society, and then take action on any complaints that the Law Society substantiated.

Quality enhancement

- Lawyers valued the services LSS already provides, such as Continuing Legal Education discounts, electronic case digests, and research memoranda from Legal Aid Ontario (LAO). Sole practitioners, in particular, very much appreciated the concept of developing an expert witness database.
- Some lawyers said that the LAO research memoranda were very useful, but they found the ordering process cumbersome. Rather than having to fill out and fax a form, they would prefer to select the memoranda online and submit the request via e-mail.
- Lawyers suggested that LSS could consider setting up its own counterpart to the LAO research facility to offer research services on BC family and criminal law, perhaps using library staff and law students to respond to lawyers' e-mail requests.
- Lawyers suggested a number of other options – discounted access to Quicklaw or other case law databases; online discussion forums and precedents; expanded Continuing Legal Education programming tailored

to legal aid lawyers; and databases of community resources. Other ideas included providing printers and computers with Internet access in courthouses, and links to the Justice Information System (a criminal justice system database) through the LSS website.

- LSS could also provide a pool of staff legal assistants who could help with some tasks on legal aid files, such as interviewing witnesses. In addition, LSS could circulate information about noteworthy decisions in other legal aid cases, or develop combined timekeeping and billing software to ease the administrative burden on lawyers. Some lawyers noted, however, that such supports are not a substitute for proper compensation.
- LSS might also explore discounted professional insurance or group dental or extended health benefits for tariff lawyers.
- LSS should also fund mentoring activities to foster contact between senior and junior lawyers as an investment in the future of legal aid. In addition, LSS should fund junior counsel in more cases because this provides invaluable training for younger lawyers. It also improves efficiency and quality of service, since senior counsel can delegate some of the more routine work and focus on the key issues.
- LSS should expand training opportunities for duty counsel. Lawyers also noted that the two-year experience requirement for duty counsel hinders new lawyers from establishing a legal aid practice.

6. Results-based compensation

- Lawyers were concerned that results-based compensation (RBC) would place too much emphasis on case outcomes or result in a cumbersome, costly administrative process. Certain aspects of a case are also beyond counsel's control, and client satisfaction is very subjective. Lawyers on the whole were very skeptical about measuring results.
- Lawyers suggested that an RBC model would not appeal to government because the government is more interested in efficiency than in good results for criminal clients.
- LSS should focus instead on quality enhancement services already provided, such as Continuing Legal Education discounts, electronic case digests, etc.
- It would also be better to change the tariff structure to promote efficient procedures, since an RBC model would require costly monitoring of cases.
- One lawyer suggested that LSS should use a model for measuring the value of the services it provides, similar to those used by the auditor general. It could even ask the auditor general to write a report on the value of LSS services. This might make an increase in the tariff rates more acceptable to government funders.

7. Impact of the tariff on clients and the justice system

- Lawyers commented that the government is primarily concerned with costs, but that cuts to legal aid create false economies. The government must be made to understand that the current system has led to increased costs for the courts and hence for taxpayers. For example, unrepresented accused people receive longer sentences, which increases prison costs. Judges also spend more time explaining the court process and ensuring that the accused's rights are observed, which slows down the courts. Cases involving unrepresented people are also likelier to be appealed, which also increases costs for the justice system, especially when a new trial is ordered. One lawyer often advised women who had been denied legal aid to apply for social assistance, because the Family Maintenance Program will assign a lawyer for welfare recipients to commence proceedings to recover any maintenance owing.
- Lawyers noted that the government has increased funding for the judiciary and the Criminal Justice Branch in the last decade but has failed to improve compensation for legal aid, thus neglecting a crucial component of the criminal justice system.
- LSS should lobby the government regarding its obligation to fund LSS using revenue from the social services tax on legal services.
- Lawyers suggested that unrepresented litigants end up in court three times more frequently than litigants who have lawyers.
- The limitations in the current legal aid system also create socio-economic costs. There are illegal evictions that cannot be challenged, improper denials of CPP and EI benefits, and so on, all of which have broad social costs. This leads to increased stress on families, more child apprehensions, and a higher incidence of alcoholism as people struggle to cope with their problems.
- Single mothers cannot obtain legal aid and are forced to fend for themselves in very difficult circumstances. They are unable to collect maintenance from their spouses, who may have significant income and assets. Limited legal aid coverage exacerbates power imbalances between separated spouses, particularly when one partner, generally the man, has greater economic power.
- There were suggestions that family clients might be forced to "take a punch to get a lawyer"; that is, to stay in a dangerous relationship until the point of actual violence to meet the current emergency coverage criteria.
- In criminal cases, the coverage criteria requiring likelihood of jail may be too restrictive for people living in the north, where loss of a driver's licence may be a more severe consequence than jail.

- There is a greater risk now that the rights of accused people will not be adequately protected. Without lawyers, clients will fail to raise legitimate defences. LSS refuses coverage for some applicants when the Crown's initial sentencing position is "no jail." This position is predicated, however, on an early guilty plea. If the person opts for trial, the Crown may propose to seek jail time in the event of a guilty verdict. Faced with this choice, some people will plead guilty just to avoid the risk of jail even if they have solid defences and believe themselves to be innocent.
- One lawyer suggested that LSS should adopt a short-service referral authorizing a lawyer to spend three to five hours with clients who do not meet ordinary coverage guidelines. This would help put self-represented clients on the right track.

V. Justice system perspectives

The working group asked other justice system participants the following questions —

Discussion questions

Impact on clients

- What have you observed regarding the representation low-income people receive from their legal aid lawyers?
- What have you observed about unrepresented low-income people?
- Does the legal aid tariff system meet the legal needs of low-income people in your area of the justice system?

Impact on the justice system

- How does the legal aid tariff system affect cases you deal with in the justice system?
- Do you perceive any imbalance between the representation low-income people receive through legal aid and the representation for clients who can pay their lawyers privately?
- Do you perceive any imbalance between the representation low-income people receive through legal aid and the representation the government receives from its lawyers?

Changes to tariff

- What should be the main goals of the justice system in your area of practice?
- What changes would you like to see in the legal aid tariff system?
- Are there ways LSS can change the legal aid tariff system in order to reward efficiency and good results?

Themes

The following themes emerged during the phase 2 consultations with other justice system participants —

1. Tariff impact on clients

- Under the current tariff system, more low-income people are forced to face court proceedings without legal representation. Some people have very modest incomes but do not meet the stringent financial eligibility criteria. Others may have serious legal problems that do not fall within the coverage guidelines. Still others, particularly in family law, may have limited coverage but only for the initial part of the case, and thereafter must proceed without counsel.
- There are service quality concerns since there are lawyers who take too many files and fail to interview or communicate with clients properly or put in an appropriate amount of preparation time. These problems reinforce the perception that legal aid lawyers are second-rate.
- Many low-income people do not have the capacity to represent themselves. They may lack education or have literacy problems. They may also have mental health issues. Their legal problems often cause significant stress, and they find the court system intimidating. Faced with these obstacles, many people will be unable to assert their legitimate rights and obtain appropriate remedies.
- Unrepresented people may also get poor advice from lay advocates or family justice centres.
- Faced with the daunting prospect of representing themselves, family clients, especially single mothers, abandon legitimate claims for maintenance or property division, or accept settlements that are contrary to their interests. Similarly, criminal clients end up pleading guilty even if they have defences or believe themselves to be innocent. Without legal representation, they are more likely to be detained pending trial, and they may end up with more severe sentences.

- Coverage and funding restrictions may put legal aid clients at a tactical disadvantage. The other party may have more money and prolong the case to exhaust the legal aid referral.
- Many family lawyers will not go to Supreme Court because it is so demanding in terms of the time required. Clients therefore go to Provincial Court and deal only with custody issues.
- Some participants believed that raising the tariff rate would not make much difference for family law. Instead, it would be better to expand services to allow lawyers to take cases to the point where they can be converted to private retainers.
- If LSS plans to "unbundle" services, it should focus on the JCC in family cases as an efficient means of resolving family problems. Clients appear before judges and are satisfied because they have had their day in court. This can be a very effective forum, as parties can obtain orders at this stage and thereby avoid contested chambers applications later in the case. LSS would attract more lawyers because focusing on the JCC would place clear limits on the scope of the retainer.
- For the JCC to be effective, there must be full disclosure before the hearing. LSS could assist in this process by using paralegals to collect the necessary documents and provide them to the lawyer. The lawyer could then spend two to three hours reading and attending the hearing.
- Some participants noted the need to simplify the financial statement (Form 89) for financial disclosure. For the JCC, a two- to three-page disclosure document would be ideal. The current form is more like a tax return and is overly complicated.
- There are some child protection cases where an issue arises only because the other parent or relative cannot obtain legal aid funding for a *Family Relations Act* application. LSS should make exceptions for such matters because it would reduce overall system costs.
- Another area requiring support is where children are made parties to the proceedings but are not in the care of child protection authorities (in which case, there is no legal aid coverage). Examples of this include separation issues or voluntary care agreements.
- It is very disturbing that young lawyers are not coming into the system. Busy legal aid practices used to be training grounds for criminal lawyers.
- The First Nations Legal Clinic in Vancouver is a big help. LSS should expand this program in other parts of the province, such as Victoria and Prince George.
- LSS could include paralegals in the preparation process. This would free the lawyer to do other necessary work on the file. For example, if a client has mental health issues and needs several visits to provide the

information necessary for an affidavit, a paralegal could interview the client and prepare the affidavit.

- LSS might consider setting up a program to certify paralegals, community advocates, or court workers to do a substantial amount of work in the justice system, especially in remote areas. LSS may have to face the fact that current funding cannot cover the cost of paying lawyers to do all the work in the system. Accordingly, LSS may choose to expand the role of non-lawyer advocates to provide services with the available funding.

2. Impact of unrepresented litigants on the court system

- Cases involving unrepresented litigants place a great strain on other components of the justice system. Without a referral lawyer, cases require more court time to complete, and there are more frequent delays. Judges and opposing parties find it difficult to deal with people who are not familiar with the court system.
- Most unrepresented people lack legal expertise, which means that judges and court staff are forced to help them with their cases. Such assistance, however, can lead to a perception of unfairness by the other party. Crown counsel are also reluctant to deal with unrepresented people.
- Women have disproportionately suffered from legal aid cuts, and are forced to stay in abusive relationships or risk losing custody or support because they cannot adequately represent themselves in court.
- The vast majority of lawyers are very happy to have the assistance of Native courtworkers to maintain contact with clients and overcome cultural differences. Some lawyers, however, feel that the courtworkers are now taking over lawyers' tasks.

3. Results-based compensation

- Poor tariff compensation is the main reason that lawyers reduce the number of legal aid cases they accept or stop taking legal aid cases altogether. LSS should raise tariff compensation rates to reflect private market rates currently charged to clients of modest means. LSS should also improve compensation for preparation in both family and criminal cases to promote early preparation and resolution.
- There was concern that a performance-based system would not reward lawyers who take on difficult cases and special needs clients, or who do good work but fail to achieve early resolution. It could also encourage lawyers to "cherry pick" cases where they can get good results. Instead, LSS could pay lawyers bonuses for taking more cases and help with overhead by funding more online legal resources. It could also put more funds into services that resolve cases without resort to court.

- Family lawyers could be rewarded for using alternative dispute resolution to achieve settlements, and should not be penalized financially for choosing not to go ahead with contested hearings. Any RBC initiatives should be more client-focused, with particular emphasis on the needs of children.

VI. Survey results

LSS conducted several surveys to evaluate the tariff system and investigate the underlying causes of lawyer attrition, drawing in part on survey questions used in the Legal Aid Ontario tariff review.

Between July 2004 and April 2005, an independent consultant, Isis Communications, carried out five tariff review surveys on behalf of LSS, targeted to the following groups —

- LSS staff
- new lawyers
- tariff lawyers with a reduced number of legal aid cases (for the loss of service survey)
- community organizations, and
- legal education organizations.

Appendix 3 contains reports on the methodologies and results for each survey.

Common survey responses

The following themes were common to all the surveys —

- LSS should raise the tariff rates to reflect private market rates currently charged to clients of modest means. Poor remuneration is the major reason why lawyers choose to work on fewer tariff matters or refuse to take legal aid cases.
- LSS should increase compensation for both criminal and family law matters to promote early preparation and resolution. This includes expanding the service for family tariff items beyond the eight-hour limit and paying criminal lawyers more for trial preparation in category I, II, and III offences.
- LSS should expand eligibility for family law services. For example, LSS could consider criteria beyond financial and domestic violence situations to accommodate the "working poor," who are often unable to afford necessary legal services on a private retainer.

- The number of unrepresented litigants in family, civil, and criminal matters has increased since the cutbacks to the LSS budget in 2002. This has caused delays in the justice system, and an increased demand for pro bono advice clinics and services from lay advocates.
- LSS should try to improve communication and public relations with the bar and other stakeholders. There is a perception that LSS is not proactive in disseminating information about pilot projects and coverage changes to those who rely on it. This seems to perpetuate the resentment some feel towards the organization. Respondents indicated that it is important for LSS to be aware of client realities and the context in which legal aid services are delivered.
- Given the limited nature of tariff services, clients appreciate in-person services such as duty counsel and legal information outreach workers (LIOWs). LSS publications and websites are useful to lay advocates, but the average legal aid client often needs help to understand the materials.

LSS staff

In fall 2004, 10 out of 16 local agents and 8 out of 9 managing lawyers participated in the survey. Results were collected via telephone or in-person interviews.

The survey had the following objectives —

- to assess and identify issues in the relationship between LSS and the tariff bar;
- to assess and identify issues in the relationship between tariff lawyers and legal aid clients;
- to identify methods to improve service delivery; and
- to identify ways to leverage the features that are working well.

Tariff generally

- The tariff rate is the greatest impediment to improving client services and improving the relationship between the tariff bar and LSS. Lawyers complain about the rate "very often."
- Lawyers are resentful of the number of unpaid hours they need to invest to fulfill their ethical obligations to legal aid clients. Past experience in requesting and being refused payment for additional services is a powerful influence on their attitude towards LSS.
- Among LSS staff, 77% indicated that lawyers complain often about inadequate funding for trial preparation and thought that this issue should be a high priority for LSS.

- The morale among the tariff bar is low.
- Outside the Lower Mainland, it has become more difficult for staff to find lawyers to accept cases in all practice areas.
- To address lawyer attrition, staff cited the following as high priorities —
  - Increase the tariff rates.
  - Expand the eligibility threshold for family law coverage.
  - Increase authorized preparation time and disbursements for both family and criminal matters. Create a simple, convenient process for lawyers to bill for extra services.
  - Increase authorization of additional services.
- Lawyers resent the level of funding provided to LSS by the provincial government. They especially resent that the social services tax collected on legal services is not re-invested in the legal aid system.

Family tariff

- Respondents regarded family duty counsel as a stopgap measure. Their services are limited and they cannot fully solve the legal problems of the clients they serve. They are, however, appreciated in light of the 2002 cutbacks to the family tariff.
- There is more attrition in the family bar than in the criminal bar. This is attributed to coverage restrictions imposed in 2002 (fewer people qualify), and to the perception of inadequate funding for family legal services (there is too much unpaid time invested in files).
- In rural areas, respondents reported that family lawyers "very often" refuse to accept referrals. The delay in finding a lawyer causes difficulty in matters involving spousal abuse; this is one of the reasons why a client may remain in a dangerous situation while trying to secure help.

New lawyers survey

In fall 2004, LSS generated a list from its records of 126 lawyers with new vendor numbers and less than five years of call in BC. Isis Communications published a four-page questionnaire online, contacted each lawyer by phone or e-mail to request a response, and made follow-up calls to those who failed to respond. The Canadian Bar Association, BC Branch, also e-mailed a link and introduction to the online survey to the criminal, young lawyers, and family sections throughout the province.

Of the original list, 28% completed the survey, for a total of 36 responses. The average respondent was a sole practitioner or associate working in a small firm in an urban centre, with three years of experience at the bar. Of the

lawyers on the original list, 25% are either no longer practicing or currently work for a government agency.

The survey was intended to identify the following —

- reasons why new lawyers are not accepting referrals or applying for vendor numbers;
- regional and demographic factors that influence the reduction of new lawyer participation in the tariff bar;
- the impact of a low number of new lawyers in the tariff bar on the quality of service to legal aid clients; and
- measures within LSS control that would persuade new lawyers to accept cases.

Responses

- Almost half the respondents no longer practice criminal or family law, which explains the low number of legal aid matters they have accepted. The most common reason cited for changing the focus of their practice was that neither criminal nor family law is lucrative enough to help them meet their goals. They now practice primarily civil litigation and personal injury law.
- The tariff rate is not high enough to support their practices (70% strongly agreed with this statement).
- LSS does not cover the areas of law in which they practice (48% strongly agreed with this statement).
- For those who do practice criminal or family law, the tariff rate is not high enough to support their practices. Debt load does not appear to be a factor in the decision to work on legal aid matters.
- Philosophical reasons for not accepting cases included a perception that they would not be compensated for the amount of time necessary to properly defend clients.
- Of those who still practice family or criminal law, half said that they would decline any legal aid work referred to them.
- An increase in the hourly tariff rate would be “important” or “very important” to 86% of respondents.
- An increase in the number of hours available for specific tariff items would be “important” or “very important” to 78% of respondents.
- Restructuring the tariff so that block fee items would be billable by the hour would be “important” or “very important” to 64% of respondents.

- The majority of respondents charged up to $150 per hour to clients of modest means.
- New lawyers express concern for clients of modest means, and 69% perform pro bono work on a regular basis, either for individual clients, through an organization, or through referrals. This work is done in a variety of practice areas.
- 81% of respondents have never worked as duty counsel.

Loss of service survey

Isis Communications published a five-page survey online and prepared an extended version of the survey for in-person interviews. LSS then generated a list of 384 lawyers who have worked on a reduced number of files during the past five years (excluding lawyers called to the bar since 1999). LSS sent an introductory e-mail with a link to the survey to 141 lawyers. The overall response rate was 54%: 58 lawyers responded online, 8 participated in a one-hour focus group, and 10 completed the survey during a phone or in-person interview.

Of the original list of 384 tariff lawyers, 81 (21%) no longer practice law and 10 now work for the Crown. Half of the respondents were from the Lower Mainland or Fraser Valley, and the rest were equally divided between the Interior and Vancouver Island.

The average respondent was a sole practitioner with over 10 years of experience, who practices primarily in family or criminal law and employs one staff person full time.

The purposes of the survey were to solicit feedback about tariff policy from lawyers who in the past five years have worked on a reduced number of legal aid matters compared with previous years, and to identify —

- the reasons why they have worked on fewer files during the past five years;
- the impact of the loss of their services on legal aid clients;
- regional or demographic factors that contributed to the loss of their services; and
- measures within the society's control that would persuade them to continue to accept cases or increase the number of cases on which they work.

Responses

- Most respondents reduced the proportion of their legal aid work from 70 – 90% of their practice (during the year they accepted the most cases) to 0 – 20% of their practice (during the year they accepted the least cases). The

most common reasons cited for voluntarily reducing legal aid work were (a) the amount of unpaid time required to properly serve clients, and (b) dissatisfaction with the tariff rate.

- Seventy-one percent of respondents cited the rate of compensation as the primary factor in their decision to reduce the number of legal aid files accepted during the past few years.
- A significant proportion of family lawyers stated that they did not choose to reduce legal aid work; rather, their withdrawal was a result of the tariff restrictions implemented in 2002.
- Almost all respondents indicated that they have earned more money since they reduced their legal aid work and increased private client work in their practices.
- Some respondents felt that they had been penalized for settling matters or efficiently negotiating successful outcomes before matters reached trial. They indicated that tariff policies to reward efficiency and full service (increased remuneration for preparation, negotiation, pre-trial meetings, judicial case conferences, research, etc.) would be a significant factor in attracting lawyers to accept more cases.
- The process of applying for extra fees is a particular problem, especially considering that 90% of the respondents indicated that they work unpaid hours on legal aid matters "frequently" or "all the time."
- The increased number of unrepresented litigants in recent years is a source of frustration for the bar. Most respondents attribute the increase directly to LSS funding cutbacks. There was a large amount of negative feedback regarding the policies of the provincial government.
- Respondents viewed tariff lawyer attrition as detrimental to the justice system as a whole, since it restricted choice of counsel and limited access to services from those overworked lawyers who continue to accept referrals and rely on a high volume of work to maintain their practices (and therefore have less time to advise clients).

Community organizations survey

For this survey, LSS identified key organizations in each region. After a brief introductory phone call, Isis Communications sent a questionnaire to organizations that agreed to participate. The survey originally targeted organizations in rural British Columbia, but later expanded to gather feedback from the seven regional centres.

From January to March 2005, the consultant sent the survey to 82 organizations via e-mail or mail. Of these, 43 filled out the questionnaire, for a response rate of 52%.

Most respondent groups serve clients with family law issues that also involve poverty law, criminal law, or immigration issues — for example, women who leave abusive relationships and have little or no income but possess assets or wish to apply for refugee status on their own.

The survey focused on community organizations that regularly work with the tariff bar and legal aid clients to identify —

- geographic (province-wide and regional), practice area (criminal and family), and demographic (gender, age, psychographic) patterns; and
- perspectives on the current legal aid system, including but not limited to —
  - ♦ the impact of the 2002 budget cutbacks on services to clients;
  - ♦ the impact of reduced tariff services on their work;
  - ♦ the methods they used to cope with recent changes to the legal aid system; and
  - ♦ suggestions to improve the situation.

Responses

- Organizations working with family law clients felt that the eight-hour limit for family tariff emergency services was a source of frustration for both clients and lawyers. They reported that it is more difficult to find lawyers willing to accept cases they refer. The tariff rate, combined with limited hours, contributes to the difficulties.
- Respondents reported that while criminal law services have not been reduced in the past few years, the family tariff cuts have resulted in fewer, lower-quality services for clients. They viewed this as a denial of access to justice for low-income British Columbians.
- Ninety-five percent of respondents said that the attrition rate among tariff lawyers has negatively affected their organizations and their clients. The most frequently cited suggestions for improving the situation include expanding eligibility requirements for family law, paying lawyers for increased services and at increased rates, attracting more lawyers to the tariff bar to give clients more choice, and educating lawyers on the sensitivities of serving clients who have left abusive situations.
- Organizations are increasingly relying on pro bono services and advice from lay advocates to fill in the gaps caused by family tariff reductions. This advice is deemed inadequate to fully solve clients' legal problems, however.
- All organizations reported that they have experienced an increased demand for legal information since the LSS budget cutbacks in 2002. This has resulted in increased costs to organizations for staff time, training,

developing new programs, and developing alliances with lawyers or pro bono clinics that serve a low-income clientele.

- Serious mental health problems are more prevalent among low-income British Columbians. Because of reduced services, clients do not have the means to resolve stressful situations, such as family breakdown or civil disputes, so existing mental health problems get worse.
- Restrictions on poverty law services have greatly affected clients. It has become more difficult to find lawyers to represent low-income people. More clients are unrepresented when they go to court, and they find it intimidating, which ultimately may not serve their interests well.
- Increased government funding is the best way to solve the problems in the tariff system, but LSS faces a major challenge in trying to obtain a sustainable budget increase.
- There was a mix of positive and negative feedback about the quality of services that LSS provides. Respondents thought that the quality of service from tariff lawyers had declined, due mostly to the current limits on funded services. Respondents recognized that individual situations and individual lawyers contribute to varying degrees of service quality.

Legal education organizations survey

Isis Communications solicited feedback from the University of Victoria Faculty of Law, the University of British Columbia Faculty of Law, the UBC Law Students' Legal Advice Program, the Law Centre (Victoria), the University of Victoria Law Clinic, the Simon Fraser University School of Criminology, the Law Society of BC, the Professional Legal Training Course, the Continuing Legal Education Society, and the Law Courts Education Society. After determining the appropriate contacts at each organization, Isis completed the surveys through in-person interviews.

The survey had the following objectives —

- to consult with legal education leaders about their observations of the tariff system;
- to solicit feedback regarding past and current tariff policy in the context of the provincial and national justice systems;
- to solicit feedback about how past and current tariff policy affects client services; and
- to obtain input on how to meet the following goals —
  - ♦ retaining senior tariff lawyers;
  - ♦ recruiting new lawyers to the tariff;
  - ♦ restructuring the tariff to promote efficiency and good results; and

- ♦ effectively promoting LSS objectives along with other key players in the BC justice system in order to best serve clients.

Responses

- All respondents agreed that raising the tariff rates should be a high priority for LSS, if feasible and sustainable, to provide fair and reasonable compensation.
- There was concern that policies promoting RBC might encourage lawyers to cut corners and settle matters early. Respondents felt that the tariff should pay for as much advance preparation as possible (certainly more than at present) to promote negotiation, avoid court if possible, and improve client representation.
- Respondents agreed that philosophical differences between the tariff bar and the provincial government are a barrier to recruiting and retaining lawyers. Much of the tariff bar is opposed to the government's current policies and perceives LSS as subject to those policies because of its funding and board structure. Respondents said that LSS needs to become more autonomous and self-sustaining if it aims to continue being a valued service for low-income British Columbians.
- Respondents encouraged LSS to simplify tariff administration for sole practitioners who have few administrative resources.
- Some suggested that LSS should educate lawyers about the unique role of the tariff bar. This would help lawyers understand the particular responsibilities involved in representing legal aid clients and help them to respond effectively to changes in policy and the law.
- All respondents said that LSS needs to improve communication with other participants in the justice system. For example, LSS tariff policy regarding immigration and Aboriginal law is unclear to respondents who have specialized knowledge and provide legal education in these two areas.
- Almost all respondents (with one exception) indicated that women, and therefore children, are being marginalized as a result of current family law policy. The limitations in legal aid mean that the courts are developing the law in a way that negatively affects women and self-represented litigants.

5
The Tariff System: Trends and Analysis

I. Introduction

Thus far, we have reviewed the history of the legal aid tariff system in British Columbia (in Chapter 3) and the perspectives of various stakeholders on the current tariffs (in Chapter 4). In this chapter, we analyze LSS internal data and statistics to identify significant long-term trends in the tariff system, including the demographic and billing profiles of the tariff bar, patterns of expenditure in the individual tariffs and in the tariff system as a whole, and the nature and frequency of various case outcomes.

II. Declining lawyer participation and the "greying" of the tariff bar

Our analysis of LSS statistics suggests that fewer and fewer lawyers are participating in the legal aid system, and that, based on the experience profile of tariff lawyers, those who remain active are getting older.

Lawyer participation

In absolute terms, the trend over the past two decades shows a relatively steady increase in lawyer participation rates through the 1980s and early 1990s, followed by an uninterrupted decline in the last 10 years.

One way to examine this trend is to consider the number of lawyers billing LSS. In 1983/1984, 1,036 lawyers billed LSS for services rendered. This number increased, with some minor fluctuations, through the late 1980s. The 1991 tariff increase had an immediate impact, and the number of lawyers

billing LSS peaked in 1994/95 at 1,931. Since then, LSS has lost lawyers each year, and the current number of 1,049 essentially equals the figure for 1983/1984.[73]

Since lawyer billings may relate to work done in a previous period, another approach is to consider the number of lawyers who have accepted referrals in a given year. In 1990/1991, 1,523 lawyers accepted referrals. This number increased to a peak of 1,987 in 1993/1994, after which it declined steadily to the current level of 1,000, a drop of 50% from the peak year. The decline was less severe among criminal lawyers (43%) than among family lawyers (66%). Interestingly, for the latter group much of the drop (48%) occurred even before the 2002 family coverage restrictions took effect.[74] On a regional basis, there was some variation during peak years in lawyer participation and subsequent rates of decline, but, as Table 16 shows, except in the north, the drop in all regions was close to 50%.[75]

Table 16: Decline in number of lawyers accepting referrals

Region	Vancouver Coastal (%)	Fraser (%)	Vancouver Island (%)	Interior (%)	North (%)
Drop from peak to 2004/2005	54	48	47	50	23

It is also revealing to compare the number of tariff lawyers with the number of practicing BC lawyers as a whole. Figures 5 and 6 depict these numbers in relative and absolute terms, respectively. The proportion of practicing BC lawyers accepting legal aid cases has dropped by half in the past 10 years. In calendar year 1990, 1,508 of the 5,200 BC lawyers then in full-time practice accepted a legal aid referral, or about 29%. The participation rate increased after the 1991 tariff increase, reaching 36 % in the peak year of 1993.[76] Since then, participation has declined each year, so that in 2004 only 1,005 out of 6,000 practicing BC lawyers accepted a legal aid referral, a participation rate of just 17%.[77]

[73] See Table 5A-1 in Appendix 5A.
[74] See Table 5A-2 in Appendix 5A.
[75] See Table 5A-3 in Appendix 5A.
[76] In absolute terms, the number of lawyers participating peaked in 1994 at 1,992, but in relative terms, the peak year was 1993, when 1,949 out of 5,415 full-time lawyers accepted referrals.
[77] The Law Society of BC provided the figures for the number of practicing lawyers in BC. See Table 5A-4 in Appendix 5A for more details.

Figure 5: Percentage of BC lawyers in full-time practice accepting legal aid referrals, 1990 – 2004

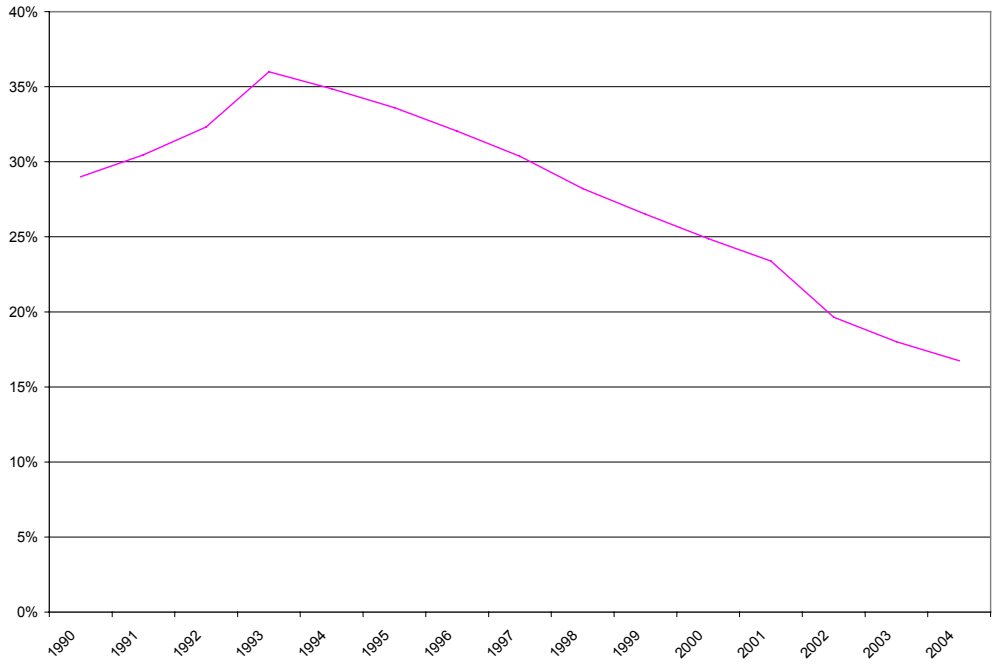
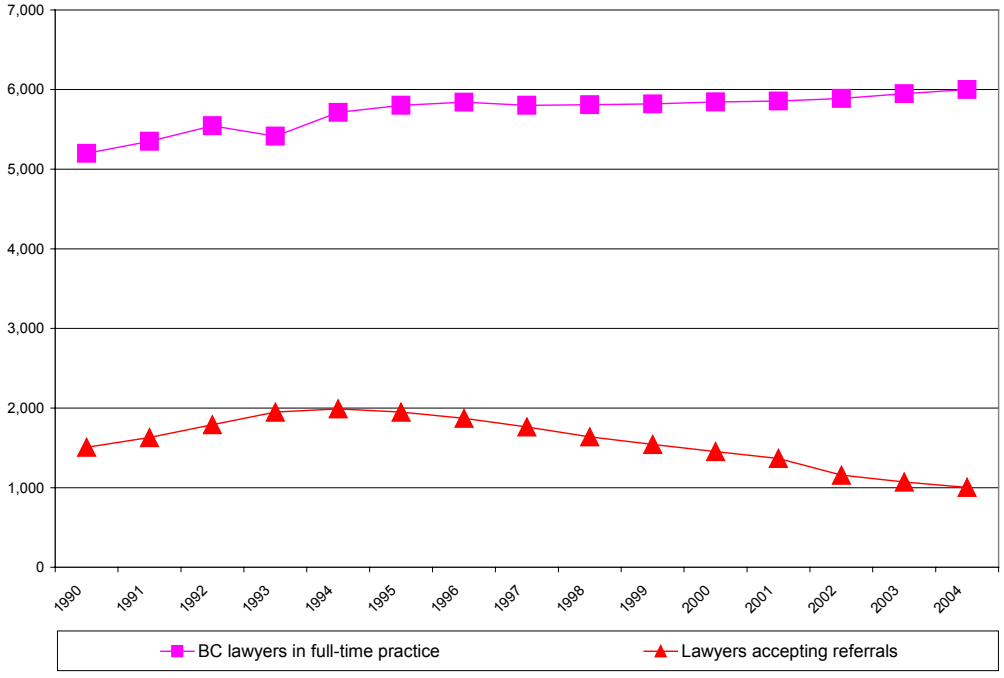


Figure 6: Number of BC lawyers in full-time practice versus number of lawyers accepting referrals, 1990 – 2004



The "greying" of the tariff bar

Assuming that years of lawyer experience is a reliable proxy for age, LSS data suggest that lawyers who still accept legal aid cases are getting older:[78]

- In 1990/1991, the average years of lawyer experience was 8.9; in 1997/1998, it was 11.2; and by 2004/2005, it had increased to 15.9.
- The aging trend is similar for both the criminal and family tariffs, although the average experience level of family lawyers (12.8 years) is substantially below that of criminal lawyers (16.8 years).
- Lawyer experience levels have increased significantly in all regions, but the increase has been most dramatic in the Lower Mainland.[79]

Figure 1 in Chapter 2 illustrates how the experience profile of the tariff bar has changed in recent years, with the proportion of tariff lawyers with over 10 years of experience rising from below 40% in 1990/1991 to about 70% in 2004/2005. During the same period, the proportion of lawyers in the intermediate (4 – 10 years of experience) and junior (under 4 years of experience) levels has declined significantly.

III. Tariff lawyer billings

In this section, we examine billing patterns of tariff lawyers over time. Figure 2 in Chapter 2 shows the distribution of total fees billed by tariff lawyers in 2004/2005, and Figures 7 to 10 depict long-term trends. Figure 7 shows the number of lawyers billing at four different levels of annual tariff earnings between 1983/1984 and 2004/2005, while Figures 8 and 9 show the same distribution for the criminal and family tariffs, respectively. Figure 10 shows annual average billing per lawyer between 1983/1984 and 2004/2005.[80]

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[78] See Tables 5A-5 and 5A-6 in Appendix 5A.

[79] Between 1990/1991 and 2004/2005, the average years of experience increased from 9.8 to 17.3 in the Vancouver Coastal region, and from 7.6 to 16.1 in the Fraser region. During the same period, the experience level in the Northern region increased from 9.3 to 13.4 years.

[80] Additional detail regarding lawyer billings may be found in Tables 5A-7 to 5A-11 in Appendix 5A.

Figure 7: Private bar lawyers billing LSS, by fiscal year — All case types

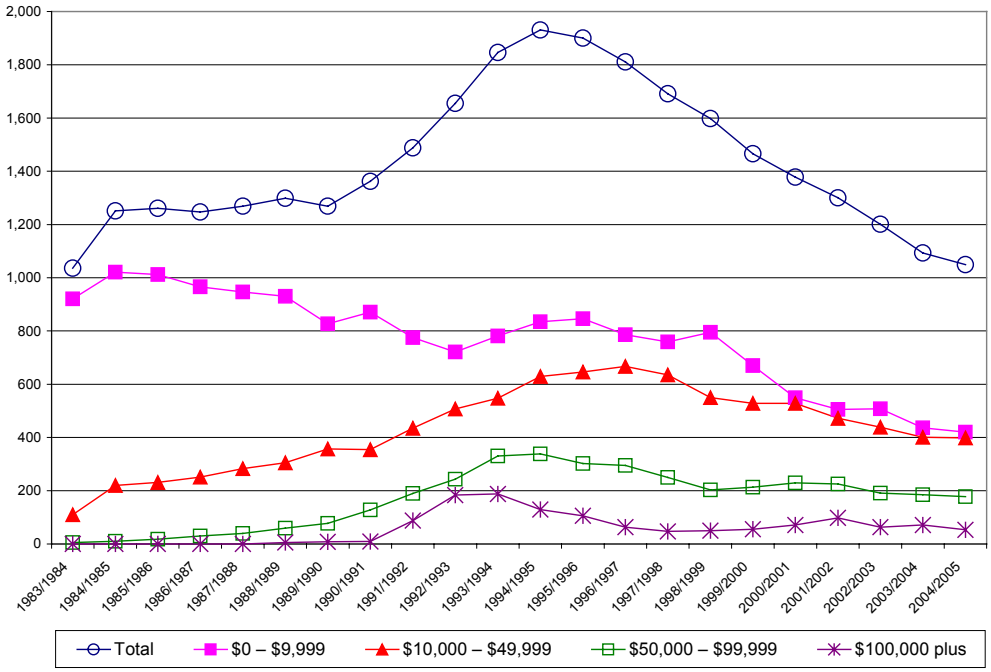


Figure 8: Private bar lawyers billing LSS, by fiscal year — Criminal cases only

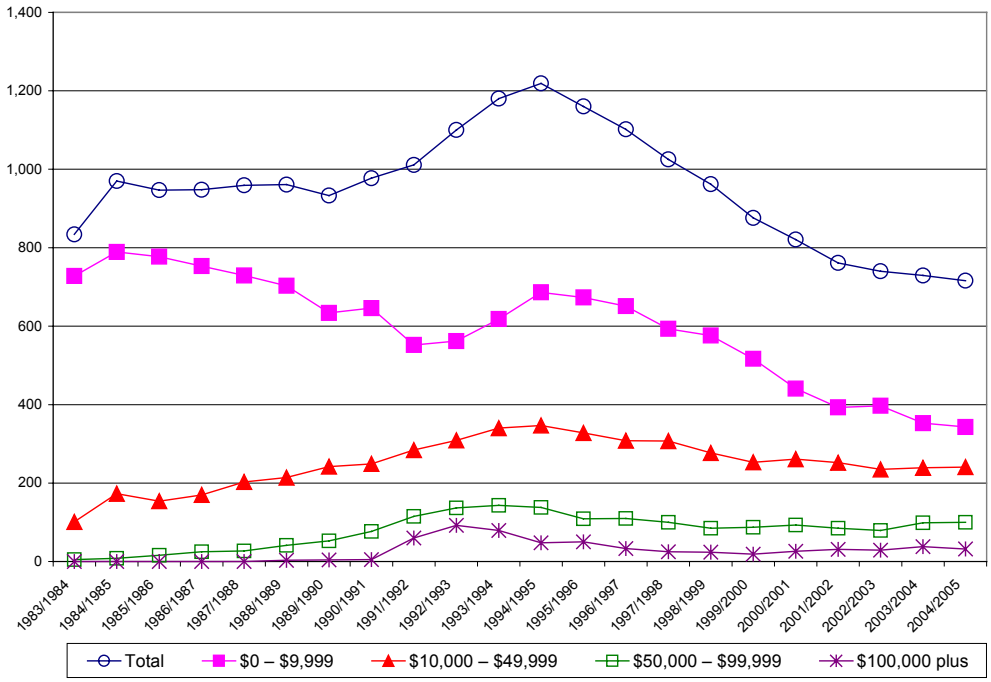


Figure 9: Private bar lawyers billing LSS, by fiscal year — Family cases only

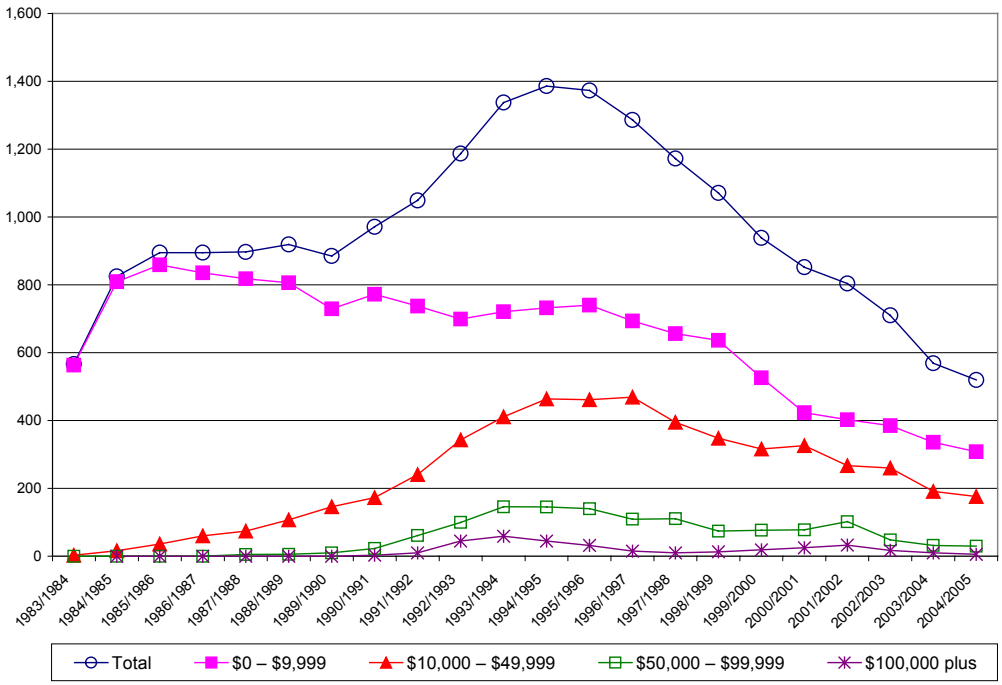
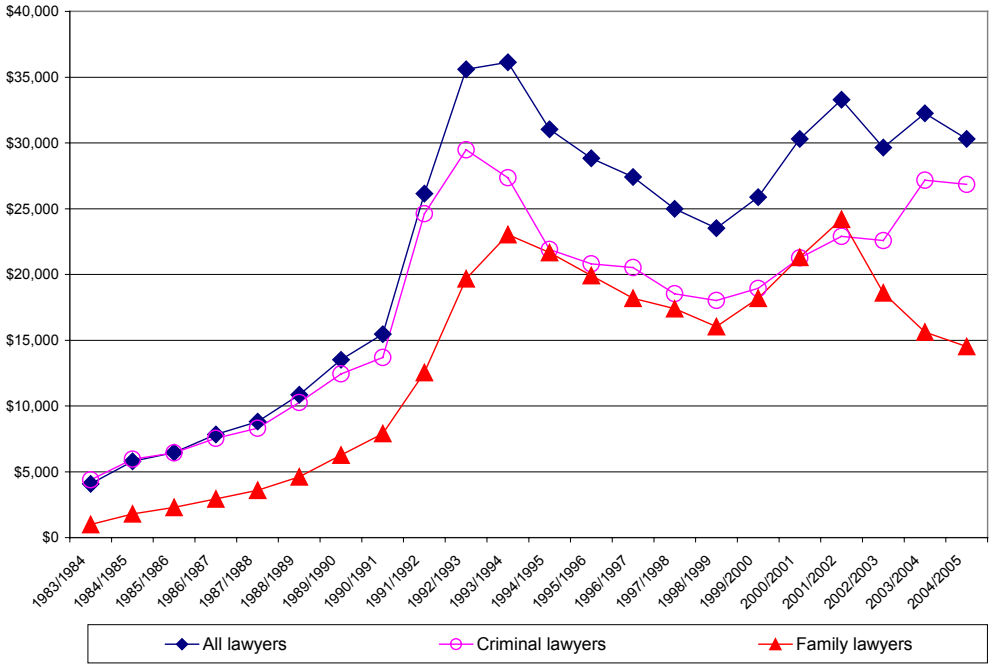


Figure 10: Average annual billings per lawyer



As Figure 2 in Chapter 2 demonstrates, almost 78% of lawyers billed less than $50,000 in legal aid fees in 2004/2005, but LSS paid over 60% of total fees to

the 22% of lawyers billing over $50,000. Figures 7 to 9 reveal that for both the criminal and family tariffs, the number of lawyers billing under $50,000 has declined steadily since the mid-1990s, although the decline is more pronounced in the latter tariff. The trend for lawyers billing over $50,000 shows less fluctuation over the past five years, with a slight increase for criminal lawyers billing above this threshold, and a slight decline for family lawyers.

As Figure 10 shows, in 2004/2005, average billings per lawyer were just over $30,000.[81] Average billings peaked at about $36,000 in 1993/1994, following the tariff increase of 1991. They declined in the late 1990s, dropping to a low of $23,517 in 1998/1999. From 2000/2001 to 2004/2005, they have generally hovered between $30,000 and $33,000. In 2004/2005, median billings were $16,747. Since the 1991 increase, median billings have ranged from a low of $10,157 in 1998/1999 to a high of $17,524 in 2001/2002.[82]

In criminal law in 2004/2005, average billings were $26,840 and median billings were $11,305. Among criminal lawyers, 48% billed under $10,000 and 82% billed under $50,000. Further, 14% of lawyers billed between $50,000 and $100,000 (with their billings accounting for 36% of all lawyer billings), while 4% billed over $100,000 (with their billings accounting for about 25% of all lawyer billings).[83]

In family law in 2004/2005, average billings were $14,526 and median billings were $6,130. Among family lawyers, 60% billed under $10,000 and 93% billed under $50,000. Further, 6% of lawyers billed between $50,000 and $100,000 (with their billings accounting for 26% of all lawyer billings). Only 1% of lawyers billed over $100,000; their billings accounted for about 10% of all lawyer billings.[84]

Finally, Figures 11 and 12 illustrate how the distribution of billings among junior, intermediate, and senior lawyers has changed over time. With the average experience level of tariff lawyers increasing, and fewer young lawyers joining the tariff bar, senior lawyers have increased their share of overall tariff billings.

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[81] The fact that the average fees for all tariffs exceed the average fees in each tariff requires further explanation. Since some lawyers accept referrals in more than one area of law, they may be counted as both criminal and family lawyers in calculating averages for each tariff. When calculating average fees for all tariffs, however, these "dual-status" lawyers count only once, which produces higher figures for average fees than for the individual tariffs.

[82] For more details regarding average and median billings, see Table 5A-1 in Appendix 5A.

[83] For more detail regarding billings for criminal lawyers, see Tables 5A-8 and 5A-9 in Appendix 5A. Criminal billings include fees paid for criminal cases and criminal appeals.

[84] For more detail regarding billings for family lawyers, see Tables 5A-10 and 5A-11 in Appendix 5A. Family billings include fees paid for both family and child protection cases, as well as appeals in both areas of law.

Figure 11: Criminal fees — Percentage of total fees billed, by lawyer experience level

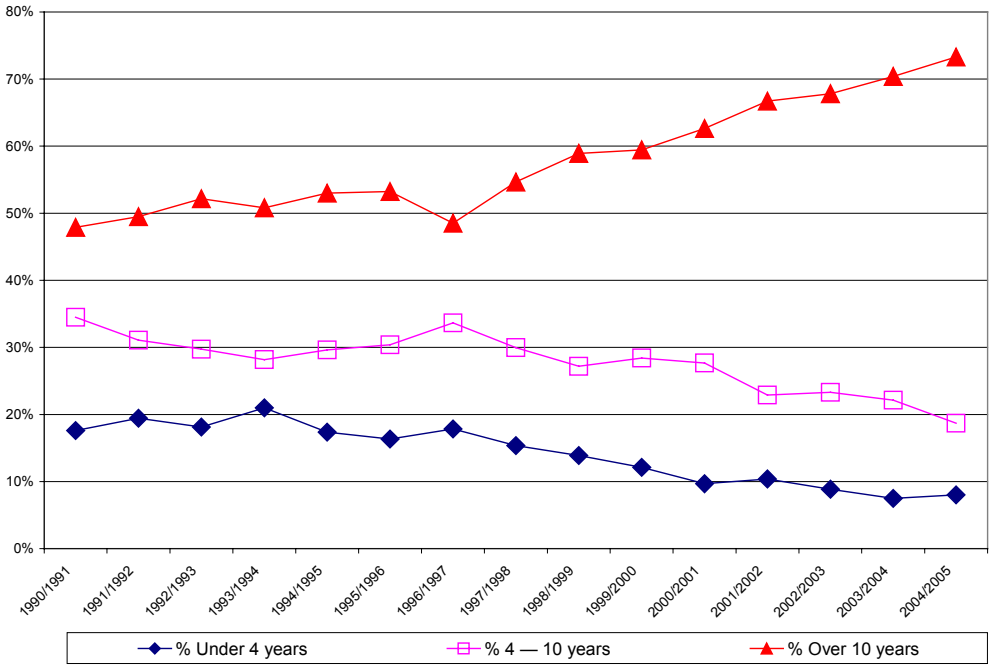
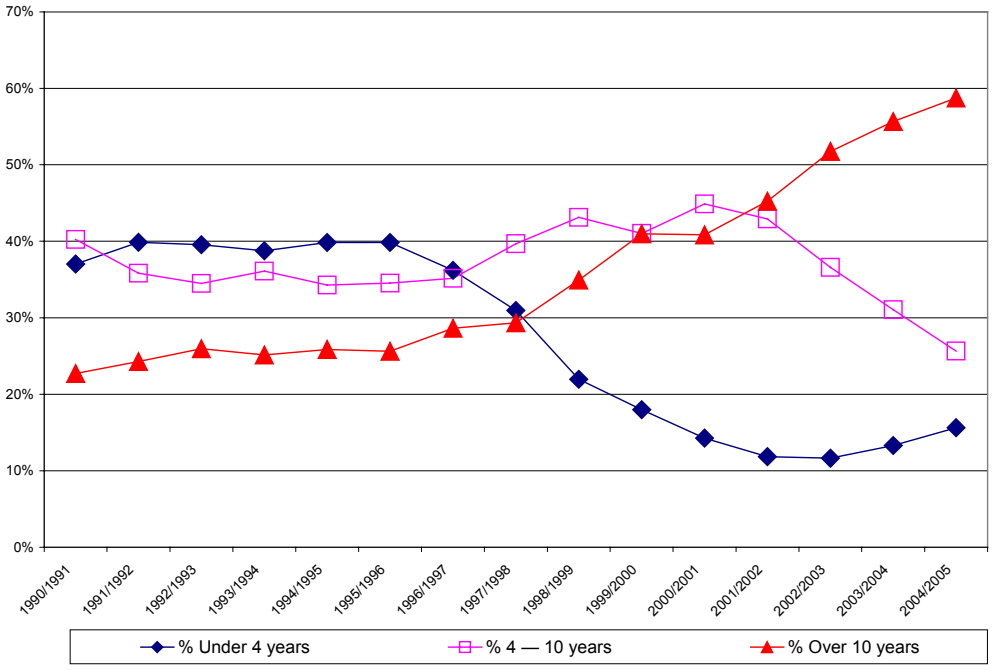


Figure 12: Family and child protection fees — Percentage of total fees billed, by lawyer experience level



IV. Tariff system expenditures

In this section, we consider funding trends for LSS and the tariff system as a whole, as well as the allocation of funding between tariffs.

Funding for LSS and the tariff system

As Figure 3 in Chapter 2 indicates, after a brief peak in the wake of the 1991 tariff increase, the LSS budget and tariff expenditures have steadily declined, while funding for other parts of the justice system has generally increased.

Figure 5B-5 in Appendix 5B shows the long-term trends in LSS per capita expenditures in current and constant (i.e., with effects of inflation removed) dollars, while Table 1 in Chapter 2 sets out the per capita figures at key points in LSS history. On a per capita basis, current LSS expenditures have decreased to a level that is slightly below that of 1989/1990, just before the last substantial tariff increase.[85]

Figure 13 depicts the proportion of its total funding that LSS received from the provincial government between 1980/1981 and 2004/2005. During the 1980s, the provincial contribution fluctuated significantly and there was an overall decline from about 89% of LSS funding to 80%. The tariff increase of 1991/1992 raised the provincial share of LSS funding to about 94%, where it basically remained until the provincial government reduced its grant to LSS in 2002; currently the provincial share of LSS total income is about 87%. In absolute terms, the amount of the provincial grant to LSS has fluctuated dramatically over the past 25 years, rising from just $12.1 million in 1980/1981 to a peak of $95.6 million in 1993/1994, and then dropping to $55.9 million in 2004/2005.[86]

Figure 14 shows the changing proportion of total LSS expenditures that the tariffs represent. LSS spending on the tariffs increased fairly steadily through the 1980s from just over 40% to about 65%. Proportionate tariff spending increased sharply in 1990/1991, reaching a peak of nearly 80% in the early 1990s, and then declined below 60% in the late 1990s as LSS expanded the number of staff lawyers and imposed reductions and holdbacks on tariff fees. With the budget cuts in 2002/2003, which forced LSS to dramatically reduce its non-tariff services, the proportion of LSS expenditures represented by the tariffs increased to almost 70%, although it has declined slightly in the past two years.[87]

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[85] For more detailed figures and explanatory notes, see Figure 5B-5 and Table 5B-6 in Appendix 5B.

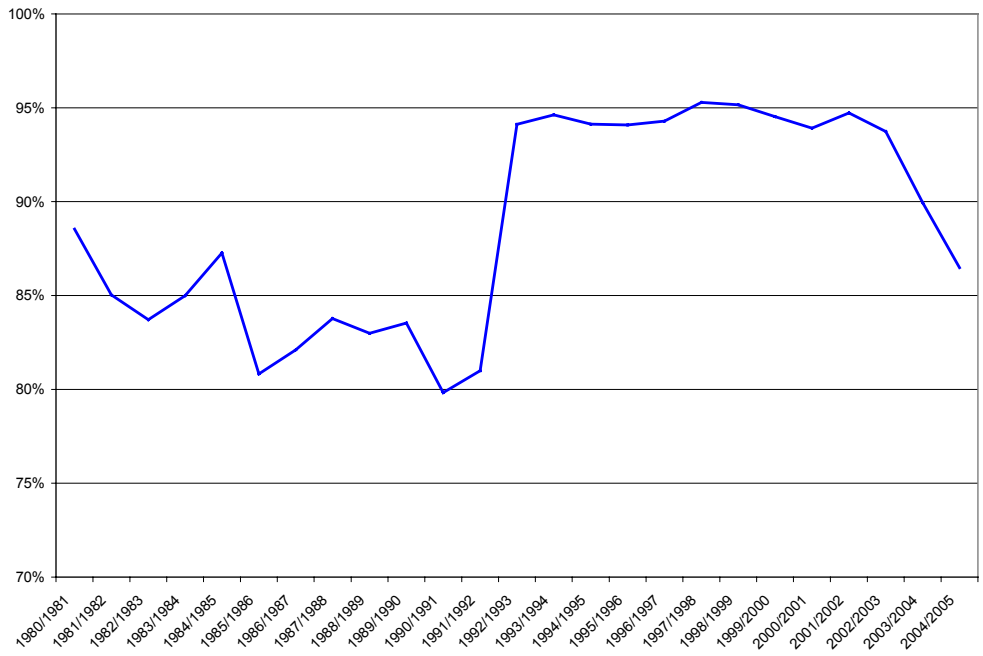
[86] For more detail, see Tables 5B-7 and 5B-8 in Appendix 5B.

[87] For more details regarding LSS expenditures, see Table 5B-8 in Appendix 5B.

Figure 15 shows the long-term trends in LSS tariff expenditures in criminal and family law.[88] Before 1993/1994, criminal tariff expenditures exceeded those for the family tariff, but from that year until the cutbacks of 2002/2003, family tariff expenditures were the largest component of tariff expenditures. The reduction of family law services has produced a dramatic reversal, so that in 2004/2005, criminal tariff expenditures were more than double those for the family tariff. As Figure 16 reveals, the 2002 cutbacks also resulted in a sharp decline in immigration tariff spending, from a peak of over $5 million in 2000/2001 to the current level of less than $1 million.

Figure 5B-9 in Appendix 5B shows the total LSS tariff expenditures (including holdback repayments) allocated to the criminal, family, and child protection tariffs, respectively, between 1996/1997 and 2004/2005, while Figure 5B-10 in Appendix 5B shows the allocation of tariff funding to duty counsel, child protection (for cases under the Child, Family and Community Service Act, or CFCSA), and immigration services in the same period. Clearly, with the reductions in family and immigration law services, criminal tariff services are now by far the largest component of tariff expenditures.[89]

Figure 13: Provincial funding as a percentage of LSS total income



[88] In this figure, "Family" includes both family and child protection services, as LSS did not have a separate tariff for the latter until 1994 and could not track expenditures separately until 1996/1997.

[89] For more detail regarding LSS expenditures on duty counsel and total criminal and family fees, see Figures 5B-11 and 5B-12 in Appendix 5B. Between 1980/1981 and 2004/2005, LSS duty counsel expenditures increased from below $0.5 million to over $5.5 million.

Figure 14: Tariff expenditures as a percentage of LSS total expenditures

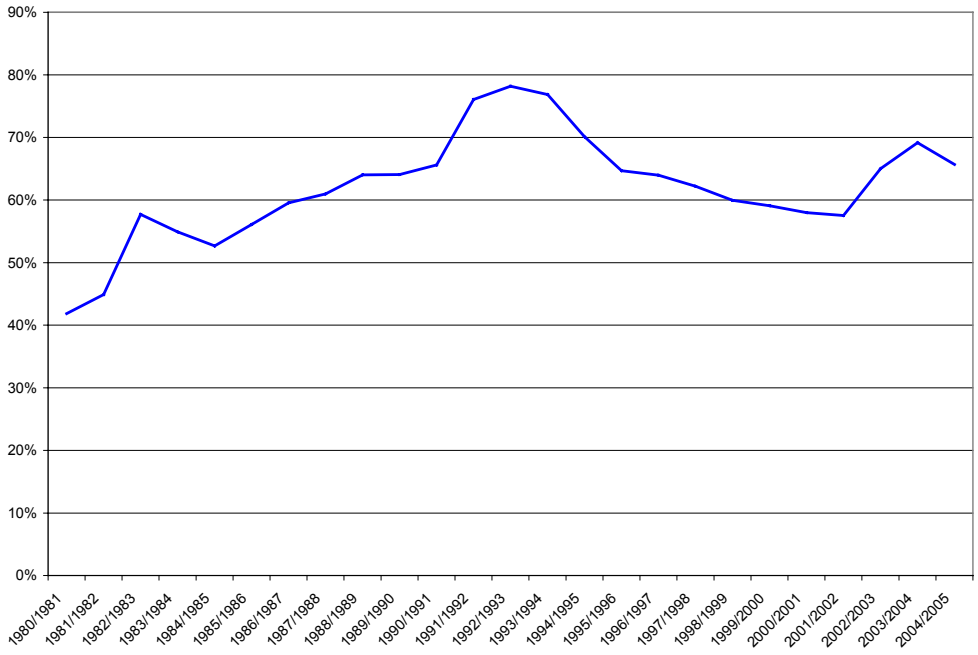


Figure 15: LSS criminal and family tariff expenditures, 1980/1981 to 2004/2005

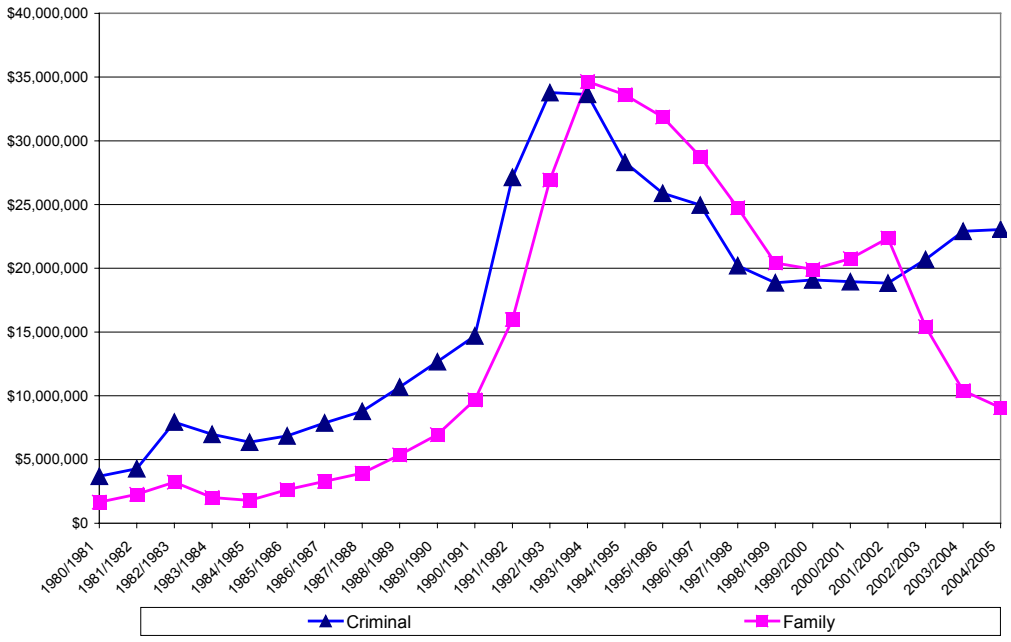
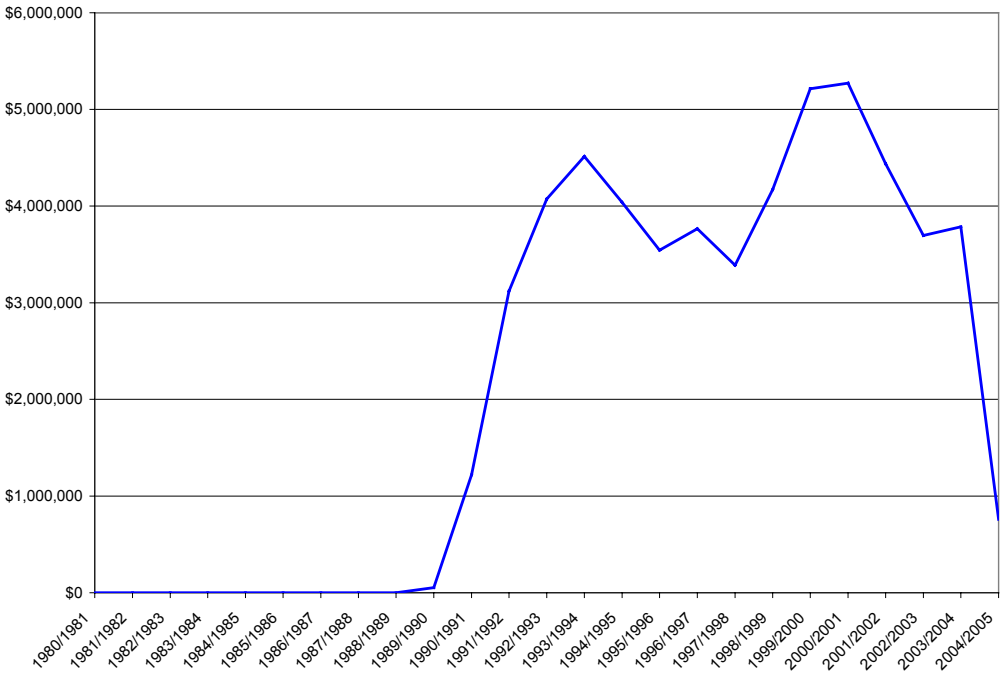


Figure 16: LSS immigration tariff expenditures, 1980/1981 to 2004/2005



Case volumes

In addition to tracing the history of LSS expenditures, it is also useful to examine trends in the volume of legal aid cases LSS has handled. Figures 17 to 19 depict long-term trends in the number of referrals issued to private bar lawyers and staff lawyers in criminal, family (including child protection), and immigration law. In both the criminal and family tariffs, case volumes rose dramatically through the 1980s and early 1990s, and then fell precipitously, so that in recent years they have basically returned to the level of the mid-1980s.[90] As these figures show, referrals to staff lawyers, which were always a small fraction of overall referral volumes, have dropped significantly since the 2002 cutbacks and restructuring.

[90] For more details regarding referral volumes for criminal, family, and immigration cases, see Tables 5B-13 to 5B-15 in Appendix 5B. Figure 18 includes both child protection and family cases.

Figure 17: Criminal cases referred to private bar lawyers and staff lawyers, 1983/1984 to 2004/2005

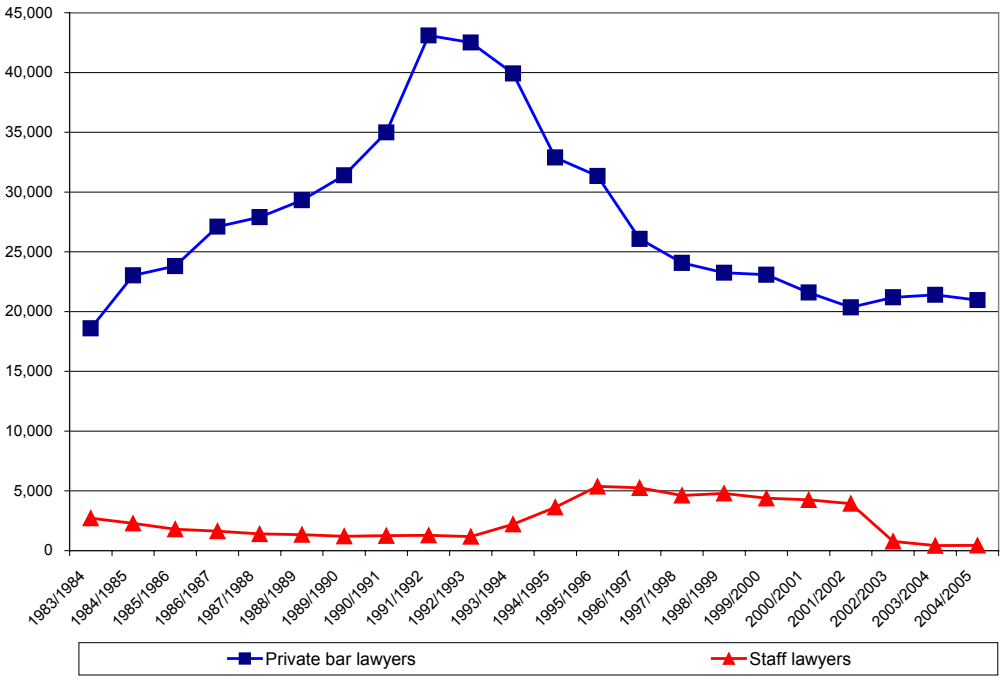


Figure 18: Family cases referred to private bar lawyers and staff lawyers, 1983/1984 to 2004/2005

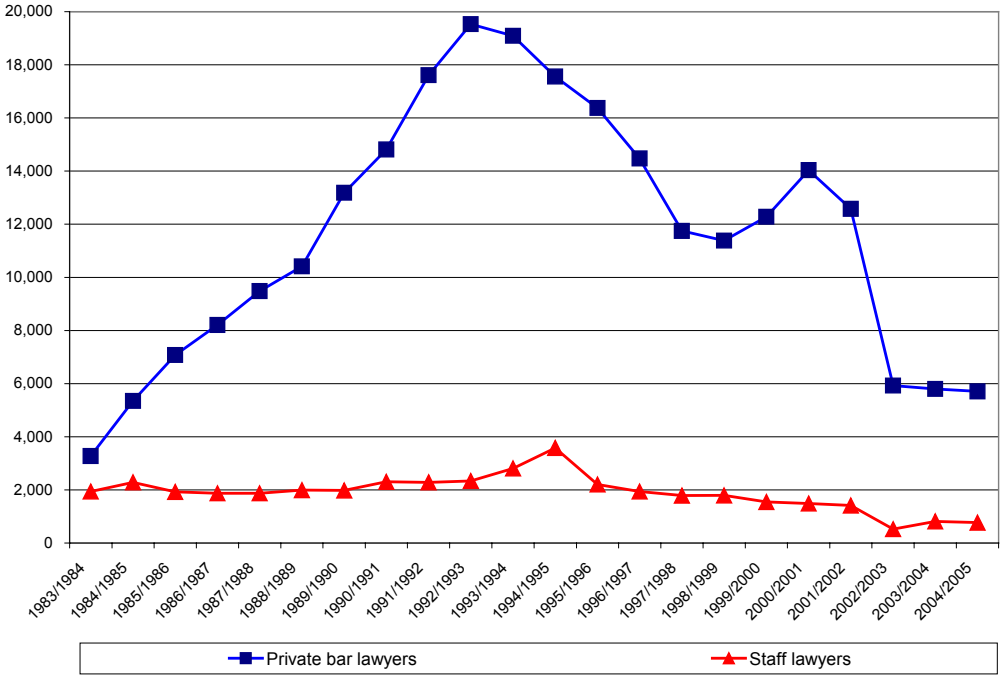
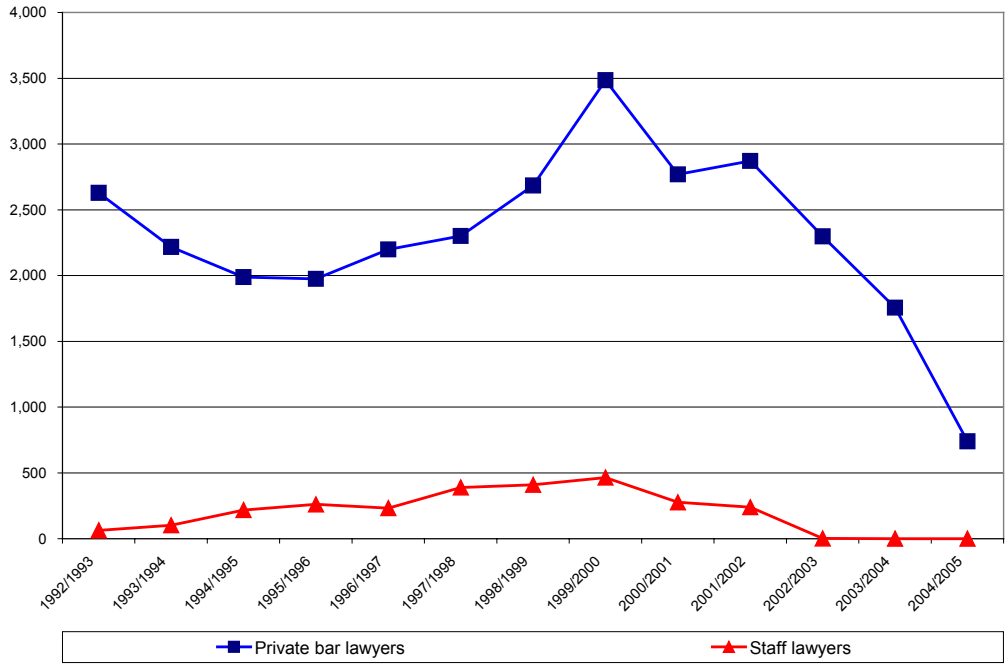


Figure 19: Immigration cases referred to private bar lawyers and staff lawyers, 1992/1993 to 2004/2005



Criminal case volumes

As Figure 17 shows, criminal referrals to private bar lawyers more than doubled between 1983/1984 and 1991/1992, rising from 18,593 to a peak of 43,099, but then declined through the 1990s, remaining at around 21,000 for the past five years.

Figures 5B-16 to 5B-24 in Appendix 5B illustrate trends in adult and youth criminal referrals for the different categories of offences from 1998/1999 to 2004/2005. For adult cases, referral volumes for category I offences, the least serious cases, have remained quite stable, and make up a small proportion of overall referrals. The bulk of criminal referrals relate to category II and III offences, and in both cases referral volumes have declined significantly since 1998/1999: category II referrals have decreased by 24% and category III referrals by 26%. For category IV offences, the most serious cases but the fewest in number, referral volumes have dropped by 30% in the same time period, with most of the decrease occurring since 2002/2003.

As Figure 5B-18 in Appendix 5B demonstrates, even before the enactment of the *Youth Criminal Justice Act* in 2003, youth case volumes had declined substantially for category I, II, and III offences. Category I referrals have declined by almost 50%, while category II and III referrals have declined by over 50% between 1998/1999 and 2004/2005. Not surprisingly, referral volumes for category IV offences have remained fairly constant, since the

youth justice reforms tended not to affect the prosecution of the most serious cases.[91]

Family and child protection case volumes

As Figure 18 shows, family and child protection referrals to private bar lawyers increased almost sixfold in the decade after 1983/1984, jumping from 3,274 in that year to a peak of 19,528 in 1992/1993. Referral volumes then declined rapidly, except for short-lived increases in 1999/2000 and 2000/2001. As a result of the 2002 budget cuts and the subsequent restriction of family law services to emergency coverage, referral volumes have been below 7,000 for the past three years, the lowest level since 1983/1984.[92]

Immigration case volumes

As Figure 19 shows, immigration referrals to the private bar declined from the initial year of 1992/1993 until 1996/1997, and then steadily increased to the peak year of 1999/2000, when volumes reached almost 3,485 due to a sudden influx of refugee claimants from China (so-called marine arrivals). Since then, immigration referrals have dropped by 79% to just 740 in 2004/2005, the lowest level since LSS established the tariff.[93]

The general and roughly parallel trends in lawyer participation rates, tariff expenditures, and referral volumes — increasing from the early 1980s to the early 1990s, and declining ever since — may indicate some form of causal relationship. As tariff funding improved, it could be that lawyers accepted more legal aid referrals and reduced pressure on clients to retain them privately, thus causing referral volumes to increase. There is undoubtedly a range of factors underlying these trends, however, making it difficult to draw any firm conclusions.

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[91] For more details on the volume of adult and youth criminal cases referred to private bar and staff lawyers, see Table 5B-25 in Appendix 5B.

[92] For more details regarding family referral volumes, see Table 5B-14 in Appendix 5B. Note that LSS did not begin tracking child protection referrals separately until 1998/1999, so that before that date they are included in the figures for the family tariff.

[93] For more details regarding immigration referral volumes, see Table 5B-15 in Appendix 5B.

V. Case costs

Average case costs

Table 2 in Chapter 2 sets out the average costs (including fees and disbursements) and average fees in criminal, family, child protection, and immigration cases in 2002/2003.

To provide a long-term perspective, Figures 20 to 23 set out the average fees (excluding disbursements) for adult and youth criminal cases, family cases, child protection, and immigration cases over a longer time span. Notably —

- Average fees for criminal (adult and youth) cases increased from $293 to $913 between 1983/1984 and 1991/1992, fluctuated during the 1990s, and have increased gradually since 1998/1999. Average case costs (including fees and disbursements) increased from $321 to $955 between 1983/1984 and 1991/1992, and were $1,065 in 2002/2003.
- Average fees in family cases increased from $364 in 1983/1984 to $521 in 1990/1991, the year before the last tariff rate increase. The peak year was 1998/1999, when average family fees reached $1,583, but they declined in each subsequent year, dropping to $1,180 in 2002/2003. Average case costs (including fees and disbursements) increased from $641 to $1,403 between 1990/1991 and 2002/2003, and peaked at $1,891 in 1998/1999.
- For child protection cases, the average fees in 2002/2003 were $1,556. Average fees have been in this general vicinity since 1997/1998. The peak year was 1996/1997, when average fees were $1,733. Average case costs (including fees and disbursements) were $1,679 in 2002/2003. They have been in this general vicinity since 1997/1998. They reached $1,932 in the peak year of 1996/1997.
- Average fees in immigration cases peaked in 1993/1994, declined steadily in the mid-1990s, rose slowly until 2000/2001, and then dropped again.[94]

[94] For more detail regarding average case costs for the various tariffs, see Tables 5C-1 to 5C-7, all in Appendix 5C.

Figure 20: Criminal tariff — Average fees per case

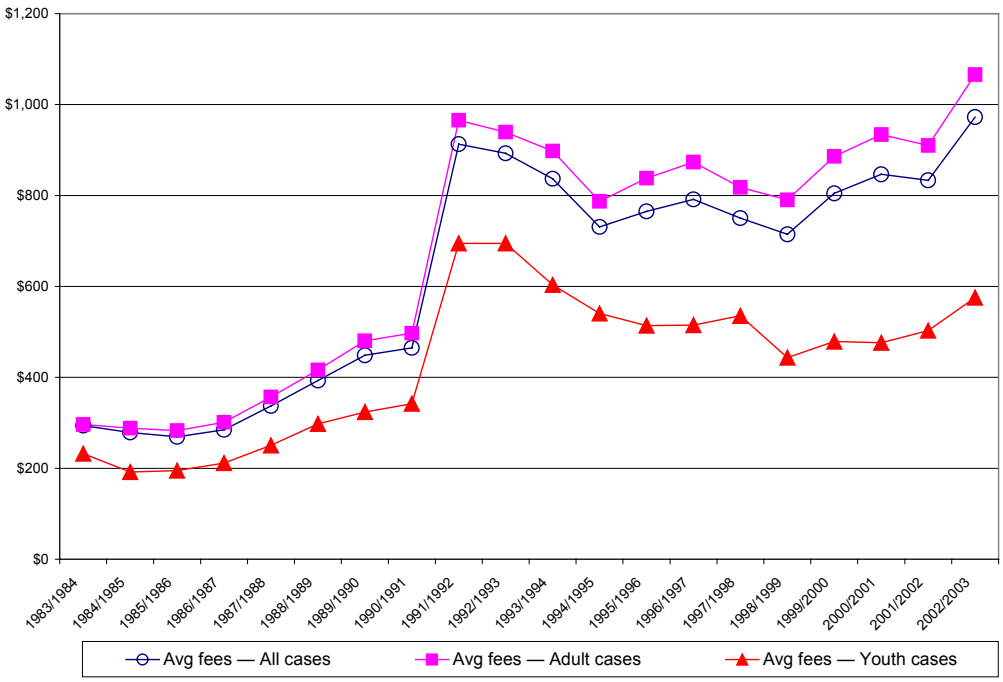


Figure 21: Family tariff — Average fees per case

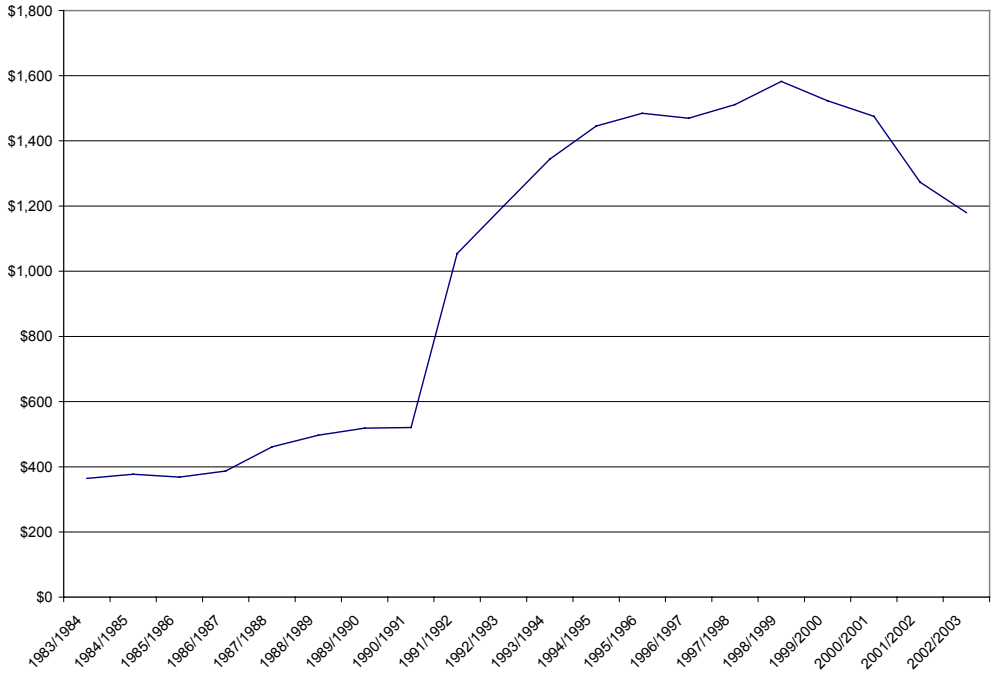


Figure 22: Child protection tariff — Average fees per case

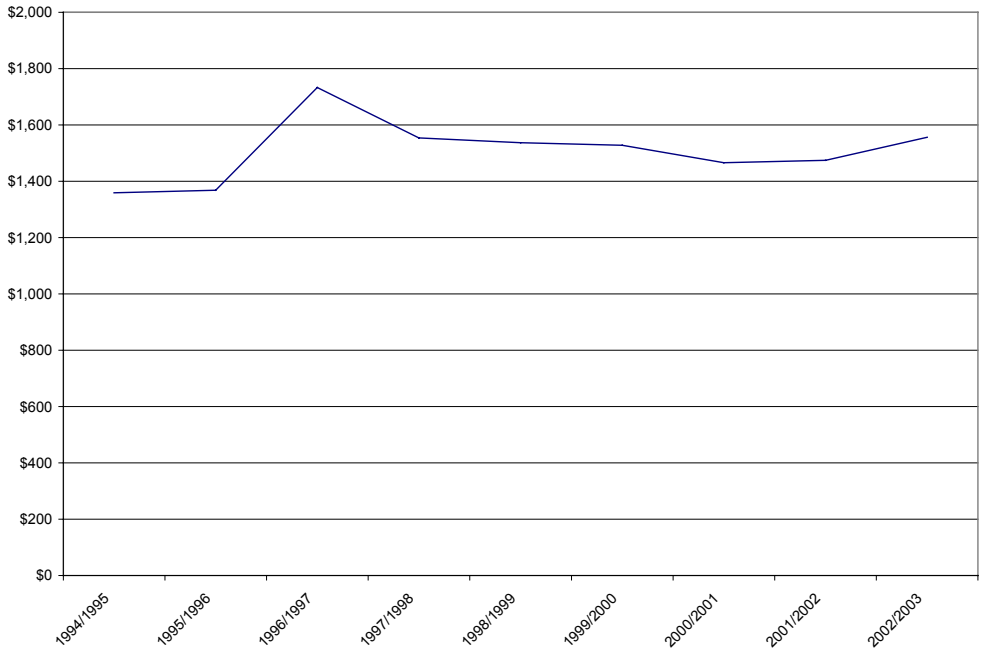
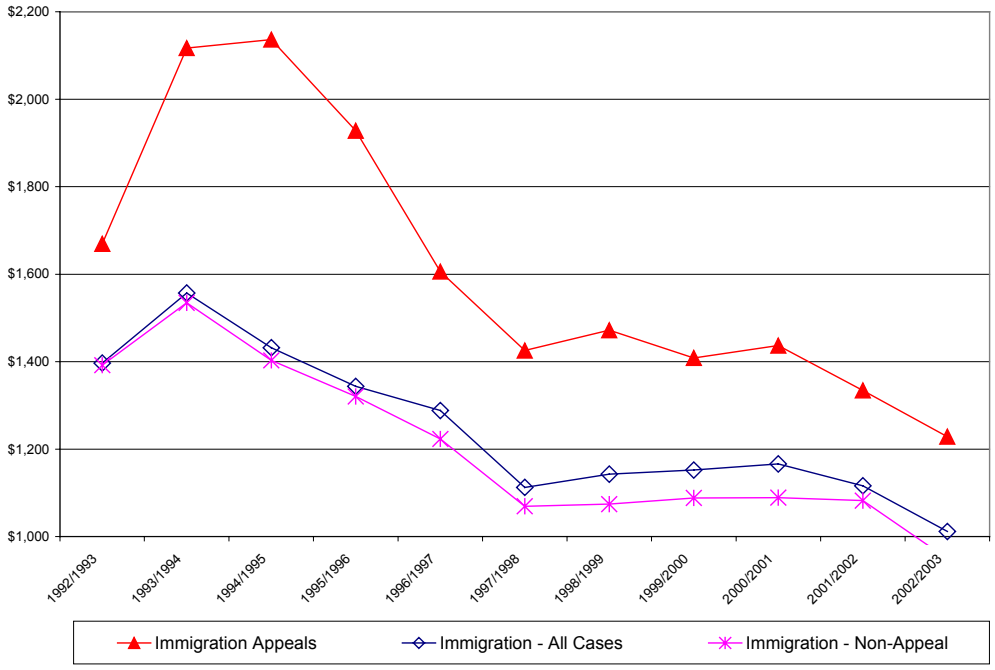


Figure 23: Immigration tariff — Average fees per case



Patterns in criminal case costs

There are a number of ways to analyze criminal case costs.

In the criminal tariff, the dominant long-term trend has been for expensive cases to consume an increasing proportion of criminal tariff expenditures. Figure 24 shows the proportion of tariff fees consumed by the most and least expensive cases. Between 1983/1984 and 2002/2003, the top quartile of criminal cases (i.e., the most expensive 25% of cases) increased their share of tariff fees from 63% to 75%. Thus, a quarter of all cases consumed three-quarters of total fees. The increase was even more dramatic for the top 5% of cases, which increased their share of tariff fees from 33% to about 53% in that period. For the less expensive cases in the middle and bottom quartiles, the proportion of tariff fees actually dropped over the same period.[95]

Figure 24: Criminal fees — Percentage of total tariff fees by quartiles and top 5% — Adult and youth cases

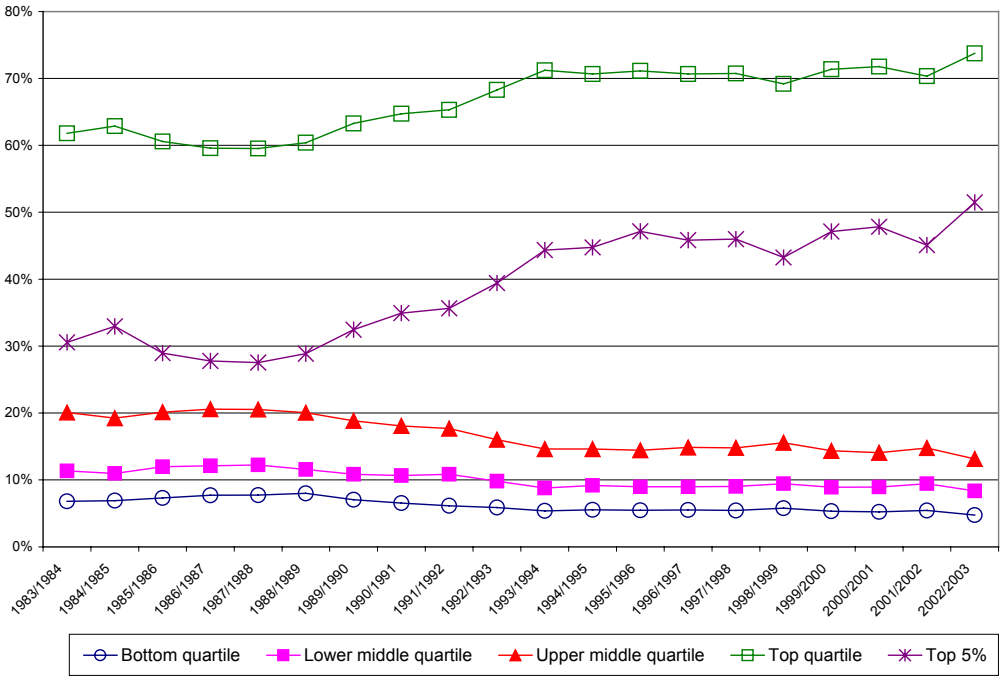


Figure 25 shows the amount of total criminal tariff fees allocated to each of the four offence categories in absolute terms, while Figure 26 shows the allocation in relative (i.e., percentage) terms. In general, the case costs for most criminal cases have remained relatively modest, but a small number of longer, more serious cases have taken up a disproportionate share of tariff

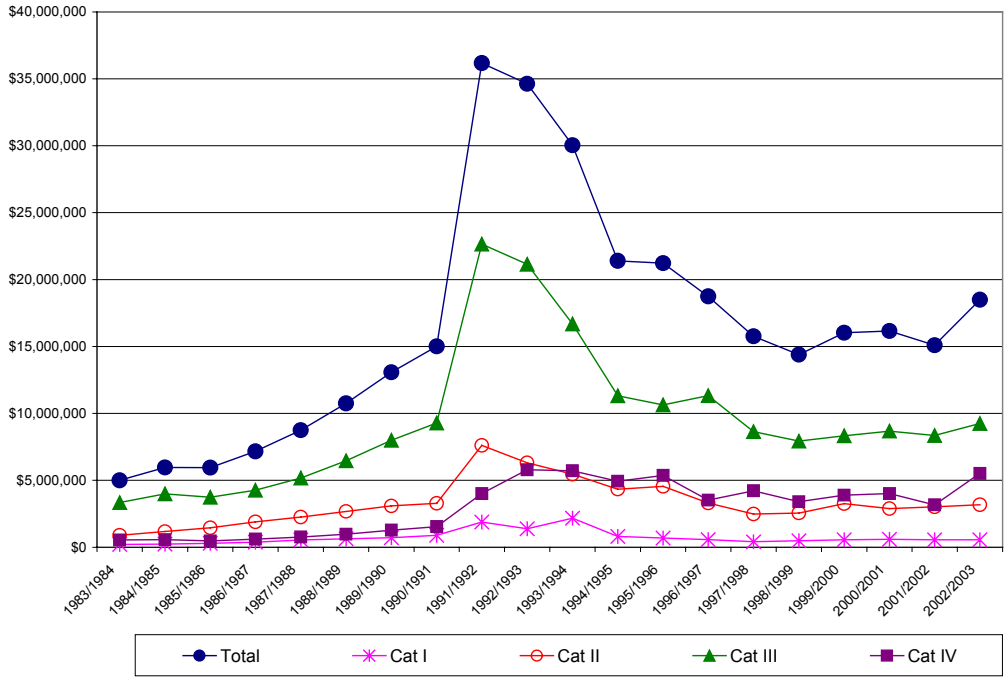
[95] For more details regarding adult and youth criminal cases, see Figures 5C-8 and 5C-9 in Appendix 5C, as well as Tables 5C-10 to 5C-12 in Appendix 5C.

expenditures. In 2002/2003, 80% of the criminal tariff spending on fees was directed to the more serious offences in categories III and IV. Moreover, between 1983/1984 and 2002/2003, the proportion of tariff expenditures for categories I, II, and III actually declined, while Category IV offences almost tripled their share of tariff spending (from 11% to 30%).[96]

Figure 27 underscores a related trend in terms of the average fees LSS pays for the different offence categories.[97] From 1983/1984, the average fees for categories I, II, and III increased slowly until 1991/1992, and have been quite stable since then.

By contrast, the average fees for category IV cases have increased quite dramatically, especially from 1990/1991 to 1995/1996. Average category IV fees fluctuated throughout the late 1990s, and increased significantly in 2002/2003, when LSS became responsible for the cost of cases above the $50,000 fee cap (which LSS implemented in 1998 to limit its expenditures in such cases). Average fees for category IV cases rose from $1,481 in 1983/1984 to $11,424 in 2002/2003, an eightfold increase.[98]

Figure 25: Total criminal fees by offence category



[96] For more details, see Figures 5C-13 and 5C-14, and Table 5C-15, in Appendix 5C. For a breakdown of criminal case costs by offence category and type of case (adult and youth), see Tables 5C-16 to 5C-30 in Appendix 5C.

[97] This figure shows average fees for all criminal cases, including appeals.

[98] For more details, see Tables 5C-31 to 5C-33 in Appendix 5C.

Figure 26: Criminal fees by offence category as a percentage of total criminal fees

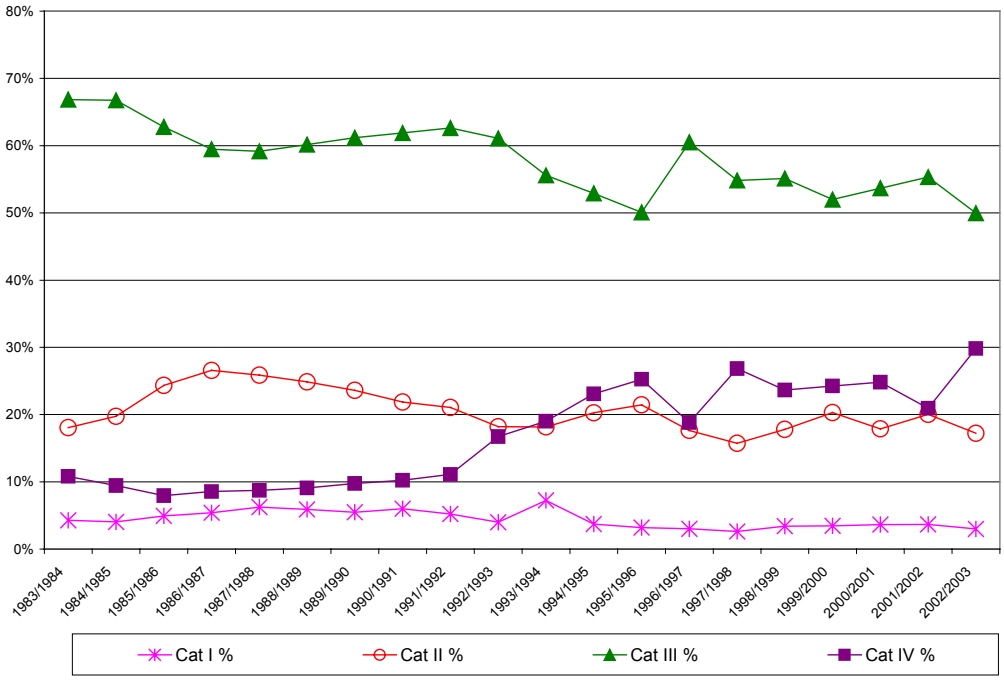
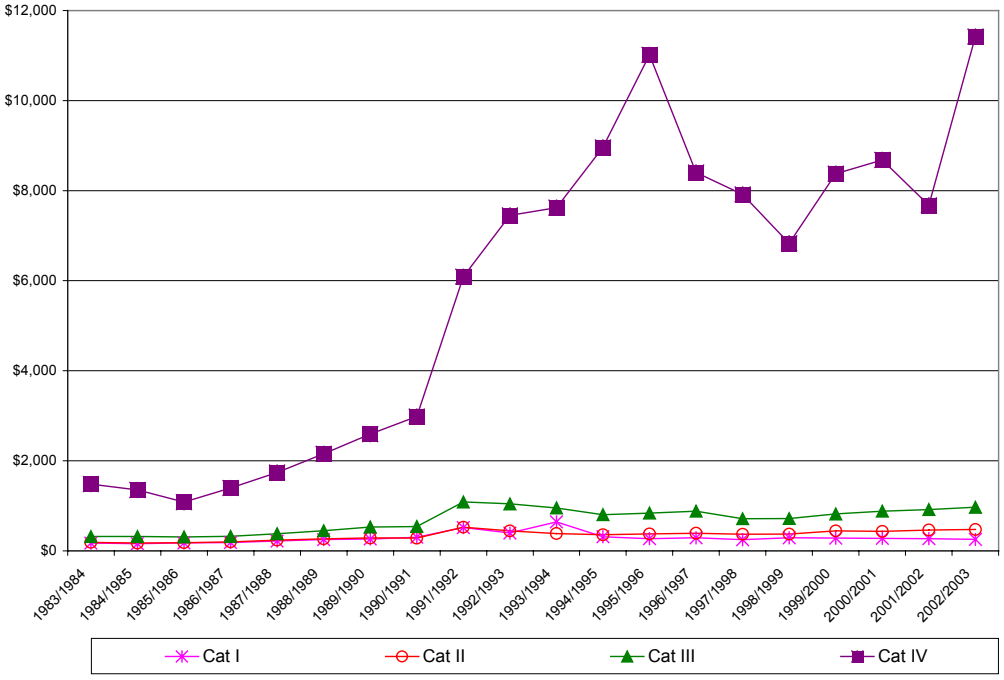


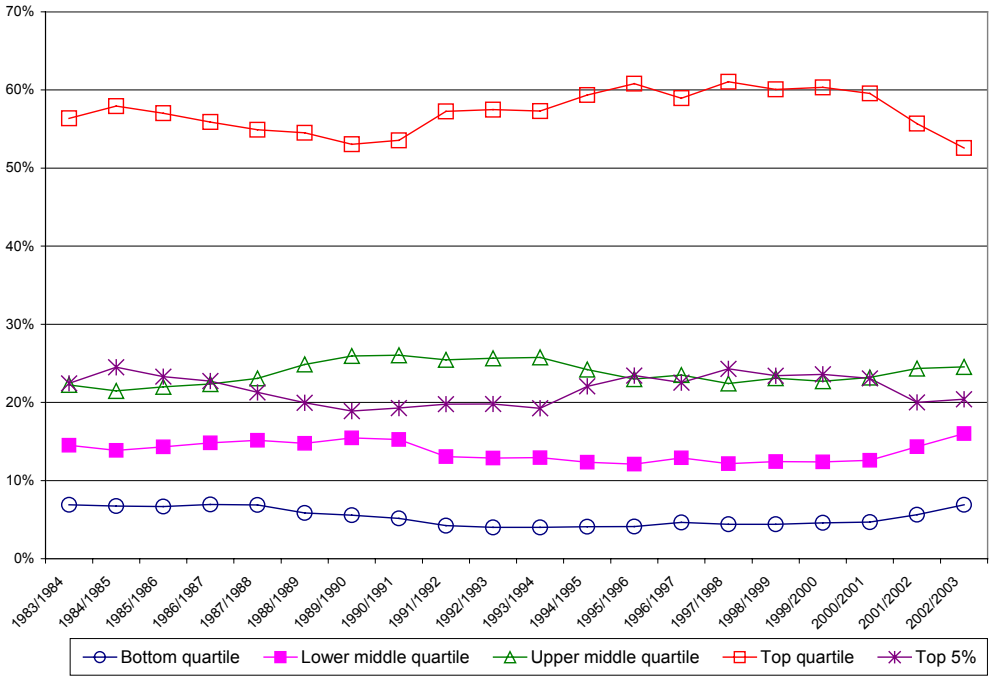
Figure 27: Average criminal fees by maximum offence category



Patterns in family and child protection case costs

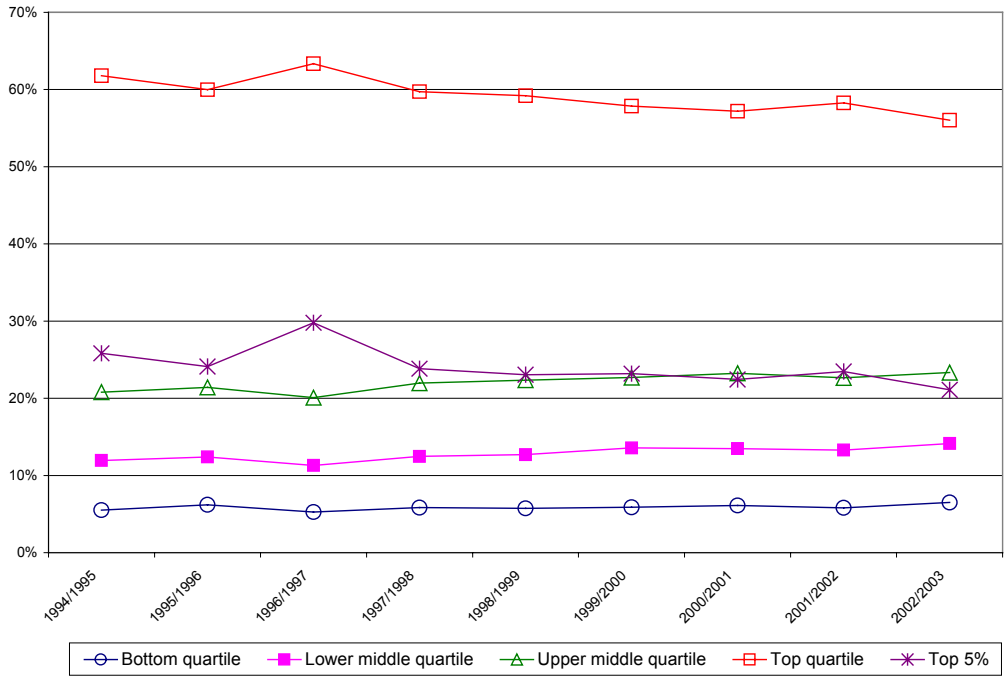
Figures 28 and 29 show the proportion of tariff expenditures consumed by the most and least expensive cases in family and child protection law. As with the criminal tariff, a relatively small number of cases consume a disproportionate share of tariff spending, albeit to a lesser degree than in the criminal tariff. In the family and child protection tariffs, the top quartile of cases (i.e., the most expensive 25% of cases) represent less than 60% of total costs (compared with 75% in the criminal tariff), while the top 5% of cases account for about 20% of costs (compared with 50% of criminal tariff expenditures). Moreover, unlike the criminal tariff, in these tariffs the expensive cases have not tended to increase their share of total costs over time; indeed, for the child protection tariff, the proportion of total costs allocated to the most expensive cases has actually declined over time.[99]

Figure 28: Family case costs (fees and disbursements) — Percentage of total tariff costs by quartile and top 5%



[99] For more details, see Tables 5C-34 and 5C-35 in Appendix 5C.

Figure 29: Child protection case costs (fees and disbursements) — Percentage of total tariff costs by quartile and top 5%

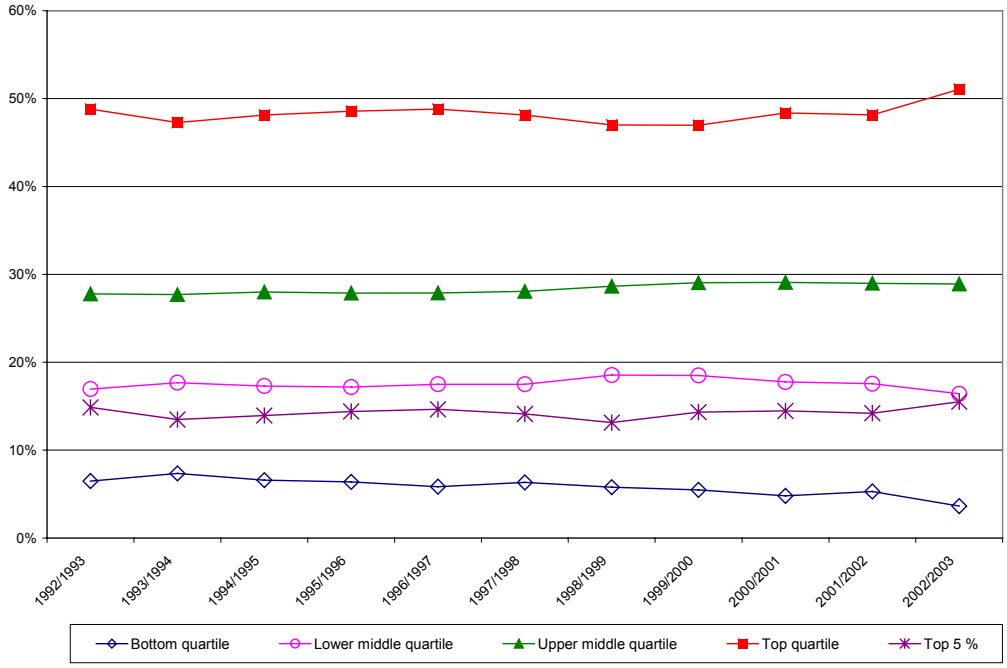


Patterns in immigration case costs

Figure 30 shows the distribution of tariff expenditures on the most and least expensive immigration cases. As in the other tariffs, expenditures are somewhat skewed towards more expensive cases, but to a much lesser degree than in the criminal tariff. Like the family and child protection tariffs, the top quartile of cases account for about half of tariff spending, but the top 5% of cases account for only about 16% of expenditures. Overall, the allocation of funding has remained relatively stable over time.[100]

[100] For more detail regarding immigration case costs, see Tables 5C-36 to 5C-38 in Appendix 5C.

Figure 30: Immigration case costs (fees and disbursements) — Percentage of total tariff costs by quartile and top 5%



VI. Case outcomes

In this section, we examine the frequency of different types of outcome in criminal, family, and child protection cases.

Outcomes in criminal cases

For criminal cases, we consider six basic types of outcome for which LSS tracks information —

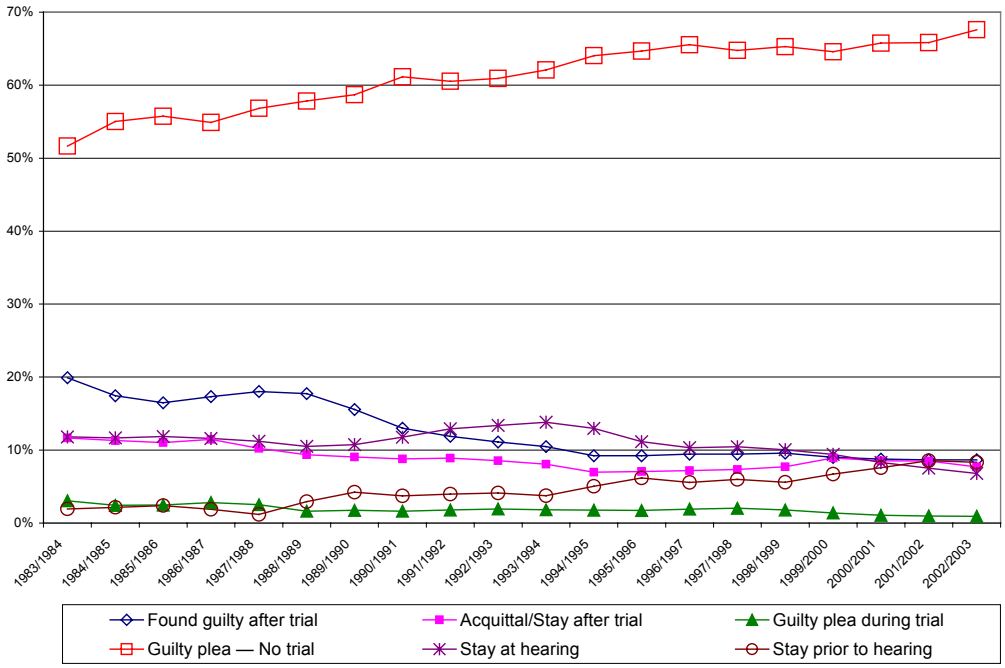
- cases in which a trial was held and resulted in a guilty verdict;
- cases in which a trial was held and resulted in an acquittal or stay of proceedings;
- cases in which an accused entered a guilty plea after the trial had commenced;
- cases in which a guilty plea was entered before trial;
- cases in which a stay of proceedings was entered at the hearing; and
- cases in which a stay of proceedings was entered prior to the hearing.

We also examine the outcome trends for different offence categories and the average fees relating to each outcome. In addition, we examine the average

length of trial for cases where a trial is held, and the frequency and length of jail sentences depending on how the case is resolved.

Figure 4 in Chapter 2 shows the distribution of criminal case outcomes for 2002/2003. Figures 31 to 33 show the outcome trends for all cases, for trial cases, and for cases resolved without a trial.[101]

Figure 31: Criminal case outcome trends — All cases



[101] For more details on outcomes in adult and youth cases, see Figures 5D-1 to 5D-6 in Appendix 5D.

Figure 32: Criminal case outcome trends — Cases going to trial

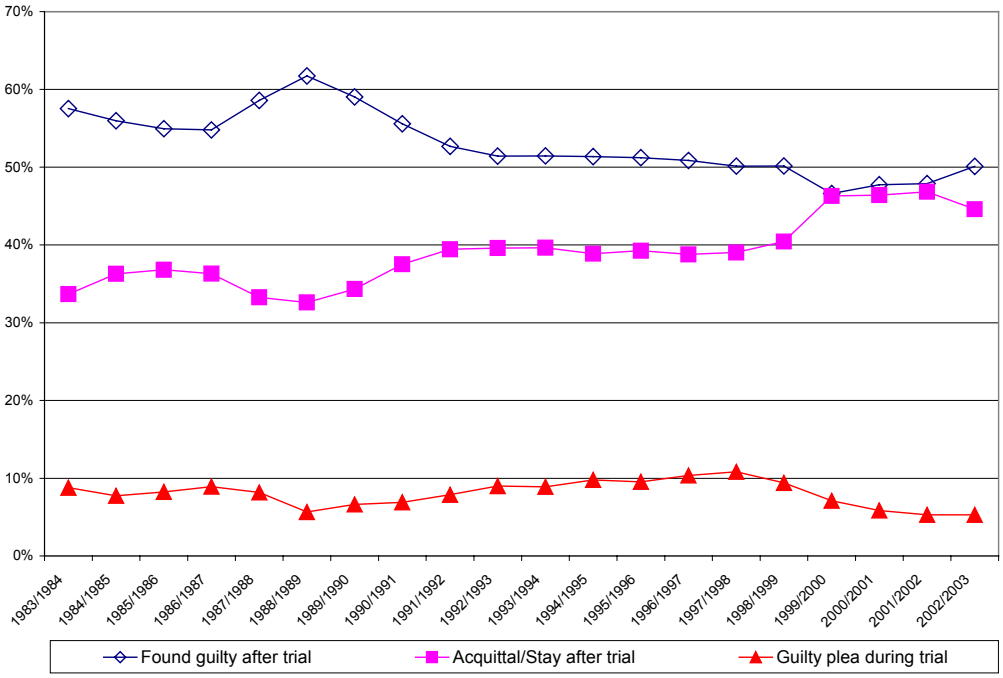
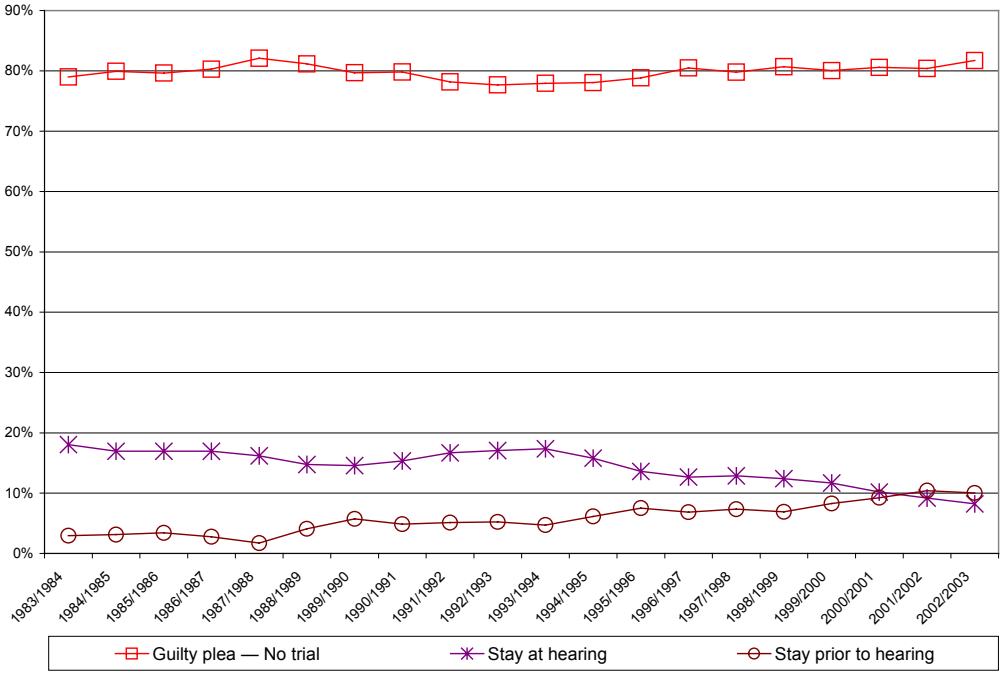


Figure 33: Criminal case outcome trends — Cases without a trial



Some key points regarding trends in criminal case outcomes are as follows —[102]

- LSS statistics disclose long-term trends in which the proportion of cases going to trial has gradually declined while the proportion of cases being resolved without trials has slowly increased.
- For example, in 1983/1984, about 35% of cases involved trials and only about 65% were resolved without trials (through guilty pleas or stays). In 1993/1994, the figures were about 20% and 80% for trial and non-trial resolution, respectively.
- In 2002/2003, about 16% of LSS criminal cases went to trial. Of those cases, about 46% resulted in guilty verdicts, 41% in acquittals or stays, and 5% in guilty pleas after the commencement of trial. The remaining 8% of trial cases had indeterminate outcomes.
- In 2002/2003, about 83% of cases funded by LSS were resolved without trials. Also, 68% of all cases resulted in guilty pleas, and about 15% resulted in stays of proceedings, either before trial (8%) or at trial (7%).

Figures 34 to 37 show case outcome trends by offence category.[103]

- For the less serious offences in categories I and II, there was a pronounced upward trend in the proportion of cases resolved by a pre-trial guilty plea, and a gradual decline in the proportion of trial cases resulting in guilty verdicts or acquittals and stays of proceedings.
- For category III cases, there was also a steady increase in the proportion of cases resolved by a guilty plea: about 53% in 1983/1984, rising to about 66% in 2002/2003. Because the offences are more serious, a higher proportion of cases go to trial, but the percentage of trial cases dropped from about one-third of cases in 1983/1984 to about 20% in 2002/2003. There was a long-term decline in the number of trial cases resulting in guilty verdicts (from just under 20% to about 10%).
- For category IV cases, which involve the most serious offences, a much higher proportion of cases go to trial than in the case of less serious offences. Nevertheless, the overall percentage declined over time: 60% of category IV cases went to trial in 1983/1984, but only 45% went to trial in 2002/2003. The percentage of cases resolved by a guilty plea increased from 30% to almost 40% between 1983/1984 and 2002/2003. The outcomes for category IV trials tended to fluctuate a great deal more throughout this time period.

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[102] For further detail, see Tables 5D-7 to 5D-12 in Appendix 5D. Some of the figures cited are based on a statistical analysis that excluded cases with an indeterminate outcome, which in 2002/2003 represented about 13.24% of total cases. The differential treatment of these indeterminate cases accounts for any apparent inconsistencies between these tables.

[103] For more detail regarding outcomes by offence category, see Tables 5D-13 to 5D-16 in Appendix 5D.

There are obviously a variety of factors influencing whether or not a case goes to trial. It is interesting to note, however, that this long-term decline in the frequency of trials appears inconsistent with the notion that there is a general tendency for legal aid lawyers to conduct unnecessary trials in order to increase their billings.

Figure 34: Criminal cases — Outcome trends — Category I offences

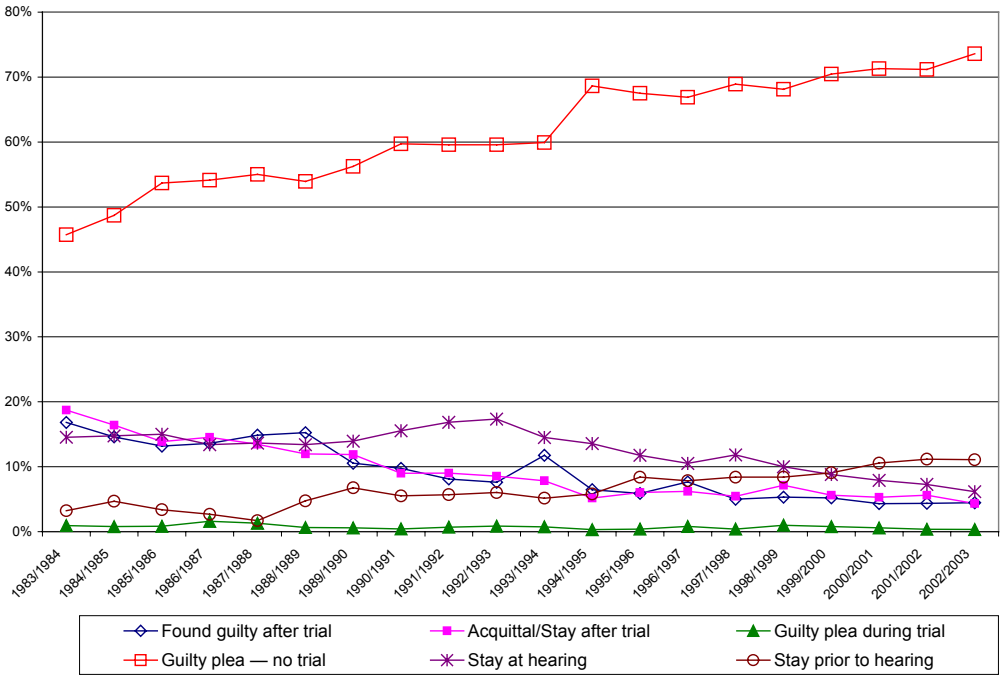


Figure 35: Criminal cases — Outcome trends — Category II offences

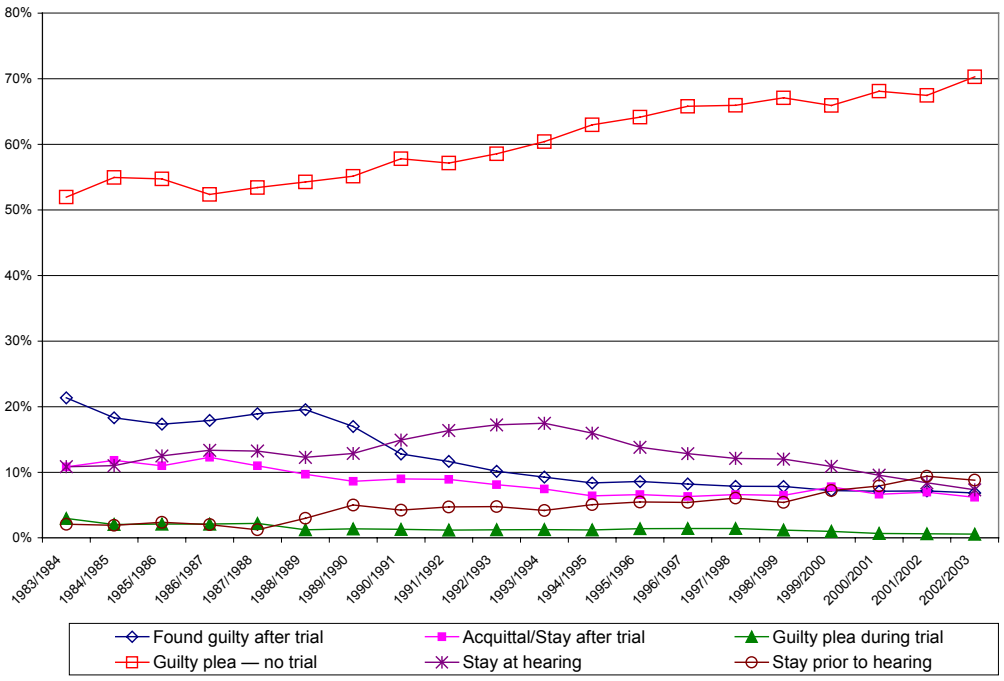


Figure 36: Criminal cases — Outcome trends — Category III offencesI

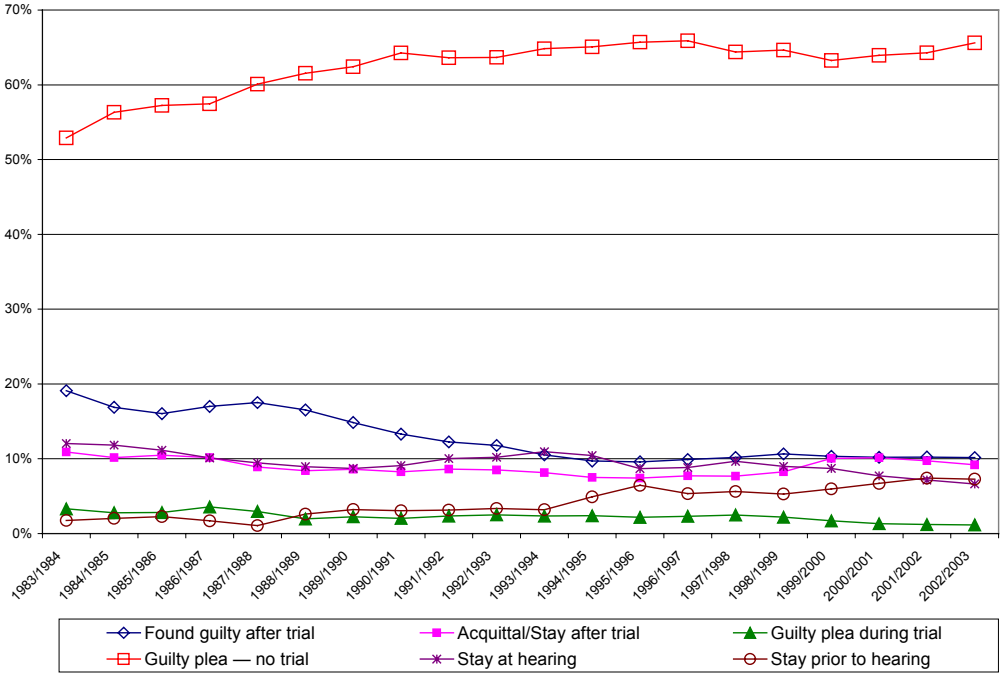
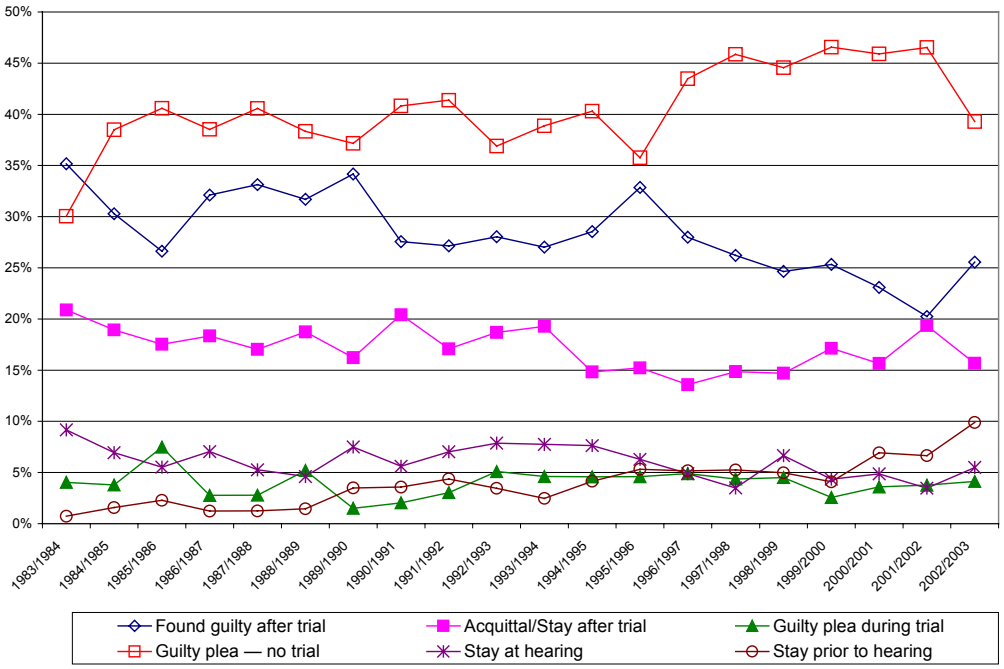


Figure 37: Criminal cases — Outcome trends — Category IV offences



Criminal case outcomes and average fees

Figures 38 to 41 show the trends in average fees for different offence categories depending on how the case was resolved.[104]

- In 2002/2003, the average fees for cases where a trial was held were $3,763. Differentiating by offence category, the average fees for trial cases were $647 (category I), $1,143 (category II), $2,842 (category III), and $24,621 (category IV).
- There was a substantial jump in average trial fees from 2001/2002 to 2002/2003, largely due to a spike in category IV trial costs as the attorney general directed LSS to fund high-cost cases to their conclusion.
- The average fees for cases where an accused entered a guilty plea were $492, and fees ranged from $246 (category I) to $1,431 (category IV).
- For all offence categories, the average fees for cases resolved by guilty pleas were lower in 2002/2003 than in 1991/1992. Rates generally peaked in 1991/1992 (when the last tariff increase occurred), except for category IV offences, which reached a peak of approximately $3,000 per case in 1999/2000.

[104] More details regarding average fees for different case outcomes and offence categories may be found in Figures 5D-17 to 5D-19 and Tables 5D-20 to 5D-29 in Appendix 5D.

- The average fees for cases involving a stay at hearing were $457, and for cases involving a stay prior to the hearing, $338.

As Table 5D-28 in Appendix 5D shows, even though the frequency of trials has declined over time, the proportion of tariff fees allocated to trials has slowly increased. Conversely, even as the frequency of non-trial outcomes has increased significantly, the percentage of tariff fees allocated to such cases has gradually declined.[105] This suggests that while there is a trend towards fewer trials, the trials tend to be more expensive.

Table 5D-29 also illustrates this trend by breaking down the trial costs (in fees) by offence category.

- Category I offences have remained a relatively stable proportion of all trial cases (under 10%). The total fees allocated to category I trials, and the average fees per trial, have declined significantly, however.
- Category II offences have declined as a percentage of criminal trial cases, and their share of total trial fees has also declined. The average fees per trial ($1,143 in 2002/2003) are significantly higher, however, suggesting that trials have become more expensive.
- Category III offences represent the majority of tariff cases (around 60% of cases from 1996/1997 to 2002/2003). While their share of total trial fees has declined (from a peak of 64% in 1984/1985 to 45% in 2002/2003), the average fee per trial ($2,842 in 2002/2003) has increased significantly since the late 1990s (although it is only marginally higher than the level of the early to mid-1990s).
- Category IV offences show the most dramatic change. They have increased as a proportion of tariff cases, although they remain only about 7% of all cases. Yet, they have increased their share of total trial fees (from about 16% to 45%), and the average trial fee has jumped sharply, reaching $24,622 in 2002/2003.

Clearly, LSS trial expenditures are increasingly skewed towards a relatively small number of serious and expensive cases.

[105] The figures in Table 5D-28 include cases with indeterminate outcomes, so the percentage of trial and non-trial cases is somewhat different from the figures reflected in Table 5D-7, which excludes those cases.

Figure 38: Average fees for criminal cases going to trial, by offence category

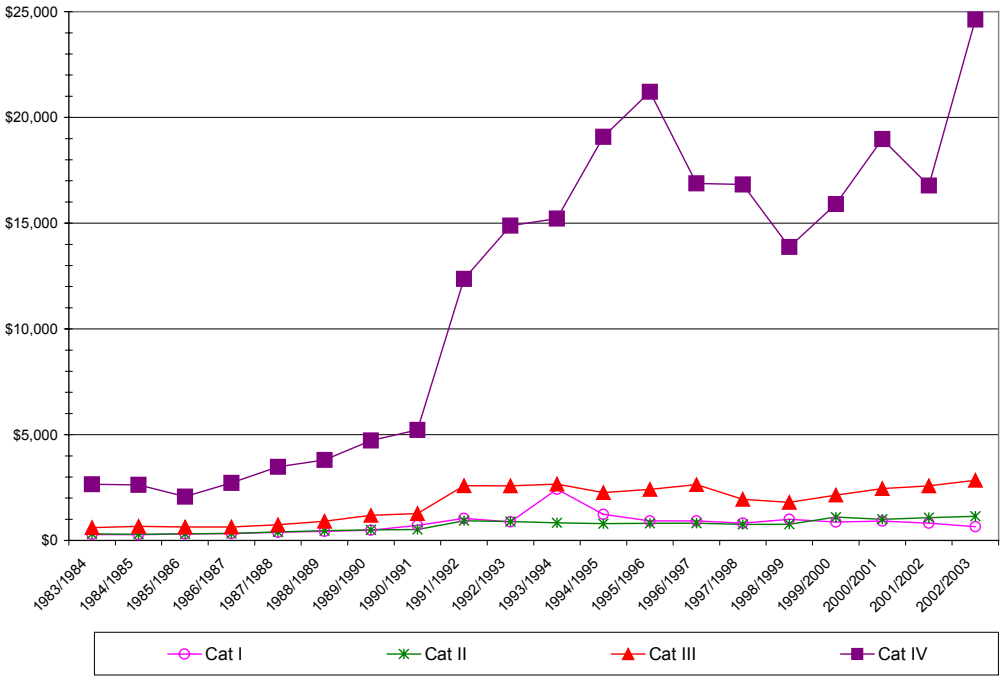


Figure 39: Average fees for criminal cases resulting in a guilty plea before trial, by offence category

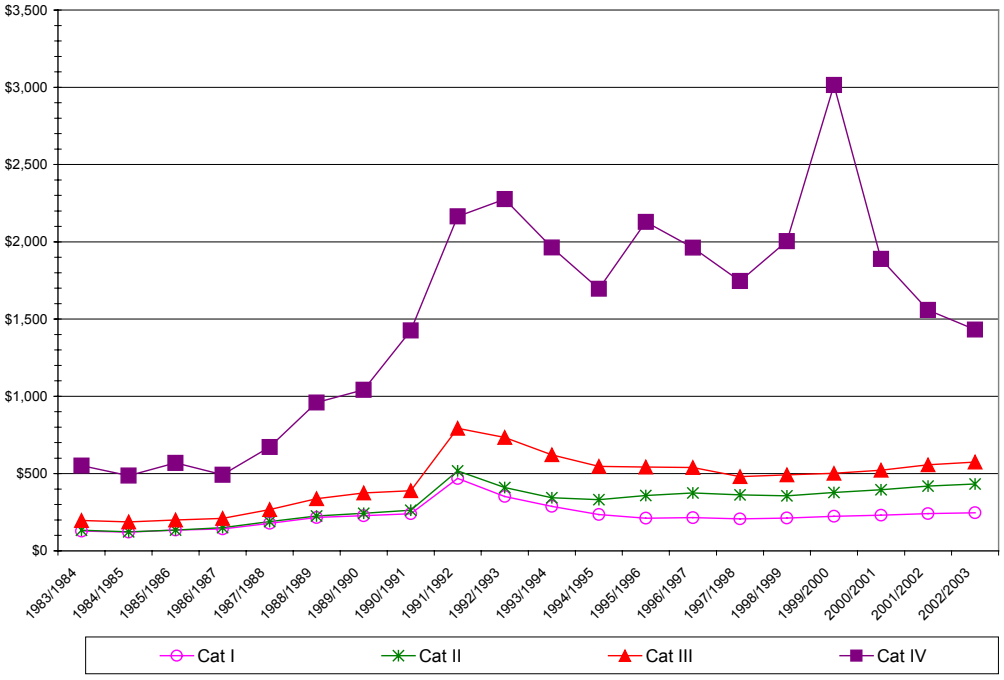


Figure 40: Average fees for criminal cases resulting in a stay at the hearing, by offence category

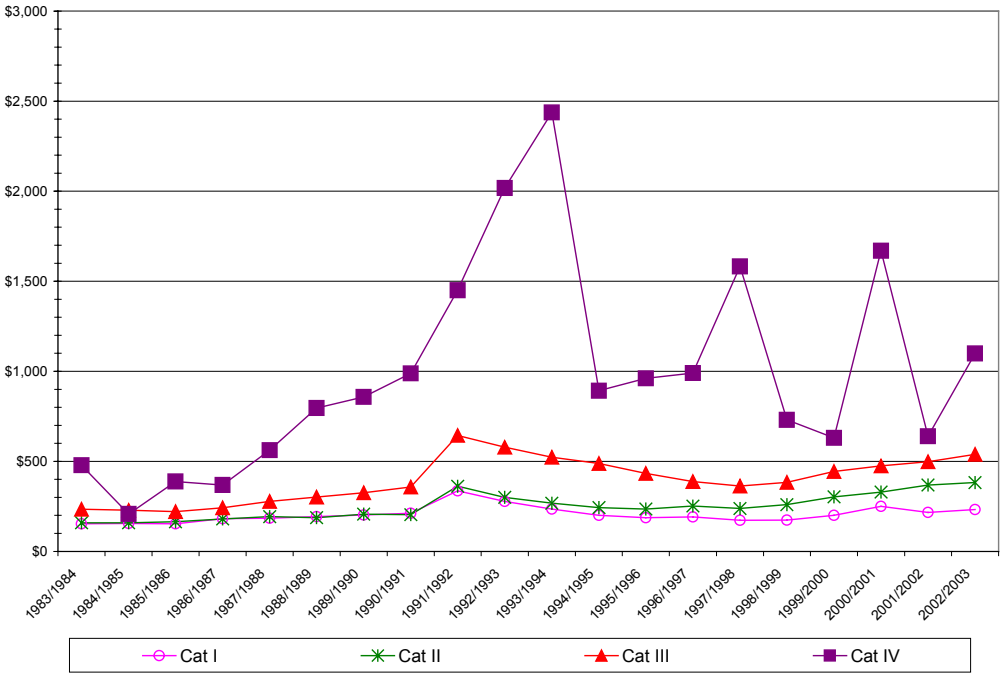
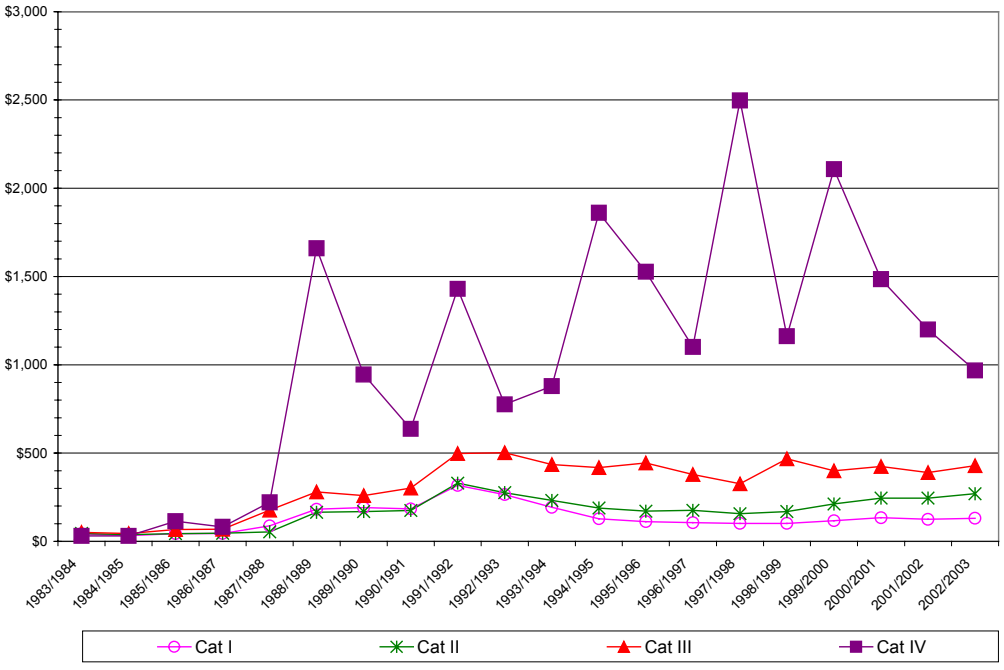


Figure 41: Average fees for criminal cases resulting in a stay before the hearing, by offence category



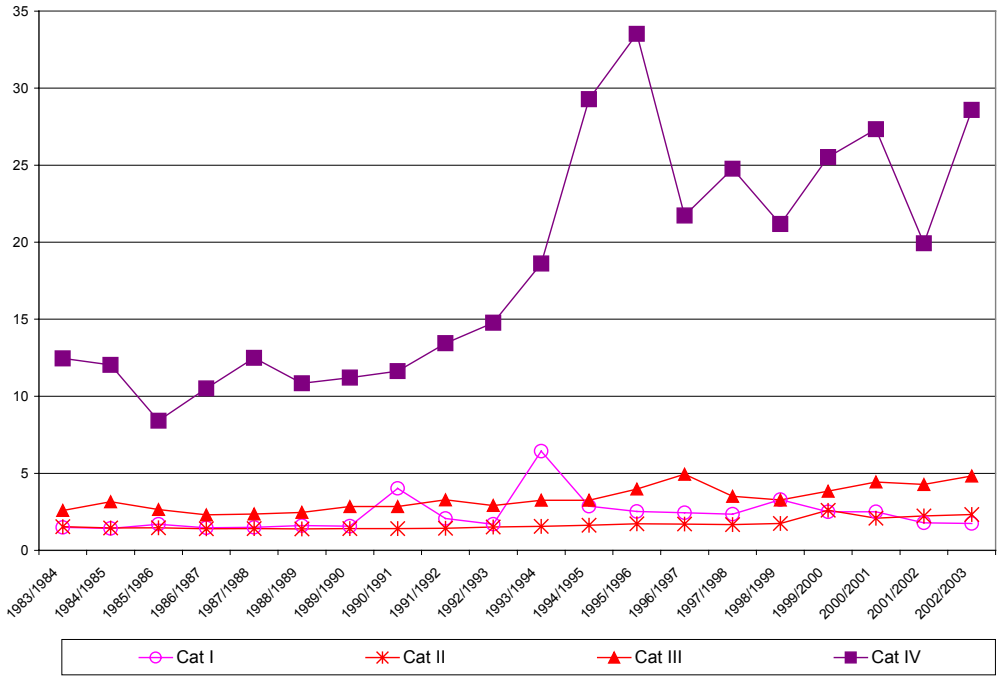
Average length of criminal trials

One of the key factors affecting case costs is the length of trial, since the block fee system ties payment to attendance in court. Also, average case length may fluctuate significantly depending on the number of lengthy trials held in any given year, particularly for the most serious and complex — and hence most costly — cases. Between 1983/1984 and 2002/2003, the average number of half days for a criminal trial increased from 2.51 to 5.61, largely due to the impact of a small number of large cases. Figure 42 outlines the trends in average trial length (in half days of court time) for the four offence categories.[106]

- For category I offences, the typical trial was completed in less than one day of court time. The average trial length in 2002/2003 of 1.74 half days was only slightly greater than in the early 1980s, and well below the 6.44 half days reached in the peak year of 1993/1994.
- For category II offences, the average trial was completed in 2.32 half days, or just over one day of court time. The average trial length increased very slowly over time.
- For category III offences, the average trial took 4.82 half days, or less than two and one-half court days, to complete. As with category II offences, there was a very slow increase in the average length of trial over time, reaching a peak in 1996/1997 and fluctuating since that time in the range of 4 to 5 half days.
- For category IV offences, average trial length has fluctuated dramatically in recent years, as Figure 42 makes plain. There was a relatively steady increase in trial length through the late 1980s and early 1990s, and it peaked at almost 34 half days in 1995/1996. Since then, the average length of trial has varied significantly, due in large part to shifting policies regarding responsibility of LSS for funding large and expensive cases. Since 2002, LSS has been responsible for funding more of these cases, which is reflected in the sharp increase in trial length for 2002/2003. The average length is still less than 30 half days, however.

[106] For more details regarding average trial length for both adult and youth cases, and the various offence categories, see Tables 5D-30 to 5D-36 in Appendix 5D.

Figure 42: Criminal trials — Average number of half days, by offence category



Trends in criminal sentencing

Finally, we consider criminal case outcomes in terms of sentencing. Figures 43 to 45 show for each offence category the proportion of all criminal tariff cases resulting in a jail sentence; the proportion of all cases with either a guilty verdict (after a trial) or a guilty plea that result in jail sentences; and the average length of sentence.[107] With some notable exceptions, the general patterns conform to expectations based on general sentencing principles and practices.

- The likelihood of a jail sentence increases with the seriousness of the offence, except in the case of category I offences, which have a slightly higher incidence of jail sentences than category II offences. This may

[107] Between 1999/2000 and 2002/2003 (the years for which data were available), the trends have remained quite stable, so these figures show only the results for 2002/2003. For more details regarding jail sentences, see Tables 5D-37 to 5D-42 in Appendix 5D. There are some important qualifiers for these results. First, in producing these statistics, LSS is relying on the results that lawyers report on billing forms, so there is no mechanism for ensuring data integrity and accuracy. For example, the reporting forms make no distinction between consecutive and concurrent sentences, and for the purposes of our analysis we have assumed that all results reflect concurrent sentences. Consequently, the results here may tend to understate the actual length of the sentence imposed. A second important qualifier is that the reporting forms do not make specific provision for life sentences and indeterminate sentences, so it is unclear how lawyers have reported results in such cases. For this reason, we have excluded cases where lawyers reported sentences of 25 years or more.

reflect the fact that, until recently, BC's *Motor Vehicle Act* imposed a mandatory jail sentence for driving while prohibited or suspended.

- Jail sentences are more frequent where an accused has a trial that results in a guilty verdict, compared with those cases where an accused pleads guilty. Category II offences are the one exception to this pattern, which may reflect the mandatory jail sentence the *Criminal Code* imposes for second (and subsequent) convictions of certain drinking and driving offences.
- For the least and most serious offences (categories I and IV), there is a significant difference in the likelihood of jail based on the method of resolving the case (guilty plea or guilty verdict), but this does not hold true for categories II and III.
- For the most serious offences (categories III and IV), the method of resolving the case has a significant impact on the length of a jail sentence, with guilty pleas leading to substantially shorter sentences.

Figure 43: Percentage of all criminal cases resulting in a jail sentence, 2002/2003

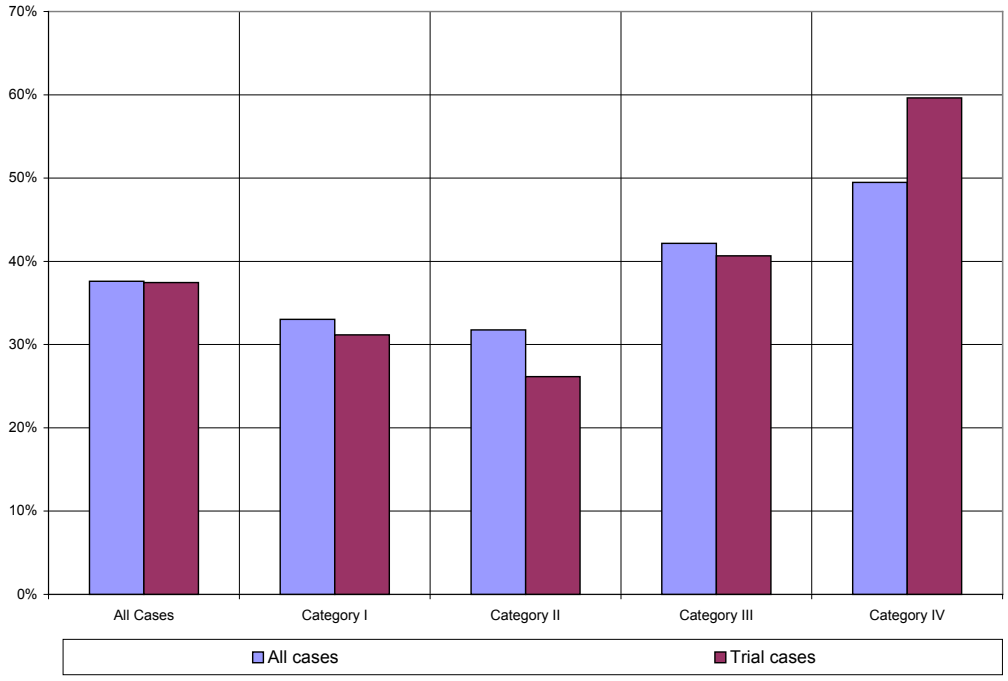


Figure 44: Percentage of criminal cases resulting in a jail sentence — Guilty verdict versus guilty plea — 2002/2003

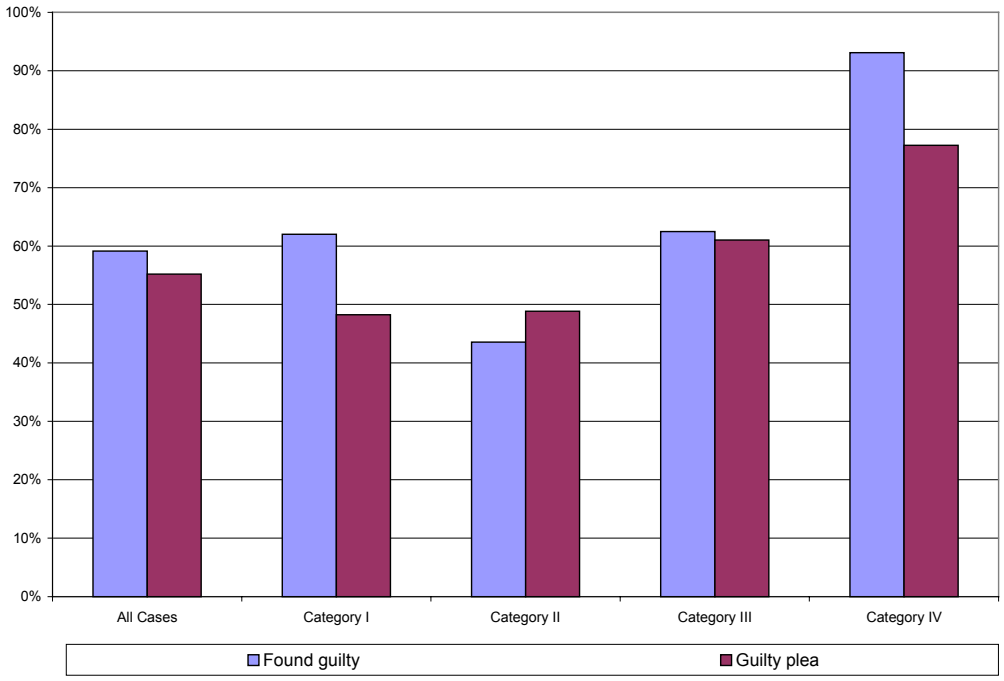
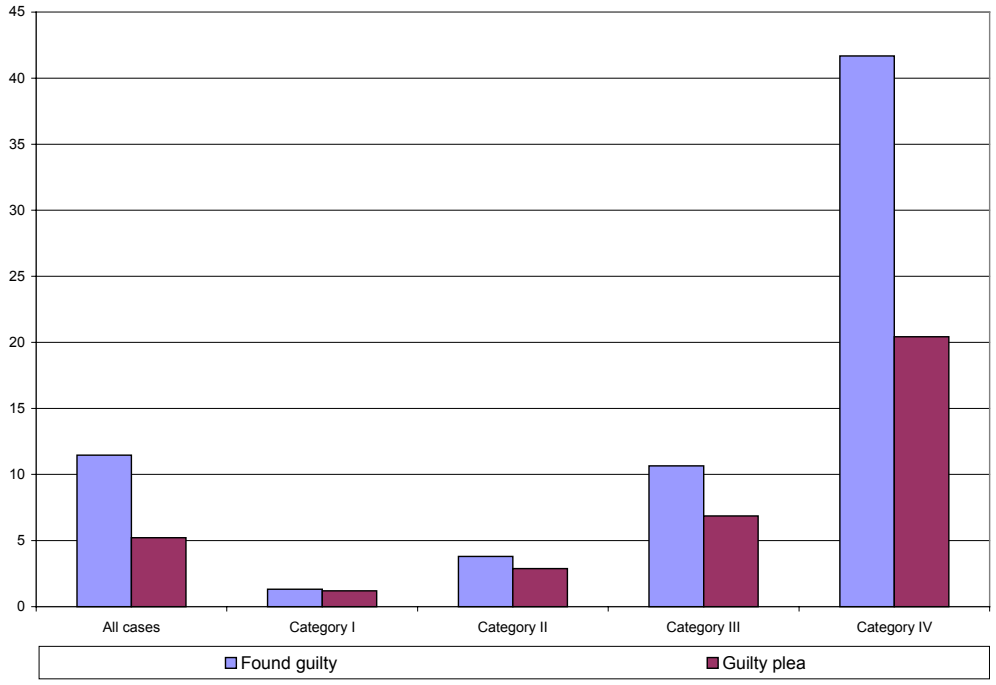


Figure 45: Average length of jail sentence (months), 2002/2003



Outcomes in family and child protection cases

At present, LSS does not have reliable data regarding the outcomes in family and child protection cases. It does, however, have data regarding the frequency of different types of proceedings or services funded under the tariffs, and the average hours that lawyers claimed. Tables 17 and 18 provide the relevant details for the family and child protection tariffs, respectively, for the period 1999/2000 to 2002/2003.

For the family tariff, the 2002 reductions in family services had a dramatic impact on the types of proceedings that LSS funds.

- Following the cutbacks, there were more settlement conferences and hearings for interim applications, and fewer chambers hearings and trials.
- The average hours required for different services were quite modest.
- Even before the cutbacks, only a very small percentage of family cases actually went to trial, and by 2002/2003, less than 1% of cases went to trial.

For the child protection tariff, which was generally not affected by the 2002 cutbacks, the frequency of different proceedings and the number of hours required were relatively stable in the period 1999/2000 to 2002/2003. The percentage of cases in which lawyers claimed fees for mediation increased significantly but remained a small proportion of cases overall.

Table 17: Family tariff — Frequency of billing attendance at different hearing types and average hours claimed

	Settlement conference		Chambers hearing		Interim application		Pre-trial conference		Registrar's hearing		Trial hearing	
Fiscal year	% cases	Avg. hrs.	% cases	Avg. hrs.	% cases	Avg. hrs.	% cases	Avg. hrs.	% cases	Avg. hrs.	% cases	Avg. hrs.
1999/2000	5.12	2.08	20.99	4.37	57.96	3.17	1.98	1.74	0.35	3.34	3.69	12.43
2000/2001	8.69	1.71	19.26	4.10	57.16	2.95	1.55	1.79	0.27	3.09	3.66	12.05
2001/2002	13.13	1.79	15.11	3.91	51.72	2.94	0.91	1.71	0.10	3.16	1.92	11.77
2002/2003	22.10	1.91	2.74	5.00	62.81	4.19	0.61	1.79			0.68	25.80

Table 18: Child protection tariff — Frequency of billing attendance at different hearing types and average hours claimed

Fiscal year	Presentation hearing		Pre/Post hearing application		Case conference		Hearing	
	% cases	Avg. hrs.	% cases	Avg. hrs.	% cases	Avg. hrs.	% cases	Avg. hrs.
1999/2000	59.62	2.3	15.63	2.2	46.97	2.1	68.66	5.2
2000/2001	57.80	2	15.30	2.2	46.79	2.1	67.42	4.6
2001/2002	57.62	1.8	14.40	2.2	41.47	1.9	68.71	4.9
2002/2003	56.96	2.1	14.95	2.2	42.27	1.9	68.82	5.4

Fiscal year	Application for leave		Application to cancel		Mediation		Aboriginal extended family meeting	
	% cases	Avg. hrs.	% cases	Avg. hrs.	% cases	Avg. hrs.	% cases	Avg. hrs.
1999/2000	0.76	3.1	0.76	3.3	0.50	3.9	0.08	2.7
2000/2001	1.13	3.6	0.86	3.6	1.32	5.6		
2001/2002	0.96	4.3	0.70	5.4	4.26	5.5	0.17	3
2002/2003	1.59	2.8	1.28	8.9	5.86	6.1	0.21	5.6

VII. Conclusion

Over the past decade or so, the number of lawyers participating in the tariff system has steadily declined, with substantial decreases in both criminal and family law in all areas of the province. The proportion of practicing BC lawyers who accept legal aid referrals has declined by over 50% since the early 1990s. In a related trend, the tariff bar is getting older and there are fewer junior and intermediate lawyers providing legal aid services, so that the bulk of tariff services are now provided by lawyers with over 10 years of experience. In terms of tariff lawyer billing patterns, average billings per lawyer are just over $30,000, and over three-quarters of lawyers bill less than $50,000 per year in fees. Lawyers billing $50,000 annually account for well over half of tariff fees, however.

LSS tariff spending, and LSS expenditures as a whole, have declined significantly since the early 1990s, while expenditures in other areas of the justice system have generally increased. LSS case volumes in all tariff areas have decreased significantly in the last decade, with family and immigration volumes showing the sharpest decline. As a result, the bulk of LSS tariff spending is now directed towards criminal law services. In general, LSS case costs and average fees per case have increased very gradually over time, and remain relatively modest. A small number of large and expensive cases

account for a disproportionate amount of tariff expenditures. In the criminal tariff, but not the other tariffs, these expensive cases have tended to consume an increasing share of tariff spending over time.

In the criminal tariff, the long-term trend is for more and more cases to be resolved without a trial, especially for less serious offences. The majority of cases are resolved by way of guilty plea, and for all offence categories, the average fees for guilty pleas are lower than in 1991/1992. Fees for cases going to trial have increased very gradually, except for category IV cases, the fees for which have almost doubled since 1991/1992. Similarly, the average trial length for category I, II, and III offences has been relatively stable over time and remains below historical peaks. By contrast, average trial length for category IV offences increased markedly in the 1990s and has fluctuated significantly since then, although it too is below its historical peak. In terms of sentencing outcomes, with a few exceptions the available data suggest that legal aid clients who plead guilty instead of going to trial are less likely to go to jail, and more likely to get a shorter sentence if a jail term is imposed.

6
Comparative Analysis of Tariff Compensation

I. Introduction

Throughout the consultations conducted as part of the Legal Services Society tariff review, it was clear that inadequate compensation is a fundamental problem in the LSS tariff system and the main cause of declining lawyer participation. The 1984 *Hughes Report* recommended that LSS implement an annual review process involving consultations and research to establish criteria for the proper relationship between legal aid tariff rates and private market compensation. Despite implementing periodic and substantial tariff increases between the mid-1980s and 1991, and evaluating and adjusting tariff expenditures on an ongoing basis since that time, LSS has not conducted any in-depth comparative assessment of tariff compensation. As part of the tariff review, the working group sought to fill this gap by collecting and analyzing a substantial amount of information regarding compensation for tariff lawyers and comparable groups (comparators). This information included —

- hourly rates and total fees for typical services provided by tariff lawyers and members of the BC private bar generally;
- compensation rates for other publicly funded justice system professionals in BC; and
- legal aid tariff rates in other jurisdictions.

We retained a compensation expert, Western Compensation and Benefits Consultants (WCBC), to provide advice regarding the appropriate methodology for evaluating tariff compensation and selecting the proper range for tariff rates. WCBC indicated that to identify the appropriate comparative marketplace, the key questions for any organization are —

- From which sectors and organizations do we recruit staff or service providers?
- To which sectors and organizations do we lose staff or service providers?
- Which sectors and organizations have similar characteristics, and utilize staff or service providers for similar functions?

WCBC found that for the tariff system, the most relevant comparison is with the private marketplace for BC lawyers, rather than with rates for legal aid work in other jurisdictions or for other public sector lawyers in BC, who have different roles, responsibilities, and employment circumstances. WCBC's full report may be found in Appendix 4B.

Comparisons with legal aid rates in other jurisdictions are not particularly helpful, because it is BC lawyers who provide legal aid services to LSS clients. In deciding whether to accept legal aid cases, BC lawyers are likely to base their decisions on comparisons with commercial rates for non-legal aid work within the province, rather than legal aid rates elsewhere. In its 2001 *Legal Aid Tariff Reform Business Case,* Legal Aid Ontario (LAO) made a similar observation —

> In any event, comparisons between Ontario's legal aid rates and the rates paid by other provinces are of limited value. When Ontario lawyers decide whether or not they can afford to accept legal aid certificates, their key considerations are the better earnings available from clients of modest means and the possibility of avoiding areas of legal practice involving low-income people.[108]

There are other reasons for doubting the relevance of legal aid rates in other jurisdictions. Most other Canadian provinces rely heavily on staff, rather than judicare, models of service delivery and, in any event, tariff rates in other Canadian jurisdictions are generally regarded as inadequate. Thus, comparisons with tariff rates in other Canadian jurisdictions merely show the relative position of BC tariff rates in Canada; they cannot serve as a primary benchmark for BC tariff compensation. We discuss the legal aid rates and tariff structures in other jurisdictions in more detail in Chapter 7.

In this chapter, we review the information collected about compensation rates for various comparator groups in BC. In section II, we examine the available data on private market rates for legal services for clients of modest means in BC, and make comparisons with current tariff compensation levels. In section III, we examine the relationship between lawyer overhead costs and tariff compensation. In section IV, we review the remuneration rates for other publicly funded professionals, with an emphasis on private lawyers providing legal services under contract to government. In section V, we compare tariff

[108] Legal Aid Ontario, *Legal Aid Tariff Reform Business Case, supra* note 3 at 23.

compensation with longer-term income trends for salaried government lawyers and judges.[109]

II. Private market rates for clients of modest means

To evaluate the adequacy of current tariff compensation, LSS commissioned a survey of tariff lawyers and reviewed the results of annual compensation surveys conducted by other organizations.

Tariff lawyer compensation survey

After reviewing the available information on comparator groups, WCBC recommended that LSS proceed with a survey of tariff lawyers to collect more current information on private market rates for legal services. WCBC suggested that an independent survey would permit LSS to focus specifically on tariff lawyers and obtain compensation information about private legal services that are directly comparable to legal aid services.

Survey method

In April 2005, the online tariff lawyer compensation survey asked tariff lawyers to provide information on —

- demographics (experience, firm size and type, region, and gender);
- private market rates for clients of modest means;
- overhead costs;
- typical private fees and time expended for selected criminal and family services; and
- billing practices for early resolution and bonuses for good results.

Isis Communications, an independent consultant, conducted the survey during a 30-day period in April 2005, beginning with distribution of an introductory message and link to the survey questionnaire to 900 tariff lawyers for whom LSS had e-mail addresses. There were 268 complete responses, which represents just over a quarter of the current tariff bar. In addition to the

[109] In the course of our research, we also collected information about the net incomes of private bar lawyers in BC, which is summarized in Appendix 4C. We have not developed an in-depth analysis of lawyer incomes as we do not have sufficient information to make reliable comparisons between incomes for tariff lawyers and private bar lawyers generally. In order to simplify the questionnaire and improve the overall response rate by avoiding a potentially sensitive topic, the tariff lawyer compensation survey did not ask lawyers to provide specific details of their personal income levels.

general questions regarding demographic information, hourly rates, and overhead costs, the questionnaire included separate sets of questions for criminal and family lawyers. Some lawyers practice in both areas and answered all the questions. The questionnaire asked lawyers to provide information regarding their rates for "clients of modest means" in "typical cases." Lawyers also had the opportunity to answer some open-ended questions, and the resulting qualitative data offered further insight into tariff lawyer compensation practices. The complete results, including qualitative responses and the original questionnaire, may be found in Appendix 4A.

Demographic highlights

The demographic profile of the survey respondents was as follows —

- For years of call, 74% had over 10 years, 21% had between 4 and 10 years, and only 4% had less than 4 years. The mean years of call was 16, and did not vary significantly between criminal and family lawyers.[110]
- In terms of gender, 69% were male and 31% female, although there was a much smaller proportion of female lawyers practicing criminal law (17%) than family law (42%). On average, female respondents were less experienced than male respondents — the median years of call for female lawyers in both criminal and family law was about 12 years, whereas for male lawyers it was about 17 years.
- In terms of their practices, 91% of respondents were in firms of five lawyers or less, while 69% were sole practitioners, a trend that applied regardless of gender or area of law. Furthermore, 15% were law firm partners, while 13% were associates.
- Geographically, 39% were from the Lower Mainland, 29% from Vancouver Island, 18% from the southern Interior, 8% from the central Interior, 4% from the northwest, and 2% from the northeast.

WCBC opinion of survey validity

WCBC reviewed the LSS survey instrument and methodology in advance and considered both well-designed. It also found the survey results to be the most relevant and comprehensive measure for assessing tariff compensation among all of the data available, because the survey data —

- focused on the most pertinent information (i.e., hourly rates charged to clients of modest means for the types of services provided by LSS);

[110] The experience profile of the survey sample is somewhat higher than the experience profile of tariff lawyers as a whole. Lawyers with less than 4 years of call made up 4% of the sample but 10% of the lawyers who accepted referrals in 2004/2005. Lawyers with over 10 years of call made up 74% of the sample but 70% of the lawyers who accepted referrals in 2004/2005. Lawyers with between 4 and 10 years of experience made up 21% of the sample and 20% of lawyers who accepted referrals in 2004/2005.

- was the most current available;
- drew on a larger sample of BC lawyers than any of the other research material available;
- reflected a representative cross-section of BC lawyers by experience level, region, firm size, and practice status; and
- focused on private lawyers in BC, the relevant marketplace for compensation comparisons.

In the remainder of this section, we identify some of the key results of the survey.

Average hourly rates and overhead costs

Table 3 in Chapter 2 sets out the key survey results for rates and overhead costs. It is noteworthy that the median rates for criminal and family lawyers as a group were quite similar, despite some moderate variances at the upper experience levels, where criminal lawyers reported slightly higher rates.

The survey results suggest that —

- median hourly rates vary significantly by experience level, but not by firm size or region (with the partial exception of the northeast, which had only six survey respondents);
- the responses were relatively tightly distributed, given the lack of significant variances between mean and median rates;
- the current tariff hourly rate of $80 is 46% of the median private rate of $175, well below the 75% target recommended in the *Hughes Report*; and
- the current tariff hourly rate is 64% of the median rate ($125) for lawyers with less than 4 years call, 53% of the median rate ($150) for lawyers with between 4 and 10 years call, and 44% of the median rate ($180) for lawyers with more than 10 years of call.

In answering the qualitative survey questions, some lawyers acknowledged that while they may specify a fee or hourly rate at the outset of a case involving a private client, they may reduce the total fees by the end of the case to reflect the client's overall ability to pay. Other lawyers, however, were adamantly opposed to such discounting, as they felt it set an expectation of a discount among all clients and understated the value of the lawyer's professional services.

Comparison of tariffs and private fees for selected services

As part of the compensation survey, LSS asked lawyers to indicate their typical hours and rates for legal services commonly provided to clients of modest means. The results demonstrate not only the inadequacy of tariff rates

but also the failure of tariff compensation to reflect the actual time required to provide different services.

Criminal law services

Table 4 in Chapter 2 sets out the average private fees for selected criminal law services for clients of modest means, along with comparable tariff rates. For non-trial services, such as a show cause hearing or a guilty plea and sentencing, there were no significant differences between lawyers of varying experience levels in terms of the average hours required, although there was evidence that fees increased somewhat with experience. For trial services, however, and particularly for the first day of trial, junior lawyers spent more time than their more senior counterparts, and earned effective rates that were significantly less than those for lawyers with over 10 years of experience. There were, however, no significant variations in effective rates between lawyers with less than 4 years and those with 4 to 10 years of experience. As indicated in the detailed survey results in Appendix 4A, there were significant regional differences in fees for non-trial services, but the variations were less pronounced for trial services.

The survey results make clear, however, that with the exception of some category IV fees, tariff compensation falls well below the total compensation for a private client of modest means, and yields effective hourly rates that do not appear to cover overhead costs. Comparing tariff compensation and average private rates, total tariff fees for —

- a show cause hearing range from 13% (category I) to 19% (category III) of average private fees;
- a guilty plea and sentencing in Provincial Court range from 23% (category I) to 39% (category III) of average private fees;
- a one-day trial in Provincial Court range from 21% (category I) to 33% (category III) of average private fees; and
- a one-day trial in Supreme Court are 21% (category II), 27% (category III), and 45% (category IV) of average private fees.[111]

A comparison of tariff fees for early resolution (guilty plea and sentencing) and trials suggests that a one-day trial offers greater compensation in absolute terms, but a lower effective hourly rate due to the additional preparation time required for a trial. Trial earnings increase, however, if a trial extends beyond one day, and effective hourly rates for subsequent days of trial are higher because the related preparation time is substantially less than for the first day

[111] As the survey questionnaire invited lawyers to specify average fees for "typical" cases, it may be misleading to compare the survey results to tariff compensation for the most serious (i.e., category IV) offences such as murder. The one exception is Supreme Court trial fees, which would generally involve either a category III or IV case.

of trial. Because the fee for the first day of trial tends to encompass much of the pre-trial preparation, private fees for trial days subsequent to the first day tend to be substantially lower than the fee for the first day.

It is worth noting, too, that the LSS block fees are intended to cover all pre-trial court appearances. Tariff lawyers have frequently complained that the tariffs fail to compensate them for the repeated court appearances they are required to make. Statistics from the BC Provincial Court bear this out. In 2004, the average number of appearances per completed criminal case was 5.5.[112] Thus, a tariff lawyer who represents a client on a guilty plea and sentencing for a category III offence will receive total payment of $413, which is intended to cover all preparation outside court (including client interviews, research, discussions with Crown, etc.) and the time required for four or five court appearances, plus the actual hearing time.

The survey also asked lawyers to provide information regarding their billing practices for cases that were resolved without trials (e.g., a stay of proceedings or guilty plea). For early resolution, if cases were completed well in advance of the trial date, the majority of lawyers (71%) indicated that they would discount the fees that would otherwise apply for the first day of trial. Lawyers suggested that they would use various methods to determine their fees in such cases, and that the amount of the fee would depend on a number of case-specific factors, such as the time invested, the time saved by avoiding a trial, the lawyer's ability to fill the vacant dates, and the client's ability to pay. On average, lawyers reported that the early resolution fees would represent about 58% of their fees for the first day of trial. By contrast, the tariff fees for a guilty plea and sentencing represent a small fraction of the typical private fees for a one-day Provincial Court trial, from 9.9 % (category I) to 17.2% (category III). Depending on the offence category, the tariff fees for a guilty plea and sentencing represent 48% (category I), 63% (category II), 52% (category III), and 47% (category IV) of the tariff fees for a one-day Provincial Court trial.

Where cases were resolved without trials, either on or close to the scheduled trial date, the majority of lawyers indicated that they would bill their fees for the first day of trial. Some lawyers indicated that they used alternate billing methods in such cases, either hourly billing or a reduced block fee. Generally, however, the total fees claimed were on average a higher proportion (83%) of the first-day trial fee than would be the case for resolution well in advance of trial. In such circumstances, therefore, there is even greater disparity between typical private fees and the compensation provided by the tariff.

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[112] Statistics provided by the Court Services Branch, Ministry of Attorney General. A completed case is one in which a disposition was entered against at least one count. The number of appearances is a count of all the appearances that were scheduled throughout the life of the completed case, excluding sworn appearance dates (which are administrative only) and progress hearings in drug treatment court.

The survey also asked lawyers to indicate whether they would charge clients a bonus in the event of a good result in a case. Only a small proportion of respondents (about 13%) indicated that they made arrangements for bonuses. Those who indicated that they charge a bonus suggested that the bonus applied in almost 30% of cases, and the amount of the bonus averaged about 24% of the total bill.

Family law services

A similar pattern of inadequacy is evident in the family tariff, where the low hourly rate makes tariff compensation a fraction of the comparable private fees in most cases. Table 5 in Chapter 2 sets out the average private fees for selected family law services for clients of modest means.

For early resolution, which the survey defined as a negotiated settlement at an early stage of the case without litigation, lawyers reported relatively similar time requirements (about 10 hours) regardless of experience level, while the total fees on average for junior lawyers were somewhat below those for intermediate and senior lawyers. The tariff fees represent about 56% of the mean private fees.

With respect to case settlement conferences in Provincial Court, the tariff fees represent about 54% of the average private fees.

For one-day hearings in either Provincial or Supreme Court to obtain interim orders, the average number of hours required in a typical private case was relatively consistent across different experience levels, but the hourly rates and total fees tended to increase with experience. Supreme Court hearings required about 1.5 to 3 more hours than Provincial Court hearings, depending on experience level. The hours allotted under the tariff prior to February 8, 2005, fell significantly below what was required for both court levels and, in combination with low hourly rates, resulted in total fees significantly lower than what would have been provided on a private retainer. As of February 8, 2005, LSS increased the general preparation hours for the family tariff (emergency services) to 14 hours, which reduced, but did not eliminate, the significant gap between tariff compensation and typical private fees for clients of modest means. Total tariff fees for a one-day hearing to obtain interim orders represent 56% of typical private fees for Provincial Court matters, and 51% of those for Supreme Court matters.

Although in 2005 LSS received additional funding to expand family services in 2005/2006, and has increased hours and expanded coverage to some extent, the society will provide coverage for a trial in either Provincial Court or Supreme Court only in exceptional circumstances. For this reason, Table 5 does not include any comparison between tariff compensation and the average private fees for trials in Provincial or Supreme Court.

Together, the tables comparing private and tariff compensation for typical criminal and family law services confirm the views that tariff lawyers

expressed during the various consultations: the tariff rates are well below market levels, and the total funding allotted fails to reflect the hours involved or provide an adequate level of compensation that is capable of meeting average overhead costs.

Other surveys of BC private bar lawyers

There are two annual surveys of private bar rates in BC.

Canadian Bar Association, BC Branch, and Vancouver Association of Legal Administrators standard charge-out rate survey

The BC Branch of the Canadian Bar Association (CBABC), in conjunction with the Vancouver Association of Legal Administrators, commissions annual surveys of standard charge-out rates among BC law firms.[113] The surveys differentiate by firm size, region, and year of call. Although the sample sizes are comparatively small, the broad ranges are generally consistent with the results of the LSS survey. The key results include —

- For firms with five or fewer lawyers, the range of rates in 2003 (the last year available for this small-firm survey) was $158 to $268.
- For firms of 6 to 15 lawyers, the range of rates was $120 to $305 in Vancouver, $130 to $275 in the Interior/Vancouver Island, and $138 to $283 in the Lower Mainland (outside Vancouver).

Canadian Lawyer *magazine*

Canadian Lawyer magazine publishes an annual survey of lawyer rates across the country, and provides results for each province. Table 19 sets out the hourly rates reported in the 2004 survey for BC lawyers, along with comparative results from the LSS tariff lawyer compensation survey.[114]

[113] BC Branch, Canadian Bar Association, and Vancouver Association of Legal Administrators, *2004 Standard Charge-Out Rate Survey — Firms with 6 or More Practicing Lawyers* (Vancouver, 2004); BC Branch, Canadian Bar Association and Vancouver Association of Legal Administrators, *2003 Support Staff Compensation, Benefits, General Human Resource Information and Standard Charge-Out Rates — Firms with 1 – 5 Practicing Lawyers* (Vancouver, 2003). Surveys available for purchase from the CBABC, online: www.cba.org/bc/home/main/.

[114] K. McMahon, "The Going Rate 2004" *Canadian Lawyer* (September 2004) at 48.

Table 19: *Canadian Lawyer* magazine — Hourly rates for BC lawyers, 2004

Year of call	*Canadian Lawyer* hourly rate ($)	Median per tariff lawyer survey ($)	Survey median as % of *Canadian Lawyer* rate
2004 (newly called)	173	125	72
1999 (5-year call)	200	150	75
1994 (10-year call)	234	180	77

Not only are the LSS survey results in line with the *Canadian Lawyer* survey, but there appears to be a relatively consistent relationship between the rates identified at each experience level. On average, the median rates for LSS tariff lawyers are about 25% below the market rates established in the *Canadian Lawyer* survey, which suggests that tariff lawyers have applied a fairly uniform discount to reflect their rates for clients of modest means.

Canadian Lawyer also surveys lawyers regarding fees for standard services, and the 2004 results are generally consistent with the tariff lawyer compensation survey —

- In the *Canadian Lawyer* survey, BC lawyers reported that the average fees for a summary offence guilty plea would be $1,130, which is slightly above the tariff lawyer survey average of $1,048.
- The average fees reported for a one-day criminal trial were $2,170, only a little below the tariff lawyer survey average of $2,396.

Thus, the *Canadian Lawyer* survey results generally support the validity of the tariff lawyer compensation survey.[115]

III. Analysis of lawyer overhead costs

As noted in Chapter 2, in the course of the tariff review, the LSS board endorsed the principle that LSS should provide fair and reasonable compensation that enables lawyers to recover overhead costs and obtain an appropriate rate of return. In addition, the *Hughes Report* used overhead costs to formulate its principled approach to setting tariff compensation rates. Thus, overhead costs are a significant factor in determining the appropriate level of tariff compensation. There are two key issues to consider —

- What is the average level of lawyer overhead costs, based on available surveys and research?
- What is the appropriate level of tariff compensation, given the average level of lawyer overhead costs?

[115] The two-stage Legal Aid Ontario tariff review surveyed Ontario legal aid lawyers in 2000 and 2001 regarding fees for different services, but the results concerned Ontario lawyers and are now four or more years out of date, so we have not referred to them here.

It is generally accepted that lawyer overhead costs average about 50% of gross revenues. The 801 Ontario legal aid lawyers surveyed by LAO in July 2000 reported average overhead rates of 48.3%. Other surveys and studies also suggest that average overhead costs are 50% of gross revenues.[116]

At 48.3%, the mean overhead rate that tariff lawyers reported in the April 2005 LSS tariff lawyer compensation survey is consistent with this level of cost. Indeed, it is precisely the same result as that reported in the LAO survey. With few exceptions, BC tariff lawyer overhead costs clustered in a relatively tight range around 50% of gross annual revenues, and there were only minor variations based on practice area, experience level, region, firm size or status, or gender.[117] For example, average overhead rates —

- were 51% for family lawyers and 48% for criminal lawyers;
- were 52% for junior lawyers and 48% for senior lawyers;
- varied between 45% and 52%, depending on region;
- varied between 47% and 60%, depending on firm size;
- fell in the range of 47% to 60% based on practice status; and
- were 51% for female lawyers and 48% for male lawyers.

The *Hughes Report* accepted that, on average, lawyer overhead costs were about 50% of revenues. Accordingly, it proposed a target rate of 75% of market rates for clients of modest means, which would result in the government and the private bar each bearing half the cost (25%) of legal services above the basic cost of service delivery. A 75% target would represent a reasonable return for the lawyer, and an appropriate discount, given the element of public service and the security of payment. Apart from the reference to an overhead rate of 50%, the *Hughes Report* did not attempt to quantify prevailing overhead costs in 1984. Based on the average hourly rates and percentage of overhead costs reported in the 2005 tariff lawyer compensation survey, the current hourly overhead cost for tariff lawyers is $85, which exceeds the current tariff hourly rate of $80.[118] In other words, the survey results suggest that, on average, the tariff rates do not enable lawyers

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[116] Legal Aid Ontario, *Tariff Review Task Force Report, supra* note 3 at 167; McMahon, "The Going Rate 2004," *supra* note 29 at 35; Canadian Superior Court Judges Association/Canadian Judicial Council, *Report on the Incomes of Canadian Lawyers Based on Income Tax Data* (Submission to the Judicial Compensation and Benefits Commission, January 2003) at 11.

[117] In the regional breakdown, one respondent reported overhead costs of 20% without indicating a regional location.

[118] There are various ways to calculate the average overhead rate, and we have selected the mid-range option. The mean hourly rate reported in the tariff lawyer survey was $172.89, so the hourly overhead rate (using the mean overhead percentage of 48.3%) is $83.50. The median hourly rate was $175, so the corresponding overhead rate, using the same mean percentage, would be $84.50. The hourly overhead rate based on the median overhead percentage reported in the survey is $87.50.

to cover their basic overhead costs. Although some tariff lawyers may be able to generate a reasonable rate of return by, for example, keeping their overhead costs low and maintaining a large volume of legal aid cases, the survey results appear to confirm what many tariff lawyers reported during the tariff review consultations — namely, that tariff compensation often fails to cover their overhead costs and that their private clients effectively subsidize their legal aid work.

IV. Rates for publicly funded comparator groups

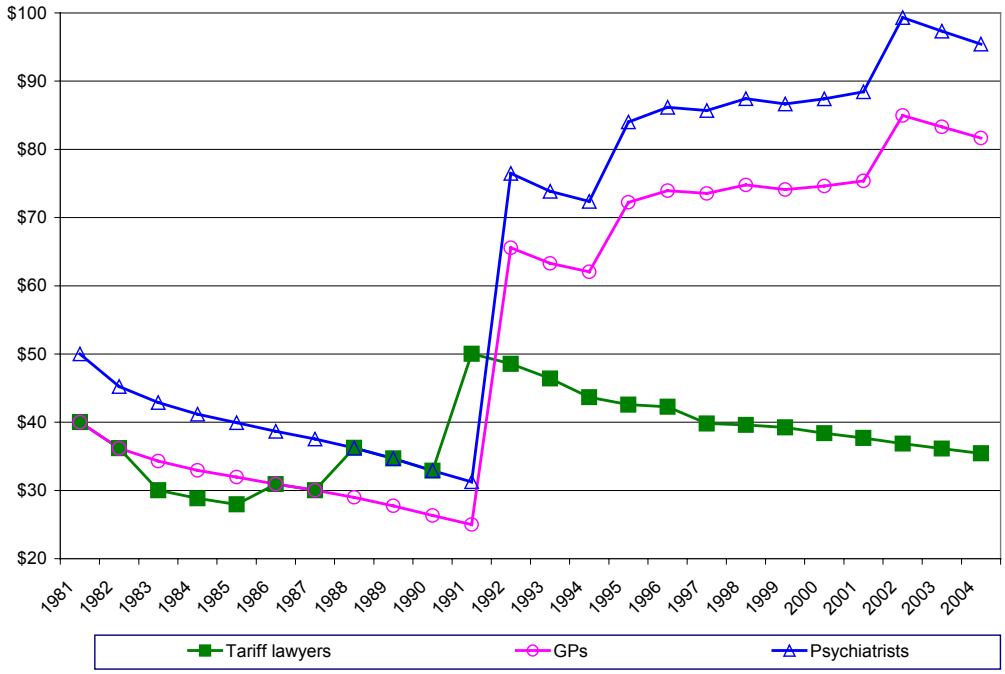
Although, as WCBC concluded, private market rates that lawyers charge clients of modest means are the most appropriate comparison, it is useful to consider the hourly rates paid to other publicly funded comparator groups. Despite contextual differences in roles, responsibilities, and contractual terms, the government rates for outside counsel and other professionals can serve as an additional benchmark in assessing the adequacy of tariff compensation. Table 6 in Chapter 2 provides a concise summary of the comparative data discussed in the remainder of this section.

LSS tariff rates for experts

The large disparity between tariff rates for experts and tariff rates for lawyers is a profound irritant to the tariff bar. During the course of the tariff review consultations, a number of lawyers described how troubling it was to pay disbursements for expert fees that substantially exceeded the lawyer's total fees for the case despite the expert's much smaller investment of time. Figure 46 compares the hourly tariff rate for family cases with the rates for psychiatrists and medical doctors between 1981 and 2004.[119]

[119] For more detail, see Table 5B-26 in Appendix 5B.

Figure 46: LSS hourly rates in constant 1981 dollars for family lawyers, general practitioners (GPs), and psychiatrists



Thus, since 1991, while tariff rates have been subject to reductions and holdbacks, there has been a 415% increase in the hourly legal aid rates for medical doctors (from $40 to $166), and a 388% increase for psychiatrists (from $50 to $194).

BC Ministry of Attorney General rates for private lawyers

The Ministry of Attorney General uses both in-house counsel and private bar lawyers to provide legal services to government in a range of civil and criminal matters. The ministry's Legal Services Branch is responsible for retaining outside counsel in civil matters and criminal matters involving youth in care, while the Criminal Justice Branch retains private lawyers to serve as ad hoc or special prosecutors in criminal matters.[120]

Legal Services Branch

For contracted legal services, the Legal Services Branch has three basic compensation methods, depending on the type of service and area of law —

- a standard tariff that applies to general civil matters;

[120] Unless otherwise stated, the Legal Services Branch of the BC Ministry of Attorney General provided the information relating to the ministry.

- a set of negotiated rates established through competitive bidding for contracted legal services in specific areas of law; and
- a residual scale that applies when it is necessary to retain ad hoc counsel in cases otherwise covered by a contract.

As part of its annual performance planning and reporting cycle, the ministry calculates the blended average hourly cost of internal and external legal services using data from the Legal Services Branch timekeeping system (for in-house counsel) and an expense tracking system for outside counsel. In recent years, the blended average hourly cost has been —

- $110 per hour for 2001/2002 and 2002/2003, and
- $118 per hour for 2003/2004.[121]

Thus, the current $80 LSS tariff rate is 32% lower than the ministry's average hourly cost for legal services of $118 per hour.

Interestingly, it appears that in evaluating its legal services costs, the ministry is following the sort of market-based approach that WCBC recommended for the tariff system. Previously, the Legal Services Branch attempted to develop benchmarking comparisons with the cost of legal services for other public agencies and governments in other Canadian jurisdictions, but found that there were too many variables to permit meaningful comparisons. The Legal Services Branch is now focusing on developing market-based comparisons using BC data, although the specific benchmarks have yet to be finalized.[122]

Standard tariff

The ministry originally developed the standard tariff in 1996 to manage compensation for outside law firms providing claims-related legal services to the Insurance Corporation of BC (ICBC), which was then subject to direct ministry oversight through the Crown Corporation Legal Services Program. The ministry eventually adopted the tariff to help standardize compensation rates in its own contracts with outside counsel. The standard tariff applies to general civil matters that do not fall within child protection law or other contracted areas. Table 20 shows the Legal Services Branch standard tariff rates in effect since 1996.

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[121] BC Ministry of Attorney General, *Annual Service Plan Report 2002/03* at 53; *Annual Service Plan Report 2003/04* at 67.

[122] Ministry of Attorney General, *Service Plan 2004/05 – 2006/07* at 27; *Service Plan 2005/06 – 2007/08* at 23.

Table 20: Legal Services Branch standard tariff rates[123]

Years at bar	Nov. 1996 ($)	Dec. 1998 ($)	Sept. 1999 ($)	Jan. 2004 ($)
0	70	80	80	80
1	75	90	80	80
2	80	100	90	90
3	85	110	100	100
4	90	120	110	110
5	95	130	120	120
6	100	140	130	130
7	105	140 – 200	140 – 200	140 – 200
8	110	140 – 200	140 – 200	140 – 200
9	115	140 – 200	140 – 200	140 – 200
10+	120 – 140	140 – 200	140 – 200	140 – 200

The current rates range from $80 per hour for a newly called lawyer to $140 per hour for lawyers with seven or more years of experience. The ministry recognizes that the tariff rates are below market rates, and there are occasions when it is difficult to find counsel based on the tariff rates.

Clearly, the current LSS tariff rate of $80 is equivalent to the rate the Legal Services Branch pays to a newly called lawyer.

Rates for contract counsel in selected areas of law

The Ministry of Attorney General uses competitive bidding to select private law firms around BC to provide legal services to the Ministry of Children and Family Development in child protection cases, defence for children and youth in care facing proceedings under the *Youth Criminal Justice Act,* and family maintenance enforcement under the Family Maintenance Program (FMP). At present, for child protection matters, 60 law firms provide services under 86 different contracts in various regions (some firms have more than one contract), while the FMP has 36 law firms with 48 contracts around the province.[124]

If there is competition for a contract within a region, the ministry's starting hourly rate is $80 per hour, but negotiated rates may be higher, depending on the availability of interested law firms in a particular region. If there is no competition, as is sometimes the case in more remote areas of the province, the ministry must pay a higher hourly rate to ensure that law firms are prepared to participate. The average negotiated rates range from $100 to $110 per hour. Although the ministry must pay higher rates in some areas, the

[123] In 1999, the Legal Services Branch began tying its hourly rates to years of experience rather than calendar year of call. The listed rates for November 1996 and December 1998 have been converted to years of experience for the purpose of this table.

[124] For more information regarding the ministry's contracting regime, see Appendix 6B.

fluctuating volume of work makes reliance on contract counsel more cost-effective than employing full-time staff lawyers.

The contracts provide for a fixed monthly payment based on estimated hours and the applicable hourly rate. The ministry uses data from the previous year to generate an estimate of the monthly time requirements. The contracts allow for some fluctuation in the hours from month to month, but over time it is expected that the monthly amount will provide appropriate compensation based on the projected time requirements. If the actual time requirements consistently exceed the expected hours, the ministry may renegotiate the contract to increase the amount of the monthly payment.

The current LSS hourly rate of $80 is equal to the ministry's starting rate of $80, but well below the average negotiated rates of $100 to $110. Moreover, unlike the block fees and capped hours in the LSS tariffs that result in effective hourly rates well below the nominal hourly rate, ministry contracts allow lawyers to bill monthly for estimated billable hours based on the volume of work.

Rates for ad hoc counsel in selected areas of law

In some instances, due to conflicts or scheduling difficulties, the Ministry of Attorney General must retain ad hoc counsel to handle child protection or other matters that otherwise fall within the scope of existing contracts. In such cases, the ministry uses a separate tariff that provides varying compensation rates based on court level. Table 21 sets out the tariff rates in effect from 1987. It includes the current rates, which have not been increased since 1992.

Table 21: Rates for ad hoc counsel

Court level	1987 rates ($)	1990 rates ($)	1992 rates ($)
Provincial Court	45	55	80
Supreme Court	50	65	95
Court of Appeal	80	95	105

In the past year, the Legal Services Branch made just over 600 ad hoc appointments, which represented about 12% of all cases.[125] When retaining ad hoc counsel, the branch sets maximum fee amounts in the contract based on average costs for similar cases, and funding may be allocated separately for each stage of the case. By segmenting the funding rather than allocating a lump sum at the outset of the case, the ministry may reduce the incentive to simply carry a case through to trial. Ad hoc counsel are entitled to bill their actual hours up to the contract maximum, but because of the low hourly rate, the ministry has real difficulty at times placing files with private bar lawyers.

[125] Information provided by staff from Ministry of Attorney General, Legal Services Branch.

Although the rates for ad hoc counsel have not been increased for 13 years, the current LSS tariff hourly rate is equivalent to the rate for Provincial Court, and substantially below the rates for Supreme Court and the Court of Appeal.

Criminal Justice Branch

The Ministry of Attorney General's Criminal Justice Branch augments its complement of staff prosecutors by retaining private bar lawyers to act as ad hoc Crown counsel or special prosecutors in some criminal cases. The current rates are as follows —[126]

- for ad hoc prosecutors, $65 per hour to a maximum of $500 per day in Provincial Court (for an effective hourly maximum of 7.7 hours per day);
- for ad hoc prosecutors, $75 per hour to a maximum of $750 per day in Supreme Court (for an effective hourly maximum of 10 hours per day); and
- for special prosecutors, $125 to $250 per hour, although very few counsel receive the maximum rate.

The rates for ad hoc Crown counsel are below the current LSS tariff hourly rate, but they provide for hourly billing of actual time up to the capped daily amount.

Insurance Corporation of BC

ICBC is a provincial Crown corporation established to provide compulsory auto insurance to BC motorists and administer driver licensing and vehicle registration. As the province's largest insurer, ICBC employs a mix of in-house and outside counsel to provide claims-related legal services.[127]

As noted earlier, ICBC previously used the standard tariff developed by the Legal Services Branch of the Ministry of Attorney General, based on years of call. Since 1999, when it introduced competitive bid contracts with outside counsel, ICBC has developed its own rate schedule, which is more closely tied to market rates than other government scales. The schedules provide different rates for junior, intermediate, and senior counsel, as well as students and paralegals. Table 22 shows the applicable rates for the periods 2000/2003 and 2003/2006.

[126] Information provided by staff from Ministry of Attorney General, Criminal Justice Branch.

[127] The discussion that follows is based upon information provided by ICBC. For more details regarding ICBC's strategic alliance with outside law firms, see Appendix 6C.

Table 22: ICBC tariff rates

Service provider	2000/2003 ($)	2003/2006 ($)
Student/paralegal	50 – 70	60 – 80
Junior counsel (0 – 5 years)	80 – 120	90 – 130
Intermediate counsel (6 – 10 years)	125 – 150	130 – 175
Senior counsel (10+ years)	150 – 250	175 – 300

Junior lawyers receive an automatic increase of $10 in their hourly rate on July 1 each year. Legal assistants can apply for increases of $10 per hour after every five years of service. ICBC reviews the performance of intermediate and senior lawyers to determine merit increases, and a lawyer who meets the applicable criteria will receive an hourly rate increase of $5.

The current LSS tariff hourly rate of $80 is equivalent to the top rates ICBC pays students and paralegals, and well below the rates for counsel, except for newly called lawyers. Given that the majority of LSS tariff lawyers have over 10 years of experience, the rate they receive from LSS is 27 – 46% of the rate ICBC pays lawyers with similar experience.

Department of Justice (Canada)

Like the BC Ministry of Attorney General, the federal Department of Justice uses both in-house and outside counsel, known as "legal agents," to provide legal services in civil and criminal matters. The department has developed administrative systems, including standard fee schedules and guidelines, to promote cost control and consistency in its remuneration practices for legal agents.[128]

Rates for legal agents in civil law matters

The Department of Justice has two different methods for setting fees for "domestic legal agents" providing legal services in civil matters, both of which have been in effect since 1990.

For legal agents doing routine property work, the department uses a fixed schedule of fees with standard rates based on years of experience. Table 23 shows the applicable rates, with a daily maximum of 10 billable hours.

[128] The Department of Justice provided the information summarized in this section. For more details, see www.justice.gc.ca/en/dept/legal_agents/index.html.

Table 23: Department of Justice fee schedule for routine property work

Experience level	Hourly rate ($)
Student/paralegal	30
5 years or less	60
5 – 10 years	71
10+ years	82

For all other civil law services, the department negotiates hourly rates with domestic legal agents on a case-by-case basis according to established guidelines. Although the guidelines are based on years of experience, when determining the actual rates in particular cases, the department considers a number of factors, such as —

- the nature, complexity, and urgency of the matter;
- counsel's expertise and experience;
- the regional market in which the services are required;
- the level of risk (i.e., the amount at stake for the government and/or impact on government programs); and
- the effort required for counsel to become sufficiently familiar with key issues, etc.

The Department of Justice does not consider the rates negotiated in one case to set a benchmark for future cases. Legal agents may bill the negotiated rate, up to a daily maximum of 10 hours. Table 24 shows the current guidelines.

Table 24: Department of Justice fee guidelines for other civil law matters

Experience level	Hourly rate ($)
1 – 3 years	60 – 85
4 – 7 years	85 – 100
8 – 12 years	100 – 125
13 – 20 years	125 – 150
20+ years	150 – 200

Federal Prosecution Service rates for legal agents

The Federal Prosecution Service (FPS) is the branch of the Department of Justice responsible for the prosecution of offences under federal legislation other than the *Criminal Code.*[129] FPS employs in-house counsel in its regional offices across the country but also contracts with private law firms to act as

[129] The discussion in this section is based on information provided by FPS, as well as Department of Justice, *Federal Prosecution Service Review,* May 2001, online: canada.justice.gc.ca/en/dept/pub/fps/fpsrp.pdf. For more information regarding the FPS and its legal agents, see Appendix 6D.

agents in areas not served by a regional office, or to handle overflow. Although some agents are appointed on an ad hoc basis, most are "standing" agents, which means that FPS retains them to prosecute all offences arising under specified legislation in a given region. FPS agents provide services under contracts with no fixed termination date. For some firms, the agent work constitutes such a large portion of their practices that they function virtually as an extension of FPS. In BC, FPS currently has about 75 agent firms, with a total of between 125 and 200 lawyers.

For its legal agents, FPS uses the same four-tiered rate structure that applies to routine property work for civil matters, as shown in Table 25.

Table 25: Federal Prosecution Service fee schedule for legal agents

Experience level	Hourly rate ($)
Student/paralegal	30
5 years or less	60
5 – 10 years	71
10+ years	82

In complex cases, FPS may pay enhanced fees of $125 to $150 per hour, and in very rare cases will pay up to $200 per hour. They may pay higher rates in some remote communities where it is difficult to find counsel. FPS is currently conducting an internal compensation review to determine the appropriate level of rates for agents.

Overall, the Department of Justice rates for agents in civil and criminal matters appear to provide better compensation than the LSS tariffs. The current hourly tariff rate of $80 generally falls below the guidelines for civil law matters (other than property work). Although the bottom tiers of the rate schedule for FPS agents fall below the tariff rate, agents may bill their actual hours at the applicable rates to a daily maximum of 10 hours. By contrast, the block fees and capped hours in the tariffs often result in effective hourly tariff rates that are well below the stated rate. Since most tariff lawyers have more than 10 years of experience, they would also qualify for the highest FPS rate of $82 per hour. Most FPS agents serve as "standing" agents, and receive a steady flow of work and generate a consistent volume of billable hours, most of which will be paid.

V. Salary trends for publicly funded legal professionals

There are obvious difficulties in attempting any comparisons between tariff rates and compensation for salaried legal professionals, such as Crown counsel or judges, because of differences in employment status, roles, responsibilities, and compensation methods (hourly rates or block fees versus annual salaries). On the one hand, salaried officials receive benefits above their basic salary level and do not have to pay any overhead costs. On the other hand, self-employed tariff lawyers are entitled to tax deductions from gross income that are not available to salaried employees. Rather than trying to develop comparisons that account for all these variables, it is preferable to compare the overall rates of increase (or decrease) in tariff rates and salary levels for other justice system professionals.

BC Ministry of Attorney General — Crown counsel salaries

Table 5A-12 in Appendix 5A sets out the salary scale for Crown counsel from 1994 to 2006.[130] The BC Crown counsel classification and salary structure contains five levels —

- Legal counsel level 1 (1 to 5 years of call) is the "entry level," while level 2 (6 to 10 years of call) is the "working level." For these first two levels, there are automatic annual wage increases tied to years of call.
- Level 3A requires a minimum of 8 years of call, and is attained automatically at year 12 unless the ministry shows cause why the employee should not advance.
- Levels 3B and 4 are merit categories, with experience minimums of 8 and 10 years of call, respectively.

In January 2004, of the 400 Crown counsel in BC, 200 were in level 3A, 50 in level 3B, and 13 in level 4.

The provincial government implemented the Crown counsel salary structure in 1993, based on recommendations contained in a 1992 arbitration award. Before that, Crown counsel had a salary schedule linked to the general salary

[130] The discussion in this section focuses on Crown prosecutors, but the same salary scale applies to ministry lawyers providing civil legal services. The information in this section is derived from the following sources: Legal Services Branch, Ministry of Attorney General; *BC (Public Service Agency) v. BC Crown Counsel Association, Report and Recommendations for Settlement of the Parties' Renewal Agreement,* unreported arbitration decision, January 14, 2004; C.J. Connaghan, *Crown Counsel Compensation in Canada,* unpublished report, February 2003; Ministry of Attorney General, *Report to the Commission of Inquiry into the Public Service and Public Sector Concerning Senior Crown Counsel Compensation* (Victoria: Ministry of Attorney General, 1992.

scale for managers. Under this earlier classification system, between August 1991 and April 1993, Crown counsel received general salary increases totalling 5.5%.[131]

The increases for the different levels of Crown counsel may be summarized as follows —

- Between 1994 and 2005, the starting salary for legal counsel level 1 increased by about 31%, from $38,000 to $49,782. The top end of the scale increased by about 13%. Including the 5.5% increase between 1991 and 1993, the cumulative increase from 1991 to 2005 was about 37% for the starting salary and 19% for the top end of level 1.
- Between 1994 and 2005, the bottom and top ends of the salary scale for levels 2 and 3A increased by 13.3%. Including the earlier 5.5% increase, the cumulative increase from 1991 to 2005 was approximately 19%.
- For level 3B, the bottom and top ends of the salary scale increased by 16%, which represents a 21.5% increase from 1991 (including the earlier 5.5% increase).
- For level 4, the bottom and top ends of the salary scale increased by about 19% and 17%, respectively. With the 1991 – 1993 increase of 5.5%, the cumulative increases from 1991 to 2005 were 24.5% and 22.5%.[132]

The average salary for Crown counsel in BC is $90,000.[133] According to a joint study commissioned for the 2004 Crown counsel arbitration, for BC Crown counsel, the cost of benefits as a percentage of payroll is 22%.[134] In March 2005, the Ministry of Attorney General implemented a 13% salary increase for Crown counsel that will take effect on April 1, 2006.[135]

Department of Justice (Canada)

The salary scales in effect between 1990 and 2005 for in-house counsel employed by the Department of Justice are set out in Table 5A-13 in Appendix 5A. The salary and classification structure has six levels —

- Like BC Crown counsel, LA-1 is the "entry level" and LA-2A is the "working level."

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[131] The 5.5% does not include any increases that may have been implemented as part of the 1993 phasing in of a separate salary scale for Crown counsel. See BC Public Service Agency, "Record of Wage Increases — Management," March 2003, online: www.bcpublicservice.ca/salary_admin/Mgmt_Record_of_Wage_Increases.pdf.

[132] For levels 3A, 3B, and 4, new pay grades added in 2001 increased the top pay for each level, but for consistency, the percentage increases here do not incorporate those changes. As a result, the percentage increases for those classification levels represent conservative figures.

[133] *Vancouver Sun* (February 19, 2005) at A1.

[134] Connaghan, *Crown Counsel Compensation, supra* note 130 at 41 – 42.

[135] *Crown Counsel Agreement Continuation Act,* S.B.C. 2005, c.64, s.2.

- LA-2B is the first level of management or specialist (e.g., senior counsel).
- LA-3A applies to managers of units providing legal services (e.g., section head).
- LA-3B is the level for managers of units providing legal services to a number of client departments. It is also the select level for senior lawyers (e.g., senior general counsel for a federal department).

The Department of Justice operates a merit-based system, so there is no automatic progression through the salary scale based on years of call. Rather, promotion is based on performance and internal competition.

The salary increases for the different levels between 1991 and 2005 may be summarized as follows —[136]

- For level LA-1, the salary range increased by about 33%.
- For level LA-2A, the salary range increased by 30 – 33%
- For level LA-2B, the salary range increased by 27 – 33%.
- For level LA-3A, the salary range increased by about 30%.
- For level LA-3B, the salary range increased by about 31%.

The Department of Justice has a performance pay system that allows for annual percentage increases within the pay range, plus performance awards for those who have reached the top of their pay range (these must be determined each year). The pay increases and performance awards are based on annual performance reviews. For the Department of Justice, the cost of benefits as a percentage of payroll is 20%.

BC Provincial Court judiciary

It is also instructive to consider the rate of judicial compensation increases since LSS tariff rates were last raised in 1991. The salaries for Provincial Court judges increased from $103,000 in 1991 to $161,250 in 2005, a 56.5% increase.

In 2004, the BC Judges Compensation Commission recommended salary increases for Provincial Court judges in 2004/2005 and 2005/2006 equivalent to the BC consumer price index, with an increase in the base salary to $198,000 effective April 1, 2006. In February 2005, the provincial government imposed a zero increase for the period January 1, 2004, to March 31, 2006, but accepted the increase to $198,000 as of April 1, 2006, which represents an increase of about 23%.[137]

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[136] Department of Justice; Connaghan, *Crown Counsel Compensation, supra* note 130 at 9.

[137] Judges Compensation Commission, *Final Report of the 2004 British Columbia Judges Compensation Commission,* online: www.ag.gov.bc.ca/public/judges-compensation/FinalReport.pdf; Legislative Assembly of

BC Supreme Court judiciary

The salaries for Supreme Court judges increased from $147,800 in 1991 to $219,400 in 2004, a 48.4% increase.

In May 2004, the federal Judicial Compensation and Benefits Commission (the Quadrennial Commission) recommended that the salary for superior court judges be increased to $240,000 for the four-year period beginning April 1, 2004, with annual adjustments for inflation. In May 2005, the federal government tabled legislation to implement the proposed changes, which will result in a 10.8% pay increase retroactive to April 1, 2004, and cumulative increases of 19.8% up to March 31, 2008.[138]

As the preceding discussion makes clear, since the last LSS tariff increase in 1991, prosecutors and judges at both the federal and provincial levels have received salary increases substantially above the cumulative inflation rate, while tariff reductions, holdbacks, and inflation have combined to reduce tariff compensation. Indeed, since the 1991 tariff increase, tariff compensation has stagnated while the cost of living has increased by 26%, so the current $80 tariff rate represents a rate of just $63 in constant 1991 dollars, a decline in real terms of about 21%. Figures 5B-27 and 5B-28 in Appendix 5B show the erosion of criminal tariff compensation in real terms between 1974 and 2004.[139]

Figure 47 illustrates the divergent compensation trends for tariff lawyers and their salaried justice system counterparts.[140]

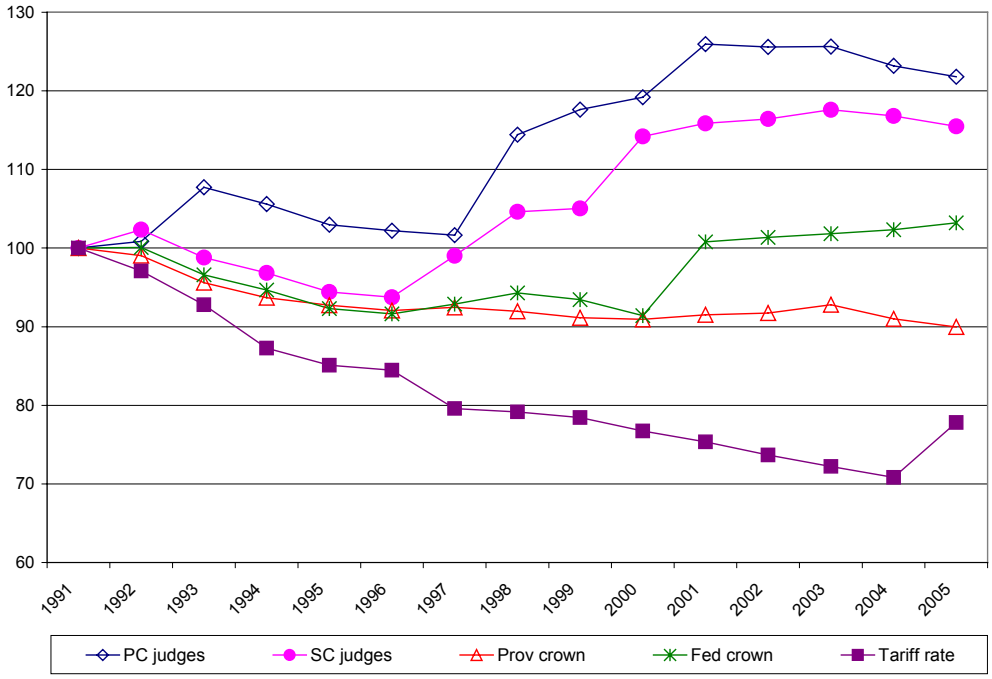
British Columbia, Votes and Proceedings, February 16, 2005, online: www.leg.bc.ca/37th6th/votes/v050216.htm.

[138] See Bill C-51, *An Act to Amend the Judges Act, the Federal Courts Act and Other Acts,* First Reading, May 20, 2005, online: www.parl.gc.ca/38/1/parlbus/chambus/house/bills/government/C-51/C-51_1/C-51_cover-E.html; "Cotler Urges Salary Boost for Superior Court Judges," *Vancouver Sun* (May 21, 2005).

[139] For more details, see Tables 5B-29 and 5B-30 in Appendix 5B. Figure 5B-31 and Table 5B-32 show the inflation figures for Vancouver, BC, and Canada from the early 1970s until 2004.

[140] For specific figures, see Table 5A-14 in Appendix 5A. For federally appointed judges, Figure 47 and Table 5A-14 use current salary figures, as Parliament has yet to enact the legislation to increase judicial salaries. For Crown counsel, Figure 47 and Table 5A-14 use the salary figures for the top tier of the "working level" for both BC Crown counsel (level 2) and federal prosecutors (LA-2A) in order to correspond roughly with the experience level of the tariff bar. Due to a lack of specific salary figures for BC Crown counsel for the years 1991 to 1993, we have assumed that there was a 2% increase in 1991/1992 (based on the general increases in the previous salary scale) and no increases in 1993 and 1994. This conservative approach likely understates the percentage increase in BC Crown counsel salaries.

Figure 47: Rates of salary increase for other BC justice system participants compared with LSS hourly rate (constant 1991 dollars = 100)



VI. Conclusion

This overview of prevailing compensation rates for private lawyers and for other publicly funded professionals confirms that current LSS tariff rates remain well below a level that could be described as "fair and reasonable." The tariff system, through a combination of low rates, unrealistic block fees, and capped hours, provides compensation that is a fraction of comparable private fees for clients of modest means, and yields effective hourly rates that are below the average lawyer overhead costs reported in the compensation survey. Similarly, even with the recent elimination of the holdback, the nominal tariff rates fall at the lower end of the range of government rates for contracted legal services, and the effective rates resulting from block fees and limited hours further reduce those rates. While other justice system professionals have received substantial compensation increases since 1991, tariff compensation has been subject to erosion due to reductions, holdbacks, and inflation.

7
Legal Aid in Other Jurisdictions: Compensation Rates and Structures

I. Introduction

In this chapter, we review the delivery models and tariff rates and structures in other jurisdictions to assess how other legal aid programs deal with the challenge of providing cost-effective services to legal aid clients. We focus on other legal aid plans in Canada, as well as those in the United Kingdom (England and Wales, and Scotland), Australia, and New Zealand, all of which have common law legal systems.[141] Our primary emphasis is on jurisdictions

[141] This chapter draws extensively on information and materials obtained directly from the various legal aid plans; relevant legislation in the selected jurisdictions pertaining to their legal aid programs; and various websites. In Canada, these websites include those of the BC Legal Services Society at www.lss.bc.ca; Alberta Legal Aid Society at www.legalaid.ab.ca; Saskatchewan Legal Aid Commission at www.legalaid.sk.ca; Legal Aid Manitoba at www.legalaid.mb.ca; Legal Aid Ontario at www.legalaid.on.ca; Legal Aid Quebec at www.csj.qc.ca; Legal Aid New Brunswick at www.sjfn.nb.ca/community_hall/L/lega6030.html; Prince Edward Island Legal Aid at www.gov.pe.ca/infopei/onelisting.php3?number=46064; Nova Scotia Legal Aid Commission at www.gov.ns.ca; Newfoundland and Labrador Legal Aid Commission at www.justice.gov.nl.ca/just/Other/otherx/legalaid.htm; Legal Services Board of the Northwest Territories at www.justice.gov.nt.ca/legalaid/LegalAid.htm; Legal Services Board of Nunavut at www.plein.ca/en/index.htm; and Yukon Legal Services Society at www.legalaid.yk.net.

In the United Kingdom, the websites consulted include those of the Legal Services Commission (England and Wales) at www.legalservices.gov.uk; the Northern Ireland Legal Services Commission at www.nilsc.org.uk; the Irish Legal Aid Board at www.legalaidboard.ie; and the Scottish Legal Aid Board at www.slab.org.uk.

In New Zealand, the website consulted was that of the Legal Services Agency at www.lsa.govt.nz.

with a strong judicare component, which are most similar to the system in BC. Accordingly, we do not include the United States in this overview because of the prevalence of the public defender model and the rather fragmented nature of legal aid service delivery in that country.[142]

We also examined the legal aid programs of Northern Ireland and the Republic of Ireland, but do not discuss them here, as the former plan is currently being restructured while the latter does not administer criminal legal aid.[143]

One distinction between Canada and these common law jurisdictions (except the United States and some, but not all, Australian states) is that the legal profession in Canada is not divided and Canadian lawyers practice as both barristers and solicitors. It is important to keep this in mind because barristers and solicitors (and, in Scotland, "solicitor-advocates") may be paid different rates. In many of the selected jurisdictions, a solicitor is able to conduct some court proceedings, but would normally receive a lower fee for these services than a barrister. Therefore, some legal aid plans will pay for solicitors only to

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In Australia, the websites consulted include those of the Legal Aid Commission of the Australian Capital Territory at www.legalaid.canberra.net.au; the Legal Aid Commission of Tasmania at www.legalaid.tas.gov.au; Legal Aid Queensland at www.legalaid.qld.gov.au; the Legal Aid Commission of New South Wales at www.legalaid.nsw.gov.au; Victoria Legal Aid at www.legalaid.vic.gov.au; Legal Aid Western Australia at www.legalaid.wa.gov.au; the Northern Territory Legal Aid Commission at www.nt.gov.au/ntlac/; and the Legal Services Commission of South Australia at www.lsc.sa.gov.au. The National Legal Aid (NLA) website at www.nla.aust.net.au also supplied important information.

142 In the United States, the civil and criminal legal aid systems are quite distinct. For civil matters, the federal Legal Services Corporation is the single largest funder, but it provides funding to only a small proportion of the large number of organizations providing civil legal aid at the state and local levels. For an overview, see Alan W. Houseman, *Civil Legal Aid in the United States: An Overview of the Program in 2003* (Washington, DC: Center for Law and Social Policy, 2003) at 1 – 4, online: www.clasp.org/publications/Legal_Aid_2003.pdf. For criminal legal aid, each of the 50 states has a different system: some have statewide systems administered by an independent commission, while in others legal aid operates at the regional or county level, often through the courts. Service delivery may involve public defenders, contracting, or assigned counsel, or some combination of the three. For an overview, see The Spangenberg Group, *Statewide Indigent Defense Systems: 2005* (Washington, DC: American Bar Association, 2005) at 1 – 2, online: www.abanet.org/legalservices/downloads/sclaid/indigentdefense/statewideinddefsystems2005.pdf; and American Bar Association – Standing Committee on Legal Aid and Indigent Defendants, *Gideon's Broken Promise: America's Continuing Quest for Equal Justice* (Washington, DC: ABA, 2004), online: www.abanet.org/legalservices/sclaid/defender/brokenpromise/fullreport.pdf.

143 The Northern Ireland Legal Services Commission was established in 2003 to take over responsibility for the legal aid scheme from the Law Society of Northern Ireland. The commission is currently in the process of adopting a plan similar to that used in England and Wales. The Irish Legal Aid Board does not provide criminal legal aid services since applications for criminal legal assistance are made to the court and administered by the Department of Justice.

appear at certain court proceedings as a cost-saving measure. This practice has no counterpart in Canada.

II. Funding and coverage

Canada

Canadian legal aid plans are primarily government-funded.[144] Both federal and provincial or territorial governments fund legal aid services since they have shared responsibility for criminal and civil legal aid.[145] In 2003/2004, the federal contribution to criminal legal aid was approximately $92 million. Federal contributions to civil legal aid cannot be estimated since those monies are subsumed under the Canada Health and Social Transfer.[146] Table 26 summarizes the federal and provincial/territorial contributions to legal aid.

[144] In 2003/2004, government contributions made up 90% of legal aid revenue, followed by client contributions and cost recoveries (4%), legal profession contributions (1%), and other sources such as research sales and interest earnings (6%): Statistics Canada, *Legal Aid in Canada: Resource and Caseload Statistics 2003/04* (Ottawa: Minister of Industry, 2005) at 5 [hereinafter "*Legal Aid in Canada*"].

[145] *Ibid.* at 6. Due to the constitutional division of powers, the federal government has jurisdiction over criminal law and certain civil matters, including divorce and refugee determination, while the provinces or territories have jurisdiction over matters pertaining to the administration of justice.

[146] *Ibid.* at 9.

Table 26: Federal and provincial/territorial contributions to legal aid and per capita expenditures for 2003/2004 (excluding federal contributions to civil legal aid) — Canada[147]

Legal aid plan	Federal contribution (excluding civil matters) ($'000)	Provincial/territorial contribution (including criminal and civil matters) ($'000)	Total revenue[148] ($'000)	Population estimates 2003/2004 ('000)	Legal aid plan expenditures per capita 2003/2004 ($)
British Columbia	11,058	52,259[149]	71,131	4,146.6	16.79
Alberta	8,166	20,632	34,999	3,153.7	12.59
Saskatchewan	2,842	9,979	13,303	994.8	13.00
Manitoba	3,397	13,760	21,365	1,162.8	18.00
Ontario	37,099	201,815	299,626	12,238.3	24.47
Quebec	20,007	98,868	125,245	7,487.2	16.43
Nova Scotia	2,914	12,344	15,729	936.0	14.92
New Brunswick	1,872	3,649	4,757	750.6	6.86
Prince Edward Island	348	575	965	137.8	7.00
Newfoundland and Labrador	1,624	...	7,395	519.6	13.26
Northwest Territories	1,301	2,077	3,713	41.9	94.26
Yukon	654	720	1,425	31.1	41.27
Nunavut	1,103	2,695	4,725	29.4	161.62
Total	**92,385**	**419,373**	**604,378**	**31,629.7**	**19.05**

All Canadian legal aid plans fund criminal and family law services (although the latter is increasingly restricted to cases involving domestic violence).[150] Funding for civil legal aid other than family law is generally quite limited and,

[147] *Ibid.,* Tables 1 – 4 at 22ff. and Table 26 at 76.

[148] Total revenue will not necessarily be the sum of federal and provincial contributions because total revenue includes federal contributions to civil legal aid as well as revenue from client contributions and recoveries, contributions from the legal profession, and other income such as interest on investments. In addition, *Legal Aid in Canada* notes that provincial/territorial contributions plus federal contributions may not equal total government contributions since the legal aid plans provide the latter figures, while the appropriate government department provides the figures for provincial/territorial and federal contributions. Consequently, these numbers may not agree due to possible differences in accounting methods and the fact that legal aid plans may have submitted back claims to the federal government that were accounted for in the figures for total government contributions: *Legal Aid in Canada, supra* note 144 at 27.

[149] This figure does not include fees and disbursements for exceptional matters as defined in the MOU between the BC attorney general and the Legal Services Society.

[150] David Crerar, "A Cross-Jurisdictional Study of Legal Aid: Governance, Coverage, Eligibility, Financing, and Delivery in Canada, England and Wales, New Zealand, and the United States" in John D. McCamus, *Report of the Ontario Legal Aid Review: A Blueprint for Publicly Funded Legal Services,* 3 vols. (Toronto: Ontario Legal Aid Review, 1997) at 1079.

where it exists, usually consists of refugee matters, poverty law, workers' compensation, mental health law, and various social welfare programs.

United Kingdom

In the United Kingdom, the national government provides funding through the Department of Constitutional Affairs (the former Lord Chancellor's Department). Client contributions and cost recovery are other sources of funding.

England and Wales[151]

In England and Wales, the Legal Services Commission (LSC) was created in 2000 to replace the former Legal Aid Board. The LSC administers the Community Legal Service and Criminal Defence Service, which replaced the former civil and criminal legal aid schemes on April 1, 2000, and April 2, 2001, respectively. In 2003/2004, the LSC received approximately £2.1 billion to fund the services as well as a grant-in-aid of £83.9 million to administer the commission.[152]

The Community Legal Service brings together networks of funders and suppliers who provide legal information, advice, and assistance in areas such as family law, mental health, debt, asylum, housing, employment, community care, and education. Family law clients may receive assistance for legal help (initial advice and assistance), general family help (non-trial resolution through negotiation and settlement), help with mediation, and legal representation.

The Criminal Defence Service provides advice and representation for people under investigation or facing criminal charges. Legally assisted people may receive funding for advice and assistance; advocacy assistance (advice and some representation in court for initial proceedings); and representation if they are charged with a criminal offence. The decision to grant representation is not made by the LSC but at Magistrates' Court or High Court if the judge decides that it is in the interests of justice that a person be represented by counsel.

The LSC also has several Public Defender Service offices in which it directly employs lawyers to provide criminal defence services to the public.

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[151] The mid-2003 population of England was 49,855,700, and the population of Wales was 2,938,000 (Office for National Statistics, online: www.statistics.gov.uk).

[152] Legal Services Commission, *Annual Report,* 2003/2004. On April 22, 2005, the English pound was worth approximately Cdn $2.37.

Scotland[153]

Unlike most legal aid plans in other jurisdictions, the Scottish Legal Aid Board (SLAB) does not have a fixed budget. The Scottish Executive covers any shortfalls in the legal aid fund. The cost of administering the SLAB is covered by a cash-limited grant-in-aid from the Scottish Executive. In 2003/2004, the cost of legal assistance was £146 million, while the cost of administering the board was £10.9 million.[154]

The SLAB provides three types of assistance: advice and assistance, civil legal aid, and criminal legal aid. Advice and assistance covers any matter of Scottish law but generally does not include representation. Assistance by way of representation may be available in special circumstances.

Both civil legal aid and criminal legal aid include legal advice and representation in court. Civil legal aid includes family law, personal injury claims, welfare rights, debt, immigration and asylum matters, and housing issues. The board determines funding for summary criminal cases, while the judge or sheriff decides whether legal aid should be granted for "solemn" cases (the equivalent of indictable offences in Canada).

Four public defence solicitors' offices provide legal advice and representation in all criminal matters through solicitors directly employed by the SLAB. People who are eligible for legal assistance can choose either a private lawyer or a public defence solicitor as defence counsel.

New Zealand and Australia

New Zealand[155]

The New Zealand Legal Services Agency replaced the former Legal Services Board on February 1, 2001. In 2003/2004, the overall cash expenditure for legal aid and related schemes reached $84 million.[156]

New Zealand provides family (except divorce) and criminal legal aid services. Other civil assistance is available for mental health compulsory treatment orders, refugee matters, employment mediation, debt recovery, breach of contract, defamation, bankruptcy and insolvency, and various matters arising under specified tribunals and specialist courts.

In 2004, the Legal Services Agency hired 12 salaried lawyers (including 3 senior lawyers) for the public defence service five-year pilot in selected

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153 The mid-2003 population of Scotland was 5,057,400 (Office for National Statistics, online: www.statistics.gov.uk).

154 Scottish Legal Aid Board, *Annual Report,* 2003/2004.

155 The estimated population of New Zealand was 4,009,200 in 2003; 4,061,400 in 2004; and 4,094,639 as of May 8, 2005 (Statistics New Zealand, online: www.stats.govt.nz).

156 Legal Services Agency, *Annual Report,* 2003/2004. On April 22, 2005, the New Zealand dollar was worth approximately Cdn $0.91.

locations. The project eventually plans to employ 18 lawyers, including 4 senior lawyers.

Australia

In Australia, the Commonwealth government enters into agreements negotiated with individual state and territorial legal aid commissions to provide funds for Commonwealth law matters within the terms of Commonwealth guidelines and priorities. The state or territorial governments fund designated matters under state law. Nationally, Commonwealth funding for legal aid was over $128 million in 2003/2004.[157] Most Australian legal aid plans require client contributions and cost recovery. Some funding is also available from legal profession contributions and other sources such as interest on investments. See Table 27 for the breakdown between Commonwealth and state funding for the various Australian legal aid commissions.

Table 27: Commonwealth and state grants for 2003/2004 — Australia (in Australian dollars)[158]

Legal aid plan	Budgeted income					Budgeted expenditure — Total	Estimated population December 2003
	Commonwealth grants ($'000)	State grants ($'000)	Other ($'000)	Commission-generated income ($'000)	Total income ($'000)		
New South Wales	41,574	60,021	17,940	3,929	123,464	128,749	6,716,277
Victoria	27,800	34,370	9,500	6,826	78,496	84,130	4,947,985
Queensland	25,612	21,247	13,000	3,239	63,098	63,098	3,840,111
South Australia	11,259	9,943	1,400	1,477	24,079	25,222	1,531,375
West Australia	12,187	13,935	600	1,761	28,483	27,852	1,969,046
Tasmania	4,039	3,218	68	270	7,595	8,054	479,958
Australian Capital Territory	3,367	2,616	550	190	6,723	7,308	322,579
Northern Territory	2,646	2,500	0	673	5,819	6,335	198,700
Total	**128,484**	**147,850**	**43,058**	**18,365**	**337,757**	**350,748**	**20,008,677**

All Australian legal aid commissions offer both family and criminal legal aid services, and tend to fund a broader range of civil matters than Canadian plans. Depending on the commission, civil legal aid services may include mental health proceedings; refugee and immigration law; employment law; disability issues; issues involving benefits, pensions, or allowances; discrimination and human rights matters; workers' and victims'

[157] See Table 27. On April 22, 2005, the Australian dollar was worth Cdn $0.96.
[158] This table is adapted from Table 8 of National Legal Aid Finance, online: www.nla.aust.net.au/. Population data are from the Australian Bureau of Statistics, online: www.abs.gov.au.

compensation; debt and consumer protection; reviews and appeals under various specialized tribunals; prison law; and inquests. Priorities in relation to Commonwealth law include family law matters arising under Commonwealth statutes, and criminal charges arising under Commonwealth statutes where there is a real prospect of imprisonment or inability to continue in one's usual occupation if convicted. As a general rule, the Australian plans tend to employ a mix of private bar and staff lawyers along with networks of community legal clinics or other legal information centres or services.

Australia's legal aid plans also provide a variety of specialist family services. Legal Aid Queensland (LAQ) has a family law practice with a mandate to resolve family law disputes through non-litigious methods. In addition, family clients may receive legal aid grants for LAQ's property arbitration program, which provides one-hour oral hearings by telephone to settle property disputes. The terms of the arbitrator's decision can be incorporated into a consent order, or the arbitration award can be registered if one party refuses to sign the consent order.

Victoria Legal Aid offers the Roundtable Dispute Management Program, an integrated alternative dispute resolution service for resolving family law disputes without recourse to litigation. Participation in the program is voluntary.

Legal Aid Western Australia provides alternative dispute resolution by family conferencing, a domestic violence legal unit, and a child support legal unit.

The Legal Services Commission of South Australia has a child support unit that gives limited assistance and representation in court. It also has family law conferencing and child and family counsellors, and provides dispute resolution to legally assisted people through its primary dispute resolution unit.

III. Delivery models

Broadly speaking, there are three basic types of delivery models for legal aid services: the judicare, staff, and mixed models. Judicare is a fee-for-service system in which the private bar bills the legal aid plan for authorized services provided to clients referred by the plan. The client can retain any lawyer willing to accept the legal aid referral. In a staff system, the legal aid plan directly employs lawyers to provide legal aid services, although the private bar may receive referrals in cases of conflict or staff shortage. Community legal clinics are often included in the staff model, although they may feature a large complement of non-lawyers such as paralegals, law students, and community workers. A mixed model consists of some combination of private bar and staff lawyers.[159] See Tables 28 and 29 for an overview of the delivery models used in the various jurisdictions discussed in this section.

[159] *Legal Aid in Canada, supra* note 144 at 6.

Canadian research, including the "Burnaby project,"[160] suggests that a staff lawyer system is less expensive than the private bar and does not lead to lower-quality service. While staff lawyers tend to plead clients guilty more often and earlier in the process compared with the private bar, which tends to take matters to trial, case outcomes are similar in terms of convictions, although staff lawyers obtain fewer custodial sentences for clients. Staff lawyers also tend to spend less time per case than private lawyers.[161]

The relative cost of private bar versus staff lawyers varies according to tariff rates or staff lawyer caseloads, however. If tariff rates or staff caseloads are set sufficiently low or high, private bar lawyers will be cheaper than directly employed lawyers, or vice versa.[162] A judicare system is also more flexible than the staff lawyer model because it more easily accommodates an expanding or contracting legal aid budget simply by adjusting tariff rates and coverage. In contrast, after the initial start-up costs, it can take years to realize any savings from employing staff lawyers. There are also expenses associated with reducing the numbers of staff lawyers in the event of budget reductions.

While many Canadian single-jurisdiction studies have concluded that a staff model is the least expensive delivery system, most controlled, comparative studies in Canada and the US show that there is no significant difference in cost or quality of service between the staff and judicare models.[163] In addition, "no one delivery model exhibits performance characteristics that are systematically superior to those of other delivery models in all contexts."[164] It has been observed that the prevailing legal aid tariff has a significant effect on the quality and experience of counsel who are willing to take legal aid cases.[165] An underfunded staff lawyer system can also have difficulty attracting and retaining experienced lawyers and quality of service can suffer from excessive caseloads.

The Manitoba government recently sparked controversy by commissioning a review of its legal aid system to investigate how to increase the use of staff lawyers. The reviewers' 2004 report relied on the earlier Canadian research findings showing no appreciable difference in service quality between staff and private bar lawyers, and developed a detailed costing model suggesting that average case costs were lower for staff criminal lawyers but not staff family lawyers. The review found that Manitoba could achieve significant

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[160] P. Brantingham et al. *The Burnaby, British Columbia, Experimental Public Defender Project* (Ottawa: Department of Justice, 1981); P.L. Brantingham and P.J. Brantingham, *An Evaluation of Legal Aid in British Columbia* (Ottawa: Department of Justice, 1984); Canada, Department of Justice, *National Review of Legal Aid* (Ottawa: Department of Justice, 1994).

[161] Albert Currie, "Legal Aid Delivery Models in Canada: Past Experience and Future Developments" (2000) 33 U.B.C. L. Rev. 285.

[162] McCamus, *Report of the Ontario Legal Aid Review, supra* note 150 at 118.

[163] *Ibid.* at 109.

[164] *Ibid.* at 108.

[165] *Ibid.* at 115.

cost savings in future years by establishing a criminal law office staffed by 10 lawyers.[166] As with previous attempts in BC and Ontario to increase reliance on staff lawyers, the proposal encountered strong opposition from the criminal bar in Manitoba.[167]

In recent years, legal aid plans in England and Wales and Scotland have introduced staff delivery models to complement their judicare systems. The LSC introduced a Public Defender Service (PDS) in May 2001, and now maintains eight staff lawyer offices. The PDS is not intended to be a significant presence in the market, but rather a locus of best practice.[168]

In Scotland, the Public Defence Solicitor's Office in Edinburgh began operating as a pilot program in 1998. The Scottish Executive commissioned an exhaustive study using both qualitative and quantitative methods to assess cost-effectiveness, service quality, client satisfaction, and impact on justice system efficiency. The results were consistent with Canadian studies showing that staff lawyers tend to resolve cases at an earlier stage of the proceeding, thereby achieving lower case and justice system costs. It also found, however, that because of the tendency to favour early resolution, the clients of staff lawyers had somewhat higher conviction rates and were less likely to feel that their lawyers had "stood up for their rights."[169]

A mixed model that uses both staff and private bar lawyers incorporates the advantages of both delivery systems. On the one hand, staff lawyers, unlike private bar lawyers, can afford to develop specializations in less remunerative areas such as poverty law. They can also achieve efficiencies, such as handling a high volume of matters in one courthouse on the same day, thereby saving travel time. Further, staff lawyers can act as monitors within the justice system and provide input into the development of the legal aid plan as well as expertise on how it works. On the other hand, making private bar lawyers available to legal aid clients respects the important principle of choice of counsel and reduces the potential for conflicts of interest. The private bar is also perceived as more independent from state influence, and market forces tend to exert pressure on private bar lawyers to produce good results. Combining both models also produces healthy competition in terms of cost and quality of service.[170]

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[166] Manitoba Justice, *A Review of Legal Aid Manitoba* (March 2004), online: www.gov.mb.ca/justice/publications.

[167] "Manitoba Defence Bar Labels Legal Aid Plans 'Deplorable'" *Lawyer's Weekly* (July 2, 2004).

[168] Legal Services Commission, "Past and Future," online: www.legalservices.gov.uk/aboutus/how/past.

[169] Alistair G. Watson, "The Public Defence Solicitor's Office: The Background to Its Introduction in Scotland" (1999) 7:1 Hume Papers on Public Policy 60-67; T. Goriely et al., *The Public Defence Solicitor's Office in Edinburgh: An Independent Evaluation* (Edinburgh: Scottish Executive, 2001), online: www.scotland.gov.uk/cru/kd01/purple/pdso-02.asp.

[170] Nancy Henderson, "The Dilemma of Choice and the BC Experience" (1998) 16 Windsor Y.B. Access to Just. 231.

Two more recent types of delivery systems are the complex mixed model and the block contracting or franchising model.

The complex mixed model integrates a wider variety of delivery methods, such as community law clinics and various legal information and advice services, with a mix of private bar and staff lawyers, and some block contracting. Jurisdictions operating a complex mixed model include BC (before the 2002 cutbacks), Ontario (to a limited extent), England and Wales, and several of the Australian states. The advantage of this model is that it applies a variety of delivery mechanisms targeted to specific needs. The challenge is to avoid duplicating services or developing a system that is so complex that it outpaces actual need, becomes prohibitively expensive to administer and maintain, and fails to adapt readily to changing circumstances.

In a block contracting system, the legal aid plan enters into contracts with law firms or individual lawyers for a certain amount of work to be performed for a fixed price. These contracts are usually presented for tender. In a franchising system, which may or may not involve competitive bidding, quality standards are built into the contract and permit the firms or individuals in question to present themselves as having obtained some restricted quality status or accreditation. Service providers receive a contract only if they meet the specified quality standards.

Block contracts can be structured in several ways. The lawyer may receive a lump sum amount for a specified period in which he or she is expected to handle all cases assigned during that time unless there is a conflict of interest. These cases may be restricted to a certain type, level of court, or district, which makes it easier to estimate the likely caseload in a given period. A second type of fixed price contract provides a lump sum for a set number of cases for the specified period. Once the quota has been reached, the lawyer would receive further remuneration, either per additional case or per hour. A third approach is the fee-per-case contract, in which the lawyer receives a set fee per case for the duration of the contract.[171]

As discussed in Chapter 8, the Legal Services Commission of England and Wales has made block contracting a central part of its service delivery, while LSS has used contracting in a targeted fashion since the mid-1990s.

Contracting models are quite controversial because, unlike judicare, they do not promote choice of counsel and the competitive bidding process risks sacrificing quality to reduce costs. Contracting also tends to reduce the number of available legal suppliers, which has the long-term potential to drive up costs when there is less competition to provide services and the contracts come up for renewal. There are also costs associated with administering,

[171] Ireland, Criminal Legal Aid Review Committee, *Final Report* (Dublin: Government of Ireland, 2002) at 29, online: www.justice.ie/80256E010039C5AF/vWeb/flJUSQ5XTLKX-en/$File/crimlegalaidrptfinal.pdf

monitoring, and evaluating the contractors.[172] Moreover, if quality controls are built into the contracts, the price advantage diminishes since "good contract systems … typically cost more than assigned counsel systems. Therefore, when a contract system may be regarded as being acceptable on quality grounds, there is no cost incentive to implement contracting. The opposite is also true in that what is acceptable on cost grounds is unlikely to provide an acceptable level of quality."[173]

The advantage of the contracting model is the predictability that such contracts provide for both suppliers and purchasers of legal services for the length of the contract period. For this reason, block contracting can encourage lawyers to provide services that would otherwise be difficult for the legal aid plans to obtain, such as legal services in remote communities or in specialized areas of practice, such as prison or mental health law. Legal aid plans can motivate contractors to provide quality service by making contract renewal contingent on meeting performance standards. Block contracting is also more conducive to monitoring than the judicare model.

While it is clear that the mixed or complex mixed models have significant advantages, developing the right combination of delivery methods can be difficult and expensive, since considerable oversight and experimentation are required. System-wide block contracting is risky, since a few select firms or individuals benefit at the expense of the rest of the private bar, who may not be willing to return to legal aid work if an attempt at contracting proves unsuccessful. This is potentially disastrous for a provincial legal aid program with a relatively small tariff bar, compared with a national program like the English LSC, which has a large number of legal suppliers available. In contrast, the simplicity of the judicare model is its strength, since it can quickly adapt to changing financial circumstances and client needs without requiring elaborate new infrastructure (physical or managerial) or staffing commitments. Given the constant pressure to rationalize legal aid services, the classic judicare model remains an attractive option due to the flexibility and efficiency it affords, although it may be less effective in meeting legal needs in areas such as poverty law in which few private bar lawyers practice.

[172] *Ibid.* at 36.
[173] *Ibid.* at 53.

Table 28: Legal aid delivery models in Canada[174]

Legal aid plan	Judicare	Staff	Mixed	Complex mixed	Contract
British Columbia	•				
Alberta	•				
Saskatchewan		•			
Manitoba			•		
Ontario[175]	•				
Quebec			•		
Nova Scotia		•			
New Brunswick			•		
PEI			•		
Newfoundland & Labrador		•			
Northwest Territories			•		
Yukon		•			
Nunavut			•		

Table 29: Legal aid delivery models in England and Wales, Scotland, New Zealand, and Australia

Legal aid plan	Judicare	Staff	Mixed	Complex mixed	Contract
England and Wales				•	•
Scotland			•		
New Zealand	•[176]				
Australia					
New South Wales				•[177]	
Victoria				•[178]	

[174] *Legal Aid in Canada, supra* note 144 at 6 – 7.

[175] The classifications in Table 28 are as described in *Legal Aid in Canada* (*ibid.* at 6 – 7). Although Alberta and Ontario could be described as mixed or even, in the case of Ontario, a complex mixed system, they are characterized as judicare, since services are primarily delivered by private lawyers (*ibid.* at 6, note 2).

[176] In 2004, the public defence service pilot began operating in select locations. The New Zealand Legal Services Agency also runs approximately 25 community law offices that offer free legal advice and assistance, including some representation.

[177] Unless there are exceptional circumstances, criminal law matters are conducted by in-house solicitors.

[178] The private bar provides a large proportion of representation, and there are a number of specialized panels for certain classes of matters. When making a referral, Victoria Legal Aid (VLA) considers whether the legal aid application was submitted by its in-house practice, a practitioner who is part of a panel firm, or a practitioner who is part of a non-panel firm but is a member of VLA's general referral panel. Subject to other considerations, the practitioner (in-house, panel, or non-panel) who applies first is awarded the file. When an applicant does not indicate a choice of counsel, VLA allocates

Legal aid plan	Judicare	Staff	Mixed	Complex mixed	Contract
Queensland				•	
South Australia				•[179]	
Western Australia				•[180]	
Tasmania			•		
Australian Capital Territory			•		
Northern Territory		•			

IV. Judicare models: Tariff rates and structures

Since LSS is now primarily a judicare delivery system, it is worth examining this model in more detail. Judicare systems can be subdivided into three main types according to tariff structure —

- a "time-and-line" structure, in which the tariff is based on pure hourly rates and lawyers are remunerated on an hourly basis for all the time authorized or reasonably required for a case. The rate may vary according to the nature of the work performed, such as a lower rate for travel time. This system typically also features add-on unit fees for letters, telephone calls, and so on;
- a "capped hours" structure, in which the tariff is based on maximum hours allocated for certain stages or types of work and lawyers bill their actual time on an hourly basis up to the specified limit; and
- a "block fee" structure, in which lawyers earn a lump sum fee for certain stages of a case or types of service regardless of the time expended.

Some systems may also combine these basic structures by, for example, using a mix of capped hours and block fees.

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the file, in order of preference, to the in-house practice, a panel firm, and a non-panel firm. If a matter is referred to a panel firm and is estimated to significantly exceed the cost ceiling, it may be re-allocated in-house.

[179] Usually, if the applicant states a preference for a particular private practitioner or in-house solicitor, the case is referred to that person. If the applicant does not request a practitioner, the case is assigned in-house unless there is a conflict of interest or some other reason to assign the file to a private practitioner.

[180] If the applicant has not requested a private practitioner and the matter cannot be handled in-house, the legal aid grant is made to a private practitioner on a specialist panel. There are currently two panels for criminal law based on pleas and trials at different levels of court, plus a family law general panel.

Hourly rate

No matter which structure is used, most legal aid tariffs are built on the basic unit of the hourly rate or billable hour. Hourly rates are the measure of value in both time-and-line and capped hours systems. Even in a block fee system, in theory the fee is based on a rough estimate of how many hours are required to perform the service in question, multiplied by a notional hourly rate.

Some jurisdictions offer differential rates according to years of experience.

In Canada, a majority of the provinces and territories — Ontario, the Yukon, the Northwest Territories, Newfoundland and Labrador, Nova Scotia, and New Brunswick — use differential rates based on experience level. While differential rates are designed to compensate more senior counsel for their experience, one criticism is that the lower rate can discourage new counsel from offering legal aid services and hence exacerbate lawyer attrition. One can argue equally, however, that the lack of a differential rate drives attrition among more senior lawyers. Since lawyers' hourly rates in the private market increase as they gain more experience, senior counsel arguably sustain a greater economic loss from a stagnant legal aid rate. Table 7 in Chapter 2 shows Canadian hourly rates.

Another difficulty is that a lawyer's year of call does not necessarily reflect years of experience in a particular practice area. In Ontario and the Yukon, the experience increase is calculated by multiplying the number of years of practice by the percentage of the lawyer's practice devoted to either criminal law or civil litigation. Ontario lawyers must apply for and receive Legal Aid Ontario (LAO) certification to move to a higher tier. This calculation does not, however, solve the problem of the practitioner who has fewer years of experience compared with others but who has developed a specialization or expertise that should be reflected in a higher rate.

LAO's Tariff Review Task Force suggested that a differential rate attracts more senior practitioners to legal aid work, thereby leading to higher-quality legal services. It suggested that the participation of senior lawyers would ensure the availability of mentors for younger lawyers and increase public awareness of legal aid work.[181]

Hourly rates may also vary according to the nature of the work involved, the type of offence or court proceeding, or the level of court. In Newfoundland, the differential rates are further subdivided according to where the matter is heard. A lower set of rates applies to matters before a judge alone, while a higher set of rates is used for offences within the exclusive jurisdiction of the Trial Division, jury trials, dangerous offender applications, and appeals to the Court of Appeal or Supreme Court of Canada. Likewise, the rates in the Yukon vary within each experience band depending on the type of offence or proceeding. In Nova Scotia, a higher rate applies for lawyers with over 10

[181] Legal Aid Ontario, *Tariff Review Task Force Report, supra* note 3 at 78.

years' experience who have conduct of a matter that carries a mandatory life sentence if the accused is convicted.

Of the three judicare provinces, BC and Alberta do not use differential rates at all, while Ontario has a differential rate based on years of experience.

In England and Wales and in Scotland, the hourly rate varies according to the type of legal assistance offered (e.g., advice and assistance has a lower rate than assistance by way of representation).

In New Zealand, the hourly rate is calculated based on the provider's experience level and the type of proceeding. This is known as the guideline hourly rate (GHR). The criminal hourly rate is divided into four categories, depending on the proceeding category (PC1, PC2, PC3, and PC4). Each proceeding category is subdivided into three levels according to years of experience. Similarly, the civil hourly rate is calculated according to the forum category and years of experience (FC1, FC2, FC3, and FC4). Thus, the GHR is a blended rate that awards both the complexity of the matter and counsel's experience. (Table 30 shows the New Zealand hourly rates.)

Table 30: Hourly rates in New Zealand

Proceedings or forum category	Level 1 — Up to 4 years' experience ($)	Level 2 — 4 – 9 years' experience ($)	Level 3 — At least 9 years' experience ($)
Criminal			
PC1[182]	95 (86.45 Cdn)	100 (91.00 Cdn)	110 (100.10 Cdn)
PC2[183]	100 (91.00 Cdn)	125 (113.75 Cdn)	130 (118.30 Cdn)
PC3[184]	120 (109.20 Cdn)	130 (118.30 Cdn)	140 (127.40 Cdn)
PC4[185]	135 (122.85 Cdn)	150 (136.50 Cdn)	165 (150.15 Cdn)
Court of Appeal/ Supreme Court	135 (122.85 Cdn)	150 (136.50 Cdn)	165 (150.15 Cdn)

[182] Proceedings in a District Court or High Court (other than jury trial or preliminary hearing); proceedings transferred to a Youth Court (other than a preliminary hearing).

[183] Trials or indictments before jury or judge alone (including preliminary hearings) where the most serious charge carries a maximum penalty of not more than 10 years' imprisonment; proceedings before the New Zealand Parole Board.

[184] Trials or indictments before jury or judge alone (including preliminary hearings) where the most serious charge carries a maximum penalty of more than 10 years' imprisonment (other than life or preventative detention), or where the client is likely to face cumulative sentences of more than 10 years (at which point the matter becomes category 4).

[185] Trials or indictments before jury or judge alone (including preliminary hearings) where the most serious charge carries a maximum penalty of life imprisonment, or where the client, if convicted, is liable to face a sentence of preventative detention.

Proceedings or forum category	Level 1 — Up to 4 years' experience ($)	Level 2 — 4 – 9 years' experience ($)	Level 3 — At least 9 years' experience ($)
Civil/Family			
FC1[186]	95 (86.45 Cdn)	120 (109.20 Cdn)	130 (118.30 Cdn)
FC2[187]	110 (100.10 Cdn)	125 (113.75 Cdn)	140 (127.40 Cdn)
FC3[188]	125 (113.75 Cdn)	140 (127.40 Cdn)	155 (141.05 Cdn)
FC4[189]	135 (122.85 Cdn)	150 (136.50 Cdn)	165 (150.15 Cdn)

In Australia, counsel rates vary according to the level of court or type of proceeding among the legal aid plans of Tasmania, Victoria, New South Wales (family), and the Australian Capital Territory (family).

In the United Kingdom and Australia, counsel rates may also vary according to whether practitioners are solicitors or barristers and, in the latter case, whether or not barristers are briefed (i.e., instructed by solicitors). As a general rule, solicitors command lower fees than barristers, which is why several Australian plans require prior approval for barristers to be used instead of solicitors. They promote the use of solicitors if possible to avoid the higher barristers' fees.

With respect to the level of tariff rates, as Table 7 in Chapter 2 shows, while BC's hourly rate of $80 appears to rank near the top in Canada, along with Alberta and Ontario, this is somewhat misleading. The lower rates of the Prairie and Maritime provinces are offset by their lower cost of living. Moreover, the tariffs in several of these provinces are generally considered inadequate. Nova Scotia is also currently undergoing a process of tariff review and has already increased its hourly rate as part of phase 1 of that review. It also plans to increase preparation time, which will further enhance remuneration to counsel. In Manitoba, which has considered increasing its reliance on staff lawyers to improve efficiency, the government recently announced that Legal Aid Manitoba will receive $365,000 to increase its tariff in 2005/2006.[190]

Similarly, in the spring of 2005, the New Brunswick government announced funding increases for legal aid, and Legal Aid New Brunswick will use much of this to raise the tariff rates. The goal is to have parity by 2007 with ad hoc prosecutors in that province, who currently earn $80 (under five years' experience) or $100 (over five years' experience) an hour. Moreover, Legal Aid New Brunswick will soon be replaced by a new Legal Aid Services Commission, at which time further changes to the tariff will be developed.

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[186] Any tribunal or judicial authority not included in any other category.
[187] Family Court, District Court (including any mental health hearing before a District Court judge), Environment Court, Employment Court, Maori Land Court.
[188] High Court, Maori Appellate Court, Waitangi Tribunal.
[189] Court of Appeal and Supreme Court.
[190] Manitoba Justice, *A Review of Legal Aid Manitoba, supra* note 166.

As discussed in Chapter 5, the majority of BC tariff lawyers have 10 years of experience or more. When this factor is taken into account, the $80 rate lags considerably behind Ontario, where the rate for lawyers with over 10 years of experience is currently $92.34 per hour.

Canadian rates are generally quite low compared with those in the United Kingdom, New Zealand, and Australia.

"Time-and-line" versus capped hours and block fees

Currently, the LSC in England and Wales and the SLAB in Scotland continue to pay lawyers on a "time-and-line" basis to some extent, although both plans are in transition. In this system, practitioners are paid for their time according to a set hourly rate. The hourly fees for certain types of work or assistance are fixed by statute, and lawyers are also paid for each item of activity undertaken (i.e., they receive a flat fee for each letter, telephone call, client interview, etc.).

The disadvantage of the time-and-line system is that it is very difficult to predict or control costs, or to determine what value is received for the amount charged. This method of payment is also very complex and time-consuming to administer, and is vulnerable to abuse. In addition, remuneration for the same tasks may vary considerably in terms of the time expended, without any assurance of added value. Such a system may reward inefficiency. It also prevents implementation of innovations such as electronic billing, since it is difficult to reduce the detailed and variable accounts to a standard electronic form. Because of these deficiencies, both the English and Scottish plans have been shifting from the time-and-line system to block fees. Indeed, rather than the time-and-line model, most judicare programs use block fees for criminal matters and maximum or capped hours for family law proceedings, although family and criminal services may feature either type of tariff structure.

Block fees are based on a "swings and roundabout" approach. A block fee is based on an approximation of the time it takes to perform certain types of work multiplied by a notional hourly rate; sometimes the task will require more time to complete than estimated, sometimes it will take less. In theory, since these differences average out over time, compensation is fair in the long run.

Capped hours versus block fees may be a distinction without a difference, since in practice capped hours often function like block fees. In theory, a lawyer might complete a task in less time than the maximum hours allocated to a particular service, so that the capped hours notionally represent the top end of a range. However, since budget constraints have tended to force legal aid plans to allot inadequate hours, in most cases lawyers are likely to exhaust the hours. For the same reason, block fees often underestimate the time required for a particular task or proceeding. Still, given fiscal realities and the need to predict and control costs, capped hours or block fees may be the most

flexible methods of remunerating counsel, given legal aid constraints. The time-and-line system is simply not economically sustainable in the long term.

Family law

Capped hours tend to be more common in family law since they allow greater flexibility in the tariff. This is a necessity in the case of family law clients, who often face chronic problems and recurring conflicts that may require repeated litigation to resolve. In addition, family law increasingly relies on alternate dispute resolution (ADR) mechanisms such as mediation, which require a flexible tariff that can stream clients in and out of ADR as appropriate.

Under a capped hours regime, it is simpler to administer discretionary increases for unusually complex matters that are difficult to define in advance: additional hours can simply be authorized if reasonable. This is a significant advantage because there is no equivalent in family law to the standardized offence categories that form the basis of the graduated fee system used in most criminal tariffs. Another distinction between the family and criminal tariffs is that in family litigation, lawyers typically spend more time drafting documents. Family tariffs thus require a simple process for adding extra hours when counsel need to submit written pleadings or other necessary documents. A capped hours system can make it easier to adopt a differential hourly rate that recognizes and rewards more experienced counsel, a major advantage when family lawyers willing to accept legal aid cases are in short supply.

In Canada, capped hours are more prevalent than block fees for family law. All three judicare provinces — BC, Alberta, and Ontario — use capped hours, as do New Brunswick, Nova Scotia, Saskatchewan, the Yukon, and Newfoundland. Block fees are used in Manitoba and Quebec, while Saskatchewan (otherwise a capped-hours system) uses a block fee of $360 if the matter is concluded in chambers. Table 31 shows select family law fees in Canada.

Table 31: Select family law fees in Canada

Legal aid plan	Interim application	First day of trial
BC (emergency services only)[191]	Up to 14 hours for general preparation and 3 hours to prepare for a hearing in Provincial or Supreme Court, plus actual time in court at $80 per hour	General preparation can be applied to all court hearings, including trial
Alberta	Up to two chambers applications initiated by counsel included in the basic civil coverage	Up to 25 hours for basic civil coverage for all services, including initiating up to two chambers applications and all trial preparation, or for all services for civil action using collaborative law, plus $205 and 1 hour preparation for each half day of trial
Saskatchewan	$360, including preparation time if matter dealt with in chambers only[192]	12 hours for preparation, plus actual court time at $60 per hour for trial subsequent to pre-trial conference
Manitoba	$760, including all preparation and appearances, and all case-management and pre-trial conferences as well as exams for discovery or exams on affidavit	$310 per half day, including preparation time
Ontario	Basic 12 hours, plus 7.5 hours for access; 9 hours for support; and 15 hours for custody and access at $73.87 or $83.10 or $92.34 per hour (depending on experience)[193]	15 hours of preparation for first day plus actual time in court, and 3 hours for all other necessary matters subsequent to trial
Quebec	$300 interim order/provisional measures/incidental proceedings, including preparation time in matrimonial proceedings	$700 after judgment, including preparation time for matrimonial proceedings

[191] For clients who are most at risk, LSS may approve extended family services that allow counsel to bill up to 40 hours for preparation time and all court appearances, but prior authorization is required.

[192] The tariff provides up to a maximum of seven additional hours for preparation at $60 per hour if the matter is further dealt with at a pre-trial settlement conference, plus one hour preparation for each hour in pre-trial.

[193] Plus four hours of preparation for the first pre-trial, case, or settlement conference or issues hearing, and two hours for any subsequent hearings plus court attendance.

Legal aid plan	Interim application	First day of trial
Nova Scotia	7 or 11 hours for contested custody; 4 or 8 hours for contested maintenance or access applications; and 8 hours for contested custody and any one or more items or 12 hours for any two or more items (applicant or petitioner) (*Maintenance and Custody Act* or *Divorce Act,* respectively) at $60 or $70 per hour (depending on experience)	15 hours for preparation and all pleadings, trial preparation, and necessary attendances leading to actual trial, plus actual time in court subject to a maximum of 6 hours per day
New Brunswick	5 hours for all services, including hearing preparation for contested motion at $43 per hour	10 hours for all services, including trial preparation for each of the first two days of trial, plus actual time in court
Newfoundland and Labrador	5 hours for maintenance application at $45 or $55 per hour (depending on experience)	20 hours for custody and wardship
Northwest Territories	At discretion of board or executive director	At discretion of board or executive director
Yukon	5 hours for all services, including preparation plus counsel fee of $390 or $500 per day, depending on type of application	10 hours for preparation for each of the first two days of trial (no more than 40 hours in total)

The BC family tariff is limited to emergency services and is capped at 17 hours (up to 14 hours for general preparation and a maximum of 3 hours for preparation for a hearing in Provincial or Supreme Court) plus actual time in court. These hours cover all interim hearings. In practical terms, the restricted hours for emergency referrals mean that lawyers cannot pursue a trial without applying for extended services.[194]

In contrast, the family tariffs in other Canadian jurisdictions tend to be more generous in their allotments —

- Alberta allows up to 25 hours of preparation for all services including trial, as well as a $205 counsel fee and 1 hour of preparation for each half day of trial.
- Ontario provides 15 hours of preparation for the first day of trial plus actual time in court. It also grants a basic 12 hours for interim applications with 7.5 – 15 additional hours depending on the type and number of applications.
- For trial alone, Nova Scotia allots 15 hours for preparation plus time in court (as well as additional hours for interim applications ranging from 4 to 12 hours).

[194] *Supra* note 191.

- New Brunswick and the Yukon both permit 10 hours for each of the first two days of trial, while Newfoundland grants 20 hours at trial for custody and wardship matters. All three jurisdictions offer 5 hours for interim applications or contested motions (for which the Yukon also provides a counsel fee of $390 or $500 per day, depending on the type of application).
- In Manitoba, counsel receive a block fee of $760 for pre-trial preparation and appearances, as well as a block fee of $310 per half day of trial.

A capped hours system is also flexible. For example, when the BC attorney general announced $4.6 million in additional funding for family legal aid services on February 1, 2005, LSS was able to offer expanded services for those clients most at risk simply by increasing the amount of authorized hours as needed. Thus, by February 8, 2005, LSS had increased the hours allotted for general preparation from 8 to 14 hours.

In England and Wales, the LSC has shifted to block fees, rather than capped hours, for family law remuneration through its family graduated fees scheme. The scheme divides family proceedings in the Magistrates' Court, County Court, and High Court into four categories —

- category 1 — family injunctions;
- category 2 — public law children;
- category 3 — private law children; and
- category 4 — ancillary relief and other family proceedings.

Each category under the scheme has a separate fee scale of different base fees and hearing unit fees according to five types of work, subdivided into different fee scales for Queen's Counsel and other counsel. These fees are set out in a series of tables according to category. This is a rare example of a block fee system that attempts to apply the categorical approach to fee setting normally seen in criminal tariffs to a family law context. Unlike the criminal tariffs, however, these categories are defined according to different areas of family law and type of work instead of complexity per se. The scheme also rewards early resolution of a family matter by doubling the hearing unit fee for interim relief or enforcement if the matter is settled at that point in the proceedings.

While initial family advice and assistance ("legal help") is currently funded on an hourly basis, the LSC also plans to move to a fixed fee system using either national or regional averages for each category of work for advice and assistance or advocacy assistance.

Table 32 shows the family graduated fees in England and Wales.

Table 32: Family graduated fees in England and Wales

Interim application	First day of trial
Family graduated fees	**Family graduated fees**
For example —	For example —
Hearing unit fee for F2 under category 1 (injunctive relief)	***Hearing unit fee for F5 under category 3 (main hearing)***
Function F2 — all work in connection with a hearing related to injunctive relief or enforcement procedures, including, but not limited to, preparation, advocacy, advising, and drafting	**Function F5** — all work in connection with the main hearing, including preparation, advocacy, advising, and drafting
Cat 1 — includes an injunction or other order to protect a person £287.50 (Cdn $681.38) for Queen's Counsel or £115 (Cdn $272.55) for other counsel as the hearing unit fee for a hearing related to injunctive relief or enforcement procedures. If the matter is settled at this point, counsel receives 100% of the hearing unit fee on top as reward for early resolution.	**Cat 3** — family proceedings between individuals that concern the welfare of children £812.50 for Queen's Counsel (Cdn $1,925.61) or £325 for other counsel (Cdn $770.25) for the main hearing (proceedings between individuals that concern the welfare of children), including preparation and advocacy.

In Scotland, with some exceptions, there are no specific fees for family law matters. Remuneration for civil legal aid includes block fees for areas of civil procedure that apply to family law proceedings, however. The SLAB introduced block fees for civil law matters in October 2003.

New Zealand and Australia both have capped hourly schemes in which maximum hours are prescribed for each "family step" or "stage of matter," respectively. Table 33 shows select family fees in these two countries.

Table 33: Select family law fees in New Zealand and Australia

Legal aid plan	Interim application	First day of trial
New Zealand	3 hours for mediation or settlement conferences; additional 4 hours for pre-hearing matters; and up to 2 hours preparation for each interlocutory application, plus actual hearing time at $110 or $125 or $140 (depending on experience — Cdn $100.10 or $113.75 or $127.40)	9 hours preparation plus actual hearing time, and 3 hours for review as a result of court order or direction
Australia — National "stages of matter" fees	6 hours for interim hearing and up to 5 hours for court attendance	Negotiated maximum fee for trial preparation and 6 hours for each hearing date

As described in the section on rates, New Zealand has a structured hourly fee (the GHR) that sets the rate for family law matters according to forum and levels of experience. In turn, various family law proceedings, such as custody and access, are divided into a series of "family steps." Each step has

prescribed maximum fees for the work that needs to be done at that particular stage, including additional hours for work that may or may not be required, depending on the factors of the individual case. This plan has a strong quality assurance component, since the tariff guide contains detailed instructions for carrying out the work required at each stage in the process. Each step provides a process overview and lists the actions and documentation required from lawyers as well as the actions and decisions to be taken by legal aid staff. Lawyers cannot proceed to the next step without prior authorization.

In Australia, all jurisdictions have adopted the national "stages of matter" model for family law matters under Commonwealth (i.e., federal) legislation. In this model, maximum hours are assigned to each stage of a family law matter and further legal aid is granted one stage at a time. As the model is broken down into very concise stages, it would be fair to describe it as a coherent and highly monitored system of unbundling, since lawyers cannot proceed to a new stage without prior authorization.[195] In addition, since it is a Commonwealth priority that consideration must be given to resolving family law matters through the use of ADR when appropriate (known there as Primary Dispute Resolution, or PDR), this is incorporated into the model as stage 1. Although the capped hours and stages of this national family law tariff are uniform, no hourly rate is specified. This means that practitioners across Australia do not receive the same remuneration for the same work since each state has its own hourly rate. This avoids introducing inequity for the general tariff of each state in comparison with other areas of the law, and reflects the differences in the cost of living from state to state.

Like the Canadian plans, state family law tariffs in Australia are usually less structured, employing either capped hours or block fees without dividing the proceedings into stages.

While the family models reviewed above present some interesting solutions for tariff renewal, capped hours remain the best option for LSS, given the limited nature of the current family tariff following the 2002 cutbacks. The detailed block fee system used by the LSC attempts to predict and award complexity according to the area of family law and type of work, but the model is overly complicated for BC's diminished family tariff. The same is true of the structured family models of New Zealand and Australia, since family cases in BC are now funded in a piecemeal fashion on an emergency basis rather than planned through to trial. In these circumstances, the tariff needs to be more flexible than ever and ready to adjust to changing financial circumstances as LSS works to rebuild family legal aid services in BC. Adding more hours as required means that LSS can respond quickly to help

[195] "Unbundling" is the term used to describe the trend in legal service delivery towards limited scope retainers in which clients retain lawyers to perform discrete tasks rather than handle all aspects of a legal matter through to its conclusion. For more information, see the website of the Law Society of BC's Unbundling Legal Services Task Force, online: www.lawsociety.bc.ca/about_law_society/TF-Unbundling.html.

families obtain the assistance they need in individual cases, while the family tariff as a whole can immediately adjust to injections of new funding without recalculating or topping up block fees. While innovations that reward early resolution have promise, such as doubling the fee when the matter is settled at an early hearing, any structural changes to the family tariff will depend largely on the reforms BC implements based on the report of the Family Justice Reform Working Group.

Criminal law

The block fee system is more widely used in criminal law, which is more predictable than family law in terms of likely issues in a case and the available procedures. The advantage of block fees is that they do not require lawyers to record time to receive payment, other than time in court, which is easy to track. Criminal lawyers are accustomed to block fees because this is the most common billing method for private clients. Block fees are simple for both lawyers and legal aid staff to administer and are very suitable for electronic billing since not much detail is required. Arguably, block fees reward efficiency and experience since more senior counsel should be able to perform the services in less time, which enhances their effective hourly rate. Block fees discourage unnecessary work since it is to the lawyer's advantage to complete the work as efficiently as possible. Moreover, counsel, rather than the legal aid plan, bear the costs of inefficiency since they will not be further compensated if they take too much time to complete a service.

In recent years, other jurisdictions have also moved towards block fees. In a 2005 report, Legal Aid New South Wales, which faced spiralling costs for District Court indictable matters, recommended block fees as an effective fee structure that identifies and rewards efficient practices. It found that block fees provide legal aid agencies with greater budget predictability and lawyers with greater certainty in terms of expected remuneration.[196] Similarly, in 2004, the Northern Ireland Court Service recommended standard or fixed fees to deliver the three objectives the government set for criminal remuneration: control, predictability, and value for money.[197]

Block fees that are set too low can compromise quality of service, however. For example, a block fee system may result in counsel reducing the time that ought to be spent on a file in order to keep the work profitable. Insufficient block fees for guilty pleas or stays can invite abuse, since practitioners may be tempted to go to trial in order to receive the higher fee. As well, if block fees are inadequate and counsel regularly spend additional time for which they are

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[196] Legal Aid New South Wales, *Indictable Crime Cost Issues: Proposals for Change Discussion Paper* (Sydney: Legal Aid New South Wales, 2005) at 1, 20, online: www.legalaid.nsw.gov.au/data/portal/00000005/public/55255001106803863890.doc.

[197] Northern Ireland, Northern Ireland Court Service, *Remuneration Proposal: Remunerating Defence Counsel in Crown Court Cases* (Belfast: Northern Ireland Court Service, 2004) at 28.

not remunerated, they become more likely to refuse legal aid work. This problem is not unique to block fees since the same difficulties arise when maximum hours or hourly rates are too low.

Canadian legal aid plans are almost evenly split in terms of using capped hours or block fees for criminal law services. The two judicare provinces of BC and Alberta use block fees for most criminal cases, with the exception of lengthy criminal cases in BC that are subject to capped hours under SCAP. Saskatchewan, Quebec, and Manitoba also use block fees, although Saskatchewan gives counsel the choice of calculating their fee as a block for all trial services or using capped hours. In contrast, the Northwest Territories, Newfoundland and Labrador, Nova Scotia, and Ontario all use capped hours. Two plans — New Brunswick and the Yukon — use a mixed system of capped hours and block fees that provides block fees for summary offences and less serious indictable offences, and maximum hours for serious indictable offences.

Table 34 shows select criminal fees in Canada.

Table 34: Select criminal law fees in Canada[198]

Legal aid plan	Bail application ($)	Guilty plea ($)	First day of trial ($)
British Columbia	80 or 120 or 150	120 or 200 or 300, plus 80 or 100 or 200 for sentencing	500, 600, or 800 for the first two half days of trial (1,400 daily maximum for category IV offence)[199]
Alberta	1 hour (Provincial Court) and up to 3 hours (Queen's Bench), including all preparation and court attendance at 80 per hour	240; 400 for plea on trial date[200]	475 for first half day, plus 240 for second half day[201]
	Express payment[202]	375 or 460 or 655, including disbursements	655 for level 1 offence trial, including disbursements
Saskatchewan	All matters other than trials are determined at time of authorization	All matters other than trials are determined at time of authorization	300 – 550 (Provincial Court trial) or 300 – 750 (Queen's Bench) for all services. Counsel may choose fixed fees or maximum hours. Maximum fees calculated on an hourly basis are 5 hours (summary conviction or indictable offence punishable by 5 years jail); 10 hours (indictable offences punishable by 14 years maximum or break and enter a dwelling house); or 25 hours (offences punishable by possible or mandatory life),[203] all at 60 per hour.

[198] Unless otherwise indicated, fee ranges are according to category of offence.

[199] The fees for the first two half days of trial for category I, II, and III offences are $500, $600, and $800, while fees for subsequent half days are $300, $400, and $500, respectively. The half day fee for a category IV trial is $700 ($1,400 maximum daily rate), with no declining rate for subsequent half days. However, a trial set for more than 10 half days is subject to the Strategic Case Assessment Program and is budgeted on an hourly tariff.

[200] The guilty plea on trial date fee is for a negotiated plea where Crown previously rejected the charge or sentence. To receive this fee, negotiations with the Crown must be documented. Sentence briefing is available for up to 1 hour for level 1 and 2 offences, and up to 2.5 hours for level 3 offences. Up to 3 hours are available for sentencing proceedings where sentencing is adjourned at the court's request; for presentation of a pre-sentence report; for presentation of *vive voce* evidence pertaining to sentence; or for additional information. An additional 3 hours for sentencing proceedings are available for each subsequent half day. Last, up to 10 hours are available for multiple charges arising from different sets of circumstances (up to 1 hour for a plea to each set of circumstances concluded at one appearance).

[201] For level 3 offences, Alberta allows a 10% increase in fees as taxed. Also, lawyers may bill for client interviews up to 1 hour for level 1 offences, up to 3 hours for level 2 offences, and up to 10 hours for level 3 offences. Defence briefing (which does not include legal database searches) is permitted up to 1 hour for level 1 offences, up to 2.5 hours for level 2 offences, and up to 10 hours for level 3 offences.

[202] Express payment is for billing of uncomplicated matters, where counsel acknowledges that the express payment fees compensate for all services, including disbursements.

[203] The CEO has discretion to authorize a maximum of 50 hours as a supplementary rate for offences punishable by a mandatory life sentence.

Legal aid plan	Bail application ($)	Guilty plea ($)	First day of trial ($)
Manitoba	There is no separate fee for bail applications, which are included in the fee for trial preparation. The fee for a bail review, where authorized, is $260 for all offences.	290 or 575 or 830	770 + 160 or 1,150 + 260 or 1,500 + 350.[204] Fees of 95 or 115 or 125 are available for subsequent sentencing.
Ontario	2 hours at 73.87, 83.10, or 92.34 (depending on experience)	6, 8.5, or 13 hours (depending on category)	10.5 or 15 hours for first day of trial, including preparation and court attendance (summary and indictable I offences); 15 hours of preparation for the first day plus actual court time, up to a total maximum of 64 hours for trials of 10 days or less (indictable II)
Quebec	100		315 (summary) or 525 (indictable) for preparation and all services including first day; 500 per day for *Criminal Code* s.469 offences (e.g., murder)
Nova Scotia	No separate fee – included in trial preparation hours	No separate fee – included in trial preparation hours	2.5 hours (summary trials); 5 hours (offences with 5-year maximums); 15 hours (10 – 14-year maximums); 22 hours (possible life sentence); and 75 hours for preliminary hearing and trial (murder), at 60 or 70 or 85 per hour, depending on experience and category of offence, plus court time up to 6 hours maximum per day
New Brunswick	Per hour at 48 or 54 or 60 per hour, depending on experience, to 234 or 281 maximum (indictable offences in Provincial Court or s.522 application in Queen's Bench)	144 for all services (summary and absolute Provincial Court jurisdiction)	Per hour to maximum of 216 or 288 including bail, preparation, and counsel fee at trial (summary and hybrid offence proceeding summarily); 360 including bail, preparation, and counsel fee at trial (absolute Provincial Court jurisdiction); or per hour for preparation to a maximum of 1,032 or 1,187 or 2,219 (indictable), plus counsel fee per half day of 144 or 180 or 252
Newfoundland and Labrador	5 or 10 hours (Supreme Court exclusive jurisdiction), at 45 or 50 or 55 or 60 per hour, depending on experience and type of matter	No separate fee – included in trial preparation hours	6 hours (summary conviction); 20 hours (indictable offences before judge alone); 30 hours (offences before judge and jury); and 75 hours (Supreme Court exclusive jurisdiction and dangerous offender applications), plus actual court time up to 6 hours maximum per day
Northwest Territories	5 hours, plus actual time in court up to 6 hours maximum per day at 70 or 81 or 99 or 117 per hour, depending on experience	No separate fee – included in trial preparation hours	7 or 10 or 20 or 50 hours, plus actual time in court. Extra 5 hours on top for trial by jury.

[204] The second figure is for each additional half day of trial.

Legal aid plan	Bail application ($)	Guilty plea ($)	First day of trial ($)
Yukon	**Groups 1 and 2** 174 (Provincial Court) **Groups 3 and 4** Included in fee for trial or stay	**Groups 1 and 2** No specific maximum hours, but hours must be reasonable for the offence and the limits specified for trial, and do not attract any block fee top-up **Groups 3 and 4** 207 (summary) or 275 (hybrid and other indictable)	**Groups 1 and 2 (serious indictable)** 8 hours of preparation for group I for each of the first 2 days of trial; 6 hours for group 2 for first day of trial, at 60/70 or 67/78 or 75/88, depending on experience and offence type, plus 275/390/500 counsel fee at trial per day **Group 3 (hybrid and other indictable)** 420 (no election) or 825 (election) for all services including bail, preliminary hearing, preparation, and counsel fee at trial, for not guilty plea (trial) or stay **Group 4 (summary)** 348 for all services including bail hearings, preparation, and counsel fee at trial, for not guilty plea (trial) or stay

As previously observed, capped hours, as used in Ontario, make it faster and easier to update the tariff in the event of any funding increases or shortfalls. In addition, it is relatively simple to grant additional hours for cases that are unusually complex, thereby avoiding case management of lower-cost cases. LAO's Tariff Review Task Force recommended against block fees. It noted the bar's concern that block fees could lead to "ill-advised" guilty pleas, and that the prospect of counsel completing a number of blocks in one day could lead to a perception of "assembly line" justice. The task force also concluded that block fees should be avoided because a public organization should have a good sense of the time spent to provide services, and that it would be difficult to estimate the increased costs of returning to such a system.[205]

Despite the above criticisms, LSS is unlikely to abandon block fees in favour of a system based on maximum hours, because the latter requires counsel to track their hours, which would increase the administrative burden on tariff lawyers and LSS staff. Moreover, in the past, LSS considered converting the criminal tariff to an hourly system like that in Ontario, but a costing analysis suggested that this would lead to higher tariff costs, especially in less serious cases.

Regarding the quantum of block fees, BC offers lower compensation than the other two judicare provinces of Alberta and Ontario, as well as Manitoba, which uses a mixed delivery system. (See Table 34.)

The BC rate for a Provincial Court bail application, either $80, $120, or $150, is low compared with most provinces except Alberta, where it is $80.

BC also does not compensate guilty pleas and sentencing particularly well. While Alberta and the Yukon appear to be comparable to BC, the $240 base fee for guilty pleas in Alberta is potentially higher than BC rates, given the additional fees available for sentence briefing, sentencing proceedings on

[205] Legal Aid Ontario, *Tariff Review Task Force Report, supra* note 3 at 192.

separate half days, client interviews, and defence briefing. Instead of claiming additional fees on top of the base rate, Alberta counsel also have the option of receiving flat-fee express payments, including disbursements at the current rates of $375 (level 1 offence) or $460 (level 2 offence). No express payment option is available for level 3 offences, which are the most serious crimes. Likewise, the Manitoba and Ontario rates for guilty pleas and sentencing are both generally higher than those of BC.

BC's block fees are not especially competitive for the least complex (summary) trials, although they are higher than those of the Yukon, Quebec, and most Maritime provinces. The BC rate for less complex trials is comparable to those of Saskatchewan and the Northwest Territories for counsel with up to seven years of experience; however, the BC rate is lower compared with fees for counsel in the Northwest Territories with seven years of experience or more. The Alberta base rate of $475 for the first half day of trial could result in a fee as high as $635 once additional fees for client interviews or defence briefing are taken into account, while the express payment option provides $655 for a level 1 offence trial, including disbursements.[206] Manitoba and Ontario both provide higher fees than BC for summary trials.

Comparing tariff rates for trials of serious indictable offences is difficult, given that the basic fee structures for trials tend to be segmented within case management systems. Comparing block fees with capped hours for indictable offences in the abstract is also problematic because it is difficult to measure capped hours for trial preparation against block fees without knowing what trial length or category of offence to use in calculating the relevant block fee. There are also no national standards for categories of offences, so the same offence could be categorized as more or less complex in different provinces. Summary offences are easier to compare because one can assume that most summary trials take one day or less.

Taking a two-day trial for an indictable offence as an example, a category IV trial in BC would pay $700 per half day with no declining fee for subsequent half days. If set for more than 10 half days, the case would be subject to SCAP. A two-day category IV trial in BC would result in a fee of $2,800, which is comparable to Alberta (up to $3,074), Manitoba ($2,550), and Ontario (up to $2,862). New Brunswick is considerably lower, at $1,907.[207]

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[206] The base fee for a trial of a level 2 offence in Alberta is $475 plus up to three hours for client interviews and two and a half hours for defence briefing, which produces a fee for a half-day level 2 trial as high as $915 (up to $1,155 for a one-day trial).

[207] Manitoba's trial rate for the most serious offence category is $1,550 for the first half day and $250 for each additional half day. Alberta provides $475 for the first half day of trial and $240 for each additional half day ($1,195 in total for two days of trial), plus up to 10 hours in additional fees for level 3 offences, which could result in a trial fee of up to $2,795. There is a 10% increase in fees as taxed for level 3 offences, which means that the fee for a two-day trial of a serious indictable matter in Alberta could be as high as $3,074. Ontario, which uses capped hours, grants more serious indictable matters 15 hours of

In England and Wales, the LSC has a variation on block fees for criminal matters in Magistrates' Court that attempts to standardize the range of billable time that could reasonably be spent on a file.[208] This system of standard or graduated fees consists of a lower standard fee, lower limit, higher standard fee, and higher limit, ranging from the lowest to the highest fee available. (See Table 35 for graduated block fees in England and Wales.) One of the lower fees is payable if the value of the work assessed on an hourly basis falls within either the lower standard fee or the lower limit, in which case counsel will receive the fee that corresponds most closely with the value of the recorded time on the file. If the work done on the file exceeds both lower fees, either the higher standard fee or higher limit is payable, depending on the value of the work. If the higher limit (the highest fixed fee) is exceeded, the value of the work is assessed in accordance with the hourly prescribed rates. If the value of the time spent is lower than all four fees, the lawyer will receive the lower standard fee (the lowest fee on the scale). Standard fees include preparation, routine letters and phone calls, and advocacy, including bail and other applications.

The advantage of this system of graduated fees is that it can be adjusted for the varying complexity of the work in a standardized manner, without requiring pre-authorization for extra fees. The disadvantage is that, unlike a block fee, it still requires lawyers to keep detailed time records. Another problem is the lack of a mechanism for determining whether the extra time taken was justified. This model therefore risks rewarding counsel inefficiency.

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preparation for the first day of trial plus actual court time, up to a maximum of 64 hours for trials of 10 days or less. Assuming six hours for court time on each day and four hours for preparation on the second day, the fee for the first two days would fall in the vicinity of at least $2,289, $2,576, or $2,862, depending on the lawyer's experience. In New Brunswick, the preparation fee is calculated per hour, up to a maximum of $1,187 for trial preparation, plus a $180 counsel fee per half day ($1,907 in total for indictable offences other than murder).

[208] These rates apply to work undertaken in Magistrates' Court, which handles most criminal matters. Standard fees, however, do not apply to proceedings where counsel is assigned under a Representation Order or where costs are allowed at an enhanced rate.

Table 35: Graduated block fees in England and Wales

Matter	Lower standard fee (£)	Lower limit (£)	Higher standard fee (£)	Higher limit (£)
Guilty plea (category 1)	**National rate**			
	173.45	298.45	417.20	517.10
	(Cdn $411.08)	(Cdn $707.33)	(Cdn $988.76)	(Cdn $1,225.53)
	London rate			
	223.25	382.90	529.25	646.85
	(Cdn $529.10)	(Cdn $907.47)	(Cdn $1,254.32)	(Cdn $1,533.03)
Trial (category 2)[209]	**National rate**			
	306.25	512.70	702.40	854.40
	(Cdn $725.81)	(Cdn $1,215.10)	(Cdn $1,664.70)	(Cdn $2,024.93)
	London rate			
	392.95	651.00	882.65	1,041.60
	(Cdn $931.29)	(Cdn $1,542.87)	(Cdn $2,091.88)	(Cdn $2,468.59)

In Scotland, the SLAB replaced the time-and-line system with block fees for lower court criminal work in 1999, and is preparing to implement a similar change for High Court cases in late 2005. The system will feature variable block fees for different stages of work, similar to the block fees that the SLAB introduced for civil matters in 2003.[210]

New Zealand uses a staged model for criminal law services similar to the family steps. There are separate models for summary and indictable offences. Each step uses a mixture of flat fees and capped hours to compensate the work to be performed for each stage. Table 36 shows select criminal fees in New Zealand.

Table 36: Select criminal fees in New Zealand

Legal aid plan	Bail application	Guilty plea	First day of trial
New Zealand	2 hours (4 hours for reverse onus), plus 1 additional hour if the hearing exceeds 1 hour, at relevant guideline hourly rate (GHR)	**Summary offences**	
		$225, including disbursements (Cdn $204.75)	3 hours for preparation plus actual hearing time at relevant GHR
		Indictable offences	
		7 hours for PC2, and 13 hours for PC3 and PC4, including all preparation and hearing time[211]	5 hours for PC2; 10 hours for PC3; 15 hours for PC4, plus actual hearing time at relevant GHR

Almost all the Australian plans use block fees for criminal matters. Legal Aid New South Wales intends to introduce block fees for indictable matters in the

[209] There are three categories. Category 1 includes guilty pleas and category 2 includes a contested trial. The category 2 fee also includes a guilty plea or stay on the trial date.
[210] Information provided by SLAB staff.
[211] See Table 31, "Hourly rates in New Zealand," to calculate the rates for PC2, PC3, and PC4.

near future. Victoria Legal Aid provides a substantial preparation fee on top of the block fee for trials or pleas in Supreme Court. In Western Australia, lawyers receive a similar "getting-up" fee for trials in both District and Supreme Court in addition to the regular block trial fee.

Given the benefits of block fees in terms of cost control, ease of administration, efficiency, and predictability, there is no need to substitute a system based on hourly rates or maximum hours for block fees in the current LSS criminal tariff. Moreover, to the extent that the maximum allotments in a capped hours system represent the average time it takes to complete a task as opposed to the higher end of the range, capped hours effectively result in a block fee. Additional hourly fees, however, could play a role in a system for providing extra remuneration for unusually complex cases along the lines of the mixture of flat fees and capped hours used in the New Zealand model. Alternatively, LSS could consider a standardized system of pre-authorized discretionary extra fees for cases of unusual complexity. This might involve an additional block fee, or raising the offence category to yield a higher block fee. Such a system would be relatively simple to administer and would guard against abuse, since counsel would have to justify the extra fees.

At present, the highest priority for the LSS criminal tariff is to increase the amount of some of the block fees, which are clearly inadequate in light of both prevailing market rates in BC (as discussed in Chapter 6) and the rates paid by other Canadian provinces. Neglecting this issue may have serious long-term consequences in terms of tariff lawyer recruitment and attrition.

V. Tariff rates and lawyer participation

BC is not alone in having difficulty attracting and retaining counsel for legal aid work due to poor remuneration —

- In a 2004 survey of private bar lawyers who accept referrals from the Saskatchewan Legal Aid Commission, 88% of respondents described increasing the tariff rate as either "important" or "very important," and cited "Increased tariff rates" as their number one priority. Respondents indicated that maximum preparation hours, the hourly rate for preparation, the hourly rate for court attendance, and fixed fees were all "too low," and 9 out of 10 lawyers who stopped accepting referrals cited low compensation as the reason. Still, 77% wanted to retain the fixed fee option.[212]
- In its 2000/2001 tariff review, LAO found that it was increasingly difficult to attract and retain counsel for legal aid work, and that the tariff was the

[212] Sigma Analytics, *Final Report: Private Bar Research Project* (Saskatoon: Saskatchewan Legal Aid Commission, 2004).

primary cause. It has since implemented substantial tariff increases to address this problem.[213]

- In Scotland, a major policy review completed in 2004 found that the failure to increase fees contributed to negative perceptions of legal aid work within the legal profession. It also found low remuneration to be a contributing factor in the reported withdrawal of lawyers from legal aid work.[214]
- A 1997 report by the Legal Services Board of New Zealand found that there was marked dissatisfaction among lawyers with remuneration for legal aid work.[215]
- In Australia, National Legal Aid conducted a survey of family law practitioners in mid-2002, and discovered that private practitioners were reducing the amount of legal aid work they were willing to do because it did not provide a sufficient rate of return. Lawyers in rural areas reported greater reductions in the amount of legal aid work than their urban counterparts.[216]

While several of these reports acknowledge that there are many reasons why practitioners stop doing legal aid work, clearly low remuneration serves as a strong disincentive to accepting legal aid work.

VI. Conclusion

Our review of legal aid in other jurisdictions suggests that there would be no clear advantages in fundamentally altering the LSS service delivery model or tariff structures. Following the 2002 funding reductions, LSS returned to a largely judicare model to deliver its core services. Given the society's current circumstances, that model is likely the most stable and efficient delivery system because of its ability to adapt quickly to changing financial circumstances and client needs without requiring investments in staff and facilities. By contrast, a mixed or complex mixed system would be expensive to maintain and administer, while system-wide block contracting or franchising risks reducing permanently the number of legal aid lawyers and compromising service quality in favour of cutting costs. Also, if a shift to system-wide contracting proved unsuccessful, lawyers who left the legal aid system might not be inclined to return.

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[213] Legal Aid Ontario, *Tariff Reform Business Case, supra* note 3 at 25ff.

[214] Scotland, *Report to Ministers and the Scottish Legal Aid Board: Strategic Review on the Delivery of Legal Aid, Advice and Information* (Edinburgh: Scottish Executive, 2004) at 112, 119 – 20.

[215] Gabrielle Maxwell, Paul Shepherd, and Allison Morris, *Legal Aid Remuneration: Practitioners' Views* (Wellington: Legal Services Board, 1997).

[216] National Legal Aid, *Family Law Private Practitioner Survey* (Hobart, Tasmania: National Legal Aid, 2002), online: www.nla.aust.net.au/pdf/Family_law_Practitioner_survey.pdf.

With respect to tariff structures, our review indicates that the LSS approach is largely consistent with trends in other jurisdictions. In family law, the system of capped hours gives LSS the flexibility to allocate hours to meet the needs of individual cases and accommodate unexpected fluctuations in funding. Until the future direction of BC family justice reform is clear, LSS need not make any major structural changes to the family tariff. As for the criminal tariff, the block fee system is easy to administer and does not require detailed timekeeping, which criminal lawyers prefer. It also rewards efficient practice and counsel experience, and therefore provides good value for the money expended.

Like legal aid agencies in other jurisdictions, however, LSS must address the issue of low remuneration, since the amount of the hourly rate, the maximum hours allotted, and some block fees are currently inadequate. Poor compensation is one of the major sources of lawyer dissatisfaction, and if no increases are forthcoming, it will continue to deter lawyers from taking legal aid work.

8
Results-Based Management and the Tariff System

> *... a sound tariff of fees is a key element in the maintenance of a viable legal aid program throughout the province.*
>
> — Task Force on Public Legal Services in British Columbia, 1984

I. Introduction

In its *Service Plan 2004/2005 – 2006/2007,* the Legal Services Society outlined its vision of a "results-based and client-focused plan" for delivering legal aid services in BC. In doing so, it recognized "tariff system pressures" as a key strategic issue —

> Over the past several years, there has been a decline in the number of private bar lawyers who are willing to accept legal aid referrals. The growing length and complexity of court cases and low tariff rates make it increasingly uneconomical for lawyers to represent LSS clients. Tariff rates in BC have remained unchanged despite increases in inflation and court case complexity. The growing stress within the tariff system represents a major risk for LSS, as the delivery of legal aid is highly dependent upon having an available pool of skilled tariff lawyers.[217]

In response to this concern, LSS launched the tariff review as a major initiative to examine the current state of the tariff system, identify problems, and review options for tariff reform.

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[217] Legal Services Society, *Service Plan 2004/2005 – 2006/2007* at 9, online: www.lss.bc.ca/__shared/assets/LSS_serviceplan04-07575.pdf.

The results of the tariff review largely confirm the assessment in the *Service Plan.* In the course of the tariff review, we heard how the low rate of compensation and outmoded tariff structures fail to reward lawyers fairly and reasonably for the commitment of time, effort, and expertise that legal aid cases demand. Tariff lawyers emphasized that tariff compensation is wholly inadequate, too often forcing them to sacrifice their own financial interests to fulfill professional obligations to clients. They described how the tariffs linked payment to court time, especially trial time, thereby failing to provide for adequate payment for necessary services outside of court, even though such efforts often achieved early resolution, producing better results for clients and improving justice system efficiency. They expressed concern that in some cases overworked lawyers would succumb to the pressure to cut corners by, for example, reducing their preparation time or failing to interview clients thoroughly. Although most people consulted maintained that tariff lawyers generally provided good-quality service even if it meant working for free, some suggested that tariff remuneration inevitably increased the risk of low-quality service, creating the potential for a two-tiered system in which the quality of justice depends on one's ability to pay. Virtually all lawyers worried that low compensation reinforced the perception that legal aid lawyers were "second rate." Other justice system participants echoed these concerns. While generally recognizing the good work that tariff lawyers do, many participants had observed instances of substandard service. Some participants also perceived that individual legal aid lawyers seemed to conduct cases to maximize billings, possibly at the expense of system efficiency and potentially contrary to their clients' interests.

Apart from the issue of remuneration and its impact on service quality, lawyers also complained about the bureaucratic nature of LSS administration, which required them to perform tasks that they perceived to be a waste of time. This "paper pushing" and "jumping through hoops," combined with the stern or admonishing tone sometimes found in communications from LSS about billing or authorization matters, instilled in many lawyers a sense that LSS did not trust them to act in a professional manner, and did not value their contributions and commitment to legal aid.

The wide range of comments about the current tariff system may be condensed into three basic propositions —

- The tariff system generally offers inadequate compensation for quality service.
- The tariff system increases the risk and fosters the perception that LSS clients get lower-quality service.
- The tariff system encourages current tariff lawyers to leave the system and discourages new lawyers from entering the system.

What all of these concerns underscore is the essential link between compensation and service quality, or, in other words, pay and performance.

As a result, LSS began looking at options for tariff reform that would enable it to provide fair and reasonable compensation to lawyers, promote high-quality service to clients, and improve the overall efficiency of the justice system. The recurring complaint that the tariffs did not reward good service and good results led the working group to consider compensation models that link rewards to results, such as the deceptively simple concept of offering a bonus for a good result in a case. In the course of the working group's inquiry, however, it became apparent that a broader strategy would be required, one that viewed tariff reform not as a one-time or periodic affair but as a continuous, goal-driven process of evaluation and adjustment integrated into the society's overall strategic priorities. This led to a shift in focus from "results-based compensation" to "results-based management," an approach in which the rates and methods of payment are components of an overarching strategy for ongoing improvement.

In this chapter, we outline the various models and techniques for tariff management that we have considered in developing the options for tariff renewal outlined in Chapter 2. In section II, we examine the concept of results-based management (RBM) as it has been developed and applied by governments in the developed world in the past decade. In section III, we examine the related notion of results-based compensation (RBC) in both the public and private sectors in its two main variants: performance pay programs for employees and performance contracting for third-party service providers. In section IV, we review developments in the legal profession, where value-based billing methods are beginning to supplant the billable hour and performance contracting is increasingly common, including three models adopted in the BC public sector. In section V, we outline some of the approaches undertaken by legal aid programs in other jurisdictions as they wrestle with the common issues of compensation, cost, efficiency, and quality. We conclude with some observations about the implications of RBM and RBC for the LSS tariff system.

II. Results-based management in the public sector

In the past two decades, the fiscal pressures created by changing economic conditions and growing government debt, along with shifts in prevailing political and philosophical attitudes towards the role of government in society, have resulted in large-scale reductions in the scope of government services.[218]

[218] M. Charih and L. Robillard, "The New Public Management" in M. Charih and A. Daniels, eds., *New Public Management and Public Administration in Canada* (Ottawa: Institute of Public Administration, 1997) 27 – 46; S. Borins, "Transformation of the Public Sector: Canada in Comparative Perspective" in C. Dunn, ed, *The Handbook of Canadian Public Administration* (Oxford: Oxford University Press, 2002) 3 – 17; A. Roberts, "Issues

To cope with the "fiscal crisis of the state" and resulting retrenchment, government agencies in the Organisation for Economic Co-operation and Development (OECD) countries have increasingly resorted to the techniques of "new public management" (NPM), a paradigm premised, somewhat controversially, on the inefficiency of government and the need to incorporate private sector principles into public administration, applying business planning methods and emphasizing "value for money" and "doing more with less." One of the principal manifestations of this fundamental shift has been the widespread adoption of management systems that emphasize transparency, accountability, and results for citizens.[219] This RBM approach, which is variously known as performance management or "managing for results," aims to shift the focus of public managers from activities undertaken to results achieved through a systematic and continuous process of strategic planning, performance monitoring, evaluation, and reporting. The ultimate goal is to promote accountability for results at three different levels: accountability of service providers to funding agencies; accountability of funding agency managers to senior executives and governing bodies; and accountability of funding agencies to elected officials and the public.[220]

Elements of results-based management

The main elements of RBM may be described as —[221]

- **Planning** — This involves setting policy direction, aligning strategies with results at different levels of the organization, and developing performance measures and targets for expected results.

Associated with Implementing Government-Wide Performance Plans" in Anwar Shah, ed., *Measuring Government Performance in the Delivery of Services* (Washington, DC: World Bank, 2002) 2 – 48, online: faculty.maxwell.syr.edu/asroberts/documents/chapters/roberts_wb_gwpr.pdf.

[219] OECD, *Overview of Results-Focused Management and Budgeting in OECD Member Countries* (June 2002), online: www.olis.oecd.org/olis/2002doc.nsf; OECD, *Public Sector Modernisation: Governing for Performance* (Paris: OECD, 2004), online: www.oecd.org/dataoecd/52/44/33873341.pdf; Auditor General of BC, *Managing for Results: Balancing Process with Culture, Capacity, and the Proper Conduct of Public Business* (August 2003), online: www.bcauditor.com/papers/paper/Results.htm. The website of the auditor general of BC includes surveys of NPM reforms and performance management in Australia, New Zealand, the United Kingdom, and the United States: see the papers collected at www.bcauditor.com/papers/PSReforms/. Critics view NPM as a vehicle for the adoption of a "neo-liberal" program to restrict the redistributive power of the welfare state and expand market power on a global basis: see, for example, J. Shields and B. Mitchell Evans, *Shrinking the State: Globalization and Public Administration "Reform"* (Halifax: Fernwood Publishing, 1998).

[220] Institute of Public Administration of Canada, "Survey of Deputy Ministers and Chief Administrative Officers — The New Three 'R's' of Public Management and the Key Pillars of the Forward-Management Agenda" (2002), online: www.ipac.ca/research/surveys_of_dms_and_caos/2002_survey.html.

[221] Auditor General of BC, *Managing for Results, supra* note 219 at 2.

- **Priority setting/Resourcing** — This occurs in conjunction with the planning process, and involves using the organization's financial, human resources, and information systems to choose priorities and allocate resources to achieve the planned results.
- **Organizing and implementing** — This involves the organization's operational activities, such as service delivery.
- **Using performance information** — This involves collecting and evaluating performance data and making operational changes.
- **Public reporting** — This entails making public the actual results in terms of the organization's outputs and broader societal outcomes, and measuring those against the expected results.

Performance measurement, a central feature of RBM, may be seen as a four-step process —

- specifying planned results;
- defining the performance measures or indicators of success;
- selecting specific, measurable goals that help assess progress towards the planned results (performance targets); and
- regular evaluation of actual performance against the targets and longer-term results.[222]

In the planning stage, one of the main challenges is to establish effective performance measures. This can pose considerable difficulty for public sector organizations, whose complex public service mandates cannot be properly evaluated using private sector measures such as profitability. It is conventional to distinguish between four types of performance measures —[223]

- **Input measures** — These quantify the resources the organization allocates to its activities, and may be expressed in terms of funding, staff time, supplies, etc.
- **Output measures** — These describe the "work done" in pursuing the organization's activities, such as clients served, offices opened, surveys completed, or reports published.

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[222] Auditor General of BC, *Quick Reference Guide to Performance Measures,* online: www.bcauditor.com/PUBS/2001-02/Report3/QRG2001.pdf.

[223] M. Schacter, "Means … Ends … Indicators: Performance Measurement in the Public Sector," *Institute on Governance, Policy Brief No. 3* (April 1999), online: www.iog.ca/publications/policybrief3.pdf. Some models also refer to "process" measures (how an organization obtains inputs, produces outputs, or achieves outcomes) and "impact" measures (the social value added by the activity): see S. Schiavo-Campo, "Strengthening 'Performance' in Public Expenditure Management" (1999) 11:2 *Asian Review of Public Administration* 23 at 25.

- **Efficiency measures** — These measure the organization's efficiency by tracking how it converts inputs into outputs; for example, costs per case.
- **Outcome measures** — Unlike the previous measures, which indicate processes inside the organization, these focus on external conditions and seek to gauge the "real-world" impact of its activities.

One of the fundamental challenges in implementing performance management is selecting what to measure. A landmark 2002 study of US state and local governments found that while RBM practices were well established, many agencies struggled to link goals and measures.[224] Traditionally, public sector evaluations have tended to focus on inputs and outputs rather than outcomes. The former are attractive because they tend to fall within the organization's immediate control and are more readily quantifiable. By contrast, measuring the "real-world" impact of a program or activity is often fraught with difficulty: an organization may be reluctant to tie evaluation to outcomes that are the product of multiple factors beyond its influence; it may be difficult to identify clear causal links between the organization's work and particular outcomes; and outcome measures may be geared towards more intangible, longer-term impacts that are not suited to shorter-term reporting cycles.[225] The problem with output measures, however, is that they do not provide any information about how effectively an organization's outputs contribute to public welfare. To overcome some of the problems with outcome measures, current practice suggests adopting a mix of performance measures, including "intermediate" outcome measures that represent interim steps between outputs and longer-term outcomes.[226]

Public agencies face a similar difficulty in deciding whether to adopt quantitative or qualitative measures.[227] Quantitative measures are more tangible and objective, but depend on the availability of relevant data and measurable outcomes. The danger is that an overemphasis on these quantifiable indicators can skew organizational goals towards outcomes that are readily measurable rather than those that are socially valuable. Qualitative measures, such as independent evaluations or client surveys, offer a means of focusing on some of the more intangible aspects of systemic outcomes, but they are inevitably subjective. The best solution is likely to strike a balance between quantitative and qualitative indicators.

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[224] Government Performance Project, *Paths to Performance in State and Local Government* (Syracuse: Maxwell School of Citizenship and Public Affairs, 2002) 153 – 171, online: www.maxwell.syr.edu/gpp/grade/2002full.pdf.

[225] Schacter, "Means … Ends … Indicators…," *supra* note 223 at 3.

[226] *Ibid.* at 4; Auditor General of BC, *Quick Reference Guide to Performance Measures, supra* note 222; M. Plantz and M. Hendricks, *Outcome Measurement: Showing Results in the Non-Profit Sector* (United Way of America, 2005), online: www.national.unitedway.org/outcomes/resources/What/ndpaper.cfm.

[227] Legal Institutions Thematic Group, World Bank, "Performance Measures," online: www1.worldbank.org/publicsector/legal/evaluatinglegal.htm#1.

Implementing RBM has the potential to be very costly and time-consuming, so in designing a performance management program, it is necessary to ensure that the program itself is cost-effective. An organization should be selective in its use of performance measures, at least initially, so as not to overwhelm its capacity to collect and utilize information while delivering services. Furthermore, it is essential to co-ordinate planning efforts within the organization to ensure consistency between goals and measures across departments and at different operational levels.

Besides the problem of establishing valid performance measures, the biggest challenge may be incorporating performance management into the organization's regular activities to promote continuous improvement. As BC's auditor general put it —

> … effectively managing for results rests largely on the degree to which performance information is used throughout the organization for meaningful internal decisions, including budget allocation, project and program management, employee assessment and communication.[228]

The auditor general suggests that despite the widespread adoption of strategic planning in the public sector, many organizations have yet to institute systems for continuous review of performance data as part of their decision-making processes. This may stem in part from the failure to integrate the performance evaluation systems into ongoing management activities, and to ensure consistency and co-ordination between different departments and at different levels of the organization —

> Organizational learning cannot take place if there is no appetite or capability to use results-based information; in turn, if no use is made of the information, there is little incentive for staff to plan and manage with a focus on results.[229]

Although RBM is a well-established feature of current public administration, it is important to recognize that it is not a panacea. Indeed, it may be counterproductive if it ends up being purely a "numbers game" or leads to "goal displacement," where an organization is more concerned with meeting numerical targets than its public service mandate. The collection and analysis of performance information is ultimately a tool intended to support decision making, not an end in itself.[230]

Despite its pitfalls, RBM emphasizes the need to focus on an organization's results rather than its activities in order to demonstrate its ongoing social

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[228] Auditor General of BC, *Managing for Results, supra* note 219 at 6.
[229] *Ibid.*
[230] C. Pollitt, "How Do We Know How Good Public Services Are?" in B.G. Peters and D.J. Savoie, eds., *Governance in the Twenty-First Century: Revitalizing the Public Service* (Montreal: McGill-Queen's University Press, 2000) 119 – 152; B.W. Carrol and D.I. Dewar, "Performance Management: Panacea or Fool's Gold?" in Dunn, *Canadian Public Administration, supra* note 218, 413 – 429.

impact. It promotes transparency and accountability, assists in deciding how to allocate scarce resources, enables managers to constantly assess how well the organization is working in practice, and provides demonstrable evidence to persuade funders and the public of the organization's value.

Results-based management in Canada

In Canada, NPM reforms have tended to unfold in a more piecemeal fashion than in countries such as New Zealand or Australia. Nevertheless, the federal government and most provincial governments, including that of BC, have now adopted some version of RBM framework for the public sector.[231]

Federal government

Individual departments of the federal government experimented with performance evaluation systems in the 1980s and 1990s, but in the mid-1990s, the government took steps to apply results-oriented management across the federal public sector.[232] A key policy statement in 2000 outlined a management approach that emphasized the need to continuously measure the impact of public services, and the Treasury Board has continued to develop and refine various management techniques to support the focus on results.[233] It offers the following definition of RBM —

> A comprehensive, life cycle, approach to management that integrates business strategy, people, processes, and measurement to improve decision-making and drive change. The approach focuses on getting the right design early in a process, implementing performance measurement, learning and changing, and reporting performance.[234]

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[231] Charih and Robillard, "The New Public Management," *supra* note 218 at 36 – 38; Borins, "Transformation of the Public Sector," *supra* note 218 at 12 – 14; P. Aucoin, "Beyond the 'New' in Public Management Reform in Canada: Catching the Next Wave" in Dunn, *Canadian Public Administration, supra* note 218, 37 – 52; Auditor General of BC, *Legislating Government Accountability Requirements* (July 1998), online: www.bcauditor.com/performance/account/legislating.htm.

[232] The first major step was the adoption of the *Planning, Reporting and Accountability Structure* (PRAS) in December 1996; see Treasury Board of Canada, *Planning, Reporting and Accountability Policy Review* (Ottawa: Treasury Board Secretariat, 2002), online: www.tbs-sct.gc.ca/rma/dpr/team-equip_e.asp.

[233] *Results for Canadians: A Management Framework for the Government of Canada* (March 2000); Treasury Board of Canada, *The Managing for Results Self-Assessment Tool* (2003); Lee MacCormack, "Getting the Foundations Right" (November 30, 2004); Treasury Board of Canada, *Preparing and Using Results-Based Management and Accountability Frameworks* (January 2005); Treasury Board of Canada, *Results Reporting Capacity Check* (February 2005); *Management, Resources and Results Structure Policy* (April 2005), all available online at www.tbs-sct.gc.ca/rma/rbm-gar_e.asp.

[234] Treasury Board of Canada, *Results-based Management Lexicon,* online: www.tbs-sct.gc.ca/rma/dpr/00-01/Guidance/lexicon-e.asp.

British Columbia

In British Columbia, efforts to implement performance management across the public sector began in the mid-1990s, culminating in 2000 with the enactment of the *Budget Transparency and Accountability Act* (the BTAA), which requires the provincial government to publish annually a government-wide performance plan, stating its goals and priorities for the public service as a whole.[235] It also requires government ministries and organizations such as LSS to publish annual service plans that set goals, objectives, and performance measures for a three-year period, and annual service plan reports comparing actual and expected results for the previous year. The performance plans for individual ministries and organizations are expected to support the government's overall goals. In early 2005, the BC auditor general completed a study to assess progress within the BC government in implementing RBM, and to encourage government ministries to redouble their efforts to adopt RBM techniques.[236] The report included case studies on three ministries and four programs, and identified some key lessons regarding RBM implementation. The auditor general found that there was firm commitment among senior managers to promote RBM but an apparent lack of integration between various management processes, and that workload pressures were impeding progress. The managers surveyed identified three main challenges —

- the time and resources required to implement RBM;
- the challenges in building capacities to use performance information in decision making; and
- the need for a culture shift.

These managers observed that success took time and required ongoing efforts to prevent RBM from becoming a mere "paper exercise." They noted a number of key tasks, including identification of viable sources of information and gathering of appropriate information. Despite these challenges, study participants indicated that RBM helped to demonstrate program impact, improve performance, refine decision making, and make operations more transparent.

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[235] S.B.C. 2000, c.23; Auditor General of BC and Deputy Minister's Council, *Enhancing Accountability for Performance in the British Columbia Public Sector* (June 1995); Auditor General of BC and Deputy Minister's Council, *Enhancing Accountability for Performance: A Framework and Implementation Plan* (April 1996); Auditor General of BC, *Performance Reporting Principles for the British Columbia Public Sector* (November 2003). All these reports are available online: www.bcauditor.com/performance.

[236] Auditor General of BC, *Building Momentum for Results-Based Management: A Study about Managing for Results in British Columbia*, 2004/2005 Report 13 (March 2005), online: www.bcauditor.com/PUBS/2004-05/Report13/building_momentum_result_based_management%20.pdf.

BC Ministry of Attorney General

Under the *BTAA,* BC's Ministry of Attorney General publishes annual service plans setting out its mission, values, and vision, as well as goals covering various aspects of the justice system, including crime reduction, public protection, and efficiency within the justice system and the ministry itself.[237] For each goal, the ministry identifies specific strategies for achieving the goal, and outcome measures to enable evaluation of the extent to which the ministry achieved its goals. For each outcome measure, the ministry also identifies performance targets for each year of its three-year plan. The ministry's *Service Plan* for 2005/2006 to 2007/2008 includes some of the following objectives and measures —

***Objective 1.3**: Ministry innovative in providing legal services*

Measure: percentage of litigation files for which ministry considers mediation and alternative dispute resolution options

***Objective 2.1**: Timely criminal prosecutions and appeals*

Measure: yearly percentage change in average time to trial for adult criminal cases

***Objective 3.2**: Timely, accessible, and efficient court process*

Measure: percentage of uncontested divorces processed in five days from filing to signing

BC Provincial Court

The move towards performance management is not limited to the executive branch or government organizations. In 2004, the BC Provincial Court established a committee to develop a performance measurement system for the court, a move that is part of a broader international trend to monitor and improve the functioning of judicial systems.[238]

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[237] The ministry's annual service plans and annual service plan reports since 2001/2002 may be found on the province of BC website at www.bcbudget.gov.bc.ca/#ministry_sp and www.bcbudget.gov.bc.ca/annualreports/.

[238] Provincial Court of BC, *Annual Report 2003 – 2004* at 2, online: www.provincialcourt.bc.ca/downloads/pdf/annualreport2003-2004.pdf. See also the resources available on the websites of the US National Center for State Courts, online: www.ncsconline.org/WC/Education/CtPerSGuide.htm; and the World Bank's Legal Institutions Thematic Group, online: www1.worldbank.org/publicsector/legal/.

III. Results-based compensation

General principles of compensation

It was perhaps inevitable that a focus on performance management would lead organizations to explore changes to compensation practices. Compensation is for many organizations the single largest area of expenditure. It is also one of the mechanisms at an organization's disposal to motivate its workforce to pursue organizational goals. Compensation systems consist not only of economic rewards, such as fees, salaries, and benefits, but also of non-economic rewards that may offer, for example, opportunities for self-development, social recognition, or public service. The effective design of a compensation system depends on external factors, such as the general economic climate, regulatory requirements, technological change, and social and political norms, as well as internal factors such as the organization's mandate, structure, objectives, work culture, and process, as well as budgetary constraints.[239]

A central challenge for any organization is to ensure that its compensation system directs the efforts of its workforce towards fulfilling its mandate and overall strategic objectives. Its success in meeting this challenge will depend on its ability to design, implement, and monitor a compensation system that meets certain basic principles —[240]

- It must offer compensation that matters to workers, and it must do so in a way that achieves both substantive equity — a fair reward — and procedural equity — a fair process for allocating rewards.
- Substantive equity must be assessed according to the relative value of the work within the organization, and in comparison to external conditions, which will inform the basic policy decision whether to meet, exceed, or trail prevailing market levels.
- Through its policies and practices, an organization must communicate clearly and consistently what performance it intends to reward.
- Workers must be aware of the compensation strategy, and must have the capacity to directly influence the outcomes the organization seeks to reward. If the desired performance or outcomes are beyond the workers' control, the rewards system may ultimately be de-motivating.

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[239] R. Kanungo and M. Mendonca, *Compensation: Effective Reward Management,* 2nd ed. (Toronto: J. Wiley, 1997) at 1 – 19, 73 – 117; Y. Emery, "Rewarding Civil Service Performance through Team Bonuses: Findings, Analysis and Recommendations" (2004) 70:1 *International Review of Administrative Sciences* 157 – 168.

[240] Kanungo and Mendonca, *ibid.* at 125 – 150; John E. Tropman, *The Compensation Solution: How to Develop an Employee-Driven Rewards System* (San Francisco: Jossey-Bass, 2001).

Although compensation is obviously important to all members of an organization, both the managers who design and administer the compensation system and the employees or service providers who receive the rewards, it is also essential to emphasize that the monetary component of compensation is not the only, nor is it generally the most important, factor in motivating people. There is strong evidence to support the notion that people do not work primarily for the money; much more important are the so-called intrinsic rewards that work offers, such as a sense of meaning and purpose, recognition, an enjoyable social environment, and opportunities for personal growth and learning. Indeed, there is a substantial body of research suggesting that "extrinsic rewards diminish intrinsic motivation and, moreover, that large extrinsic rewards can actually decrease performance in tasks that require creativity and innovation."[241]

Results-based compensation in the private sector

In the private sector, performance pay has long been a common feature of corporate compensation systems, with firms providing bonuses to executives and contractors for meeting specified targets, typically relating to the firm's economic performance. Traditionally, such results-based bonuses featured more commonly in the compensation practices of senior management rather than applying at all levels of a business.[242] Increasingly, however, the trend has been to adopt organization-wide compensation systems that replace standard tenure-based salary scales with variable pay systems combining elements of base salary, short-term (one-month or one-year) and long-term (three-to-five-year) incentives tied to financial and operational targets, and incentives linked to business value growth (e.g., profit sharing, stock options).[243]

The proponents of performance pay argue that providing rewards to good performers can have a strong impact on driving results for those rewarded, and sends a clear message to all members of the organization that excellence is expected and valued. In practice, it appears that many reward systems have failed to live up to expectations, which has caused a re-examination and refinement of pay-for-performance strategies. To proponents, the shortcomings of earlier performance pay models were mainly the product of poor implementation. Firms failed to align reward strategies with their overall objectives, did not relate rewards properly to individual performance, and sent

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[241] Jeffrey Pfeffer, "Six Dangerous Myths about Pay" in *Harvard Business Review on Compensation* (Cambridge, MA: Harvard Business School Press, 2001) 141 at 157.

[242] Ironically, the rapid escalation in executive compensation during periods of recession, downsizing, poor corporate results, and senior management scandals has generated a backlash against executive pay increases that bear no relation to success: L. Bebchuk and J. Fried, *Pay without Performance: The Unfulfilled Promise of Executive Compensation* (Cambridge, MA: Harvard University Press, 2004).

[243] E. Sullivan, "Moving to a Pay-for-Performance Strategy: Lessons from the Trenches" in H. Risher, ed. *Aligning Pay and Results* (New York: Amacom, 1999) 21 – 41.

conflicting messages.[244] Newer models recognize the need to incorporate a performance pay plan into an organization's overall business goals, and design and implement the program as part of a "total rewards strategy" combining incentives that are monetary and non-monetary, performance-based and tenure- or membership-based.[245]

Others, however, trace the lacklustre record of many performance pay programs not to implementation flaws but to some basic conceptual defects.[246] The models are premised on the classical economics notion of individuals as rational economic actors whose behaviour is governed by their financial self-interest. This one-dimensional view of human motivation is contradicted, however, by extensive psychological research suggesting that people do not work primarily for money. Individual incentives may tend to compromise teamwork, promote a short-term focus, and, because they are essentially manipulative, encourage people to think more about "looking good" than performing well.

On the management side, adjusting the incentive system is too often a substitute for tackling underlying problems in the organization. Empirical studies of performance pay schemes have in some cases shown no discernible difference in performance before and after the introduction of the system; one survey of companies using such systems concluded that "they absorb vast amounts of management time and resources, and they make everybody unhappy."[247] These critics suggest that instead of tinkering with RBC systems, organizations should focus more on retooling overall management strategy, establishing group-based rewards, motivating through non-economic rewards, and emphasizing the intrinsic value of work. It is noteworthy that one of the leading management theorists of the last century, W. Edwards Deming, staunchly opposed the assessment and rewarding of individual performance, suggesting that organizations should instead focus on systemic reform and service quality.[248]

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[244] T.B. Wilson, "Performance-based Rewards: What Are the Best Practices?" in L.R. Berger and D.R. Berger, eds., *The Compensation Handbook: A State-of-the-Art Guide to Compensation Strategy and Design,* 4th ed. (New York: McGraw-Hill, 2000) 481 – 494; H. Risher, "Using Pay as a Tool to Achieve Organizational Goals" in H. Risher, ed., *Aligning Pay and Results, supra* note 243, 295 – 311; R.B. McKenzie and D.R. Lee, *Managing through Incentives: How to Develop a More Collaborative, Productive and Profitable Organization* (New York: Oxford University Press, 1998) 84 – 102.

[245] T.B. Wilson, *Innovative Reward Systems for the Changing Workplace* (New York: McGraw-Hill, 2003) at 55 – 74.

[246] Pfeffer, "Six Dangerous Myths about Pay," *supra* note 241; Alfie Kohn, "Why Incentive Plans Cannot Work" in *Harvard Business Review on Compensation, supra* note 241, 29 – 51.

[247] Pfeffer, *ibid.* at 54, citing a study by the William M. Mercer consulting firm.

[248] W.E. Deming, *Out of the Crisis* (Cambridge: Cambridge University Press, 1986), cited in Emery, "Rewarding Civil Service Performance," *supra* note 239 at 158.

Performance contracting in the private sector

Outside the employment context in the private sector, RBC figures prominently in the trend towards "performance contracting," in which the purchaser sets performance targets for the supplier and pays bonuses upon fulfillment of the targets. Perhaps the most dramatic example of this trend is the US private health care system, where health maintenance organizations (HMOs) and other third-party payors have promoted a "competitive provider model" to control health care costs and improve service quality through pay-for-performance contracts with physician suppliers.[249] These "value-based purchasing" arrangements aim to structure payment incentives to encourage practices that reflect good-quality patient care, promote better long-term health outcomes, and thus reduce overall costs. The programs typically tie performance awards (usually a contingent 5% or 10% bonus) to meeting specified targets relating to factors such as utilization (e.g., average patient emergency visits), clinical quality and effectiveness (e.g., percentage of patients receiving specified treatment), or patient satisfaction (e.g., percentage who would recommend doctor to family member or friend).[250]

Performance pay programs appear to be expanding: a March 2004 study suggested that there were over 40 operating in the US in 2003.[251] Many health care managers and policy makers in the US have welcomed the shift towards incentive-based contracting, and there is a burgeoning literature on the design and implementation of such regimes.[252] There are those who question their value, however. Physicians' groups have viewed them as primarily a cost-reduction strategy, and point to the crudity of existing quality measures, the cost of data collection, and the lack of empirical research to demonstrate the overall benefits.[253]

Results-based compensation in the public sector

The widespread adoption of results-based management across the public sector has implications for the compensation systems government agencies use. Indeed,

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[249] Robert H. Ryan, et al., "Pay for Performance: The Case for Quality as an Integrating and Incentivizing Factor" *Health Lawyer's Weekly* (December 19, 2003); V. Maio et al., "Value-based Purchasing: A Review of the Literature" (Commonwealth Fund, May 2003), online: www.cmwf.org.

[250] S. Endsley et al., "Getting Rewards for Your Results: Pay-for-Performance Programs" (American Association of Family Physicians, 2004), online: www.aafp.org.

[251] Martin Sipkoff, "Will Pay for Performance Programs Introduce A New Set of Problems?" *Managed Care Magazine* (May 2004), online: www.managedcaremag.com/archives/0405/0405.hazards.htm.

[252] The websites of the National Health Care Purchasing Institute (www.nhcpi.net) and the Health Care Financing and Organization Initiative (www.hcfo.net) contain a variety of resources on the use of financial incentives to promote quality and cost-effectiveness in health care service delivery.

[253] Martin Sipkoff, "Will Pay for Performance Programs Introduce a New Set of Problems?" *supra* note 251.

the NPM techniques adopted in the developed world in the 1980s, particularly in anglophone countries, frequently included a performance pay component.[254] As in the private sector, the approach assumes two main forms: performance pay for employees and performance contracting for outside suppliers.

Employee performance pay

As in the private sector, the earliest attempts to implement public sector performance pay focused on senior and mid-level managers, where it was used to bridge the gap between civil service salary levels and comparable private sector compensation. In this model, a designated portion of managerial salaries was tied to individual or organizational performance, and allocated based on periodic performance appraisals. A 2005 OECD study found that over two-thirds of OECD countries had implemented RBC in their civil services to some degree.[255]

The application of performance pay to non-managerial public sector employees is a more recent phenomenon, and it continues to grow. In the US, for example, a 2004 government forum on performance pay forecast that by 2006, over half of the federal government's civilian workforce may be working within a performance-based system.[256] Forum participants, including senior government officials and performance pay experts, were generally supportive of the concept, but recognized that performance pay had to be incorporated into an overall performance management strategy, and that implementation created significant challenges.

In the US, over the past decade or so, there has been a significant shift in the educational system towards performance-based pay schemes for teachers.[257] A

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[254] F. Cardona, "Performance Related Pay in the Public Service," OECD/SIGMA paper presented to the 2nd Conference of the Institute of Public Administration and European Integration, October 2002; Emery, "Rewarding Civil Service Performance through Team Bonuses," *supra* note 239.

[255] OECD, *Paying for Performance: Policies for Government Employees* (Paris: OECD, 2005), online: www.oecd.org/dataoecd/13/51/34910926.pdf; see also OECD, *Performance-Related Pay Policies for Government Employees: Main Trends in OECD Member Countries* (Paris: OECD, 2004) online: aappli1.oecd.org/olis/2004doc.nsf/linkto/gov-pgc-hrm; OECD, *Country Study: Performance-Related Pay in Canada* (Paris: OECD, 2003), online: www.oecd.org/dataoecd/40/1/34034494.doc.

[256] National Commission on the Public Service Implementation Initiative, *Performance-based Pay in the Federal Government: How Do We Get There?* (Washington, DC: National Academy of Public Administration, 2004) at 6, online: www.napawash.org/Pubs/volcker.pdf.

[257] Bryan C. Hassel, *Better Pay for Better Teaching: Making Teacher Compensation Pay Off in the Age of Accountability* (Washington, DC: Progressive Policy Institute, 2002), online: www.ppionline.org/documents/Hassel_May02.pdf; A. Milanowski, "The Varieties of Knowledge and Skill-based Pay Design: A Comparison of Seven New Pay Systems for K – 12 Teachers" (2003) 11:4 Education Policy Analysis Archives 1, online: www.epaa.asu.edu.

growing number of school districts around the country have developed and implemented programs designed to modify the traditional seniority-based pay scale by strengthening links between teacher remuneration and teacher or student performance.[258] For teachers, performance pay initiatives may involve individual merit increases based on performance appraisals and acquisition of new skills or credentials, or individual or school-wide bonuses tied to student success rates on standardized tests.[259] As in the health care system, incentive pay for teachers has also attracted forceful criticism, based on the inherent unreliability and subjectivity of measurement and the negative effects on the practice of teaching and student development.[260]

Despite the apparent enthusiasm for performance pay, at least in some quarters, the record appears mixed at best. A 2002 OECD survey found that while RBC schemes at the managerial level may have helped staff retention in the face of private sector competition, there was no conclusive empirical evidence that it improved organizational results.[261] Similarly, studies in Britain and Australia suggested that performance pay programs for non-managers were counterproductive and de-motivating, since few employees ever received bonuses despite satisfactory performance, and managers saw no change in overall performance. Some of the implementation problems are similar to those found in the private sector: the impossibility of completely objective measurement means that employees regard assessments as arbitrary and hence illegitimate; and there is no simple method for evaluating productivity, so it cannot be demonstrated that the increased costs of performance pay are offset by better results.[262] In the public sector context, however, the difficulties with pay for performance are compounded by the inapplicability of bottom-line measures, the often diffuse and unquantifiable nature of external impacts, and the scarcity of financial and other resources to implement an effective system and provide meaningful rewards.[263] Moreover, because of the public welfare orientation of the civil service, monetary awards are likely to have even less motivational value than in the private sector, and the intrinsic value of work assumes much greater importance.[264] In its May

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[258] Education Commission of the States, "Pay-for-Performance: Key Questions and Lessons from Five Current Models" (June 2001), online: www.ecs.org.

[259] J.B. Steadman and G. McGallion, *Performance-Based Pay for Teachers* (Washington, DC: Congressional Research Service, 2001) at 6 – 9, online: www.ilr.cornell.edu/library/downloads/keyWorkplaceDocuments/CRS/CRSTeachersPerformancePay01.pdf.

[260] M. Holt, "Performance Pay for Teachers: The Standards Movement's Last Stand?" (2001) 83:4 *Phi Delta Kappan* 312.

[261] Cardona, "Performance Related Pay in the Public Service," *supra* note 254.

[262] *Ibid.*

[263] B. Liner et al., *Making Results-based State Government Work* (Washington, DC: Urban Institute, 2001) at 15, online: www.urban.org/Uploadedpdf/results-based-stategovt.pdf.

[264] Emery, "Rewarding Civil Service Performance through Team Bonuses," *supra* note 239; Holt, "Performance Pay for Teachers," *supra* note 260; S. Kelman, "The Right Pay" *Government Executive Magazine* (March 17, 2003), online: www.ksg.harvard.

2005 policy brief on public sector performance pay, the OECD suggested that —

> … the significance and impact of PRP [performance-related pay] should not be overestimated. PRP is of secondary importance as a managerial tool for improving motivation. The evidence points, therefore, to the need for a broad approach to better performance management as against a narrow preoccupation with performance-related compensation.[265]

Performance contracting in the public sector

One prominent feature of public administration since the 1990s has been the pronounced trend towards privatization, including the contracting out of functions previously performed by the civil service to private firms or non-profit organizations (the so-called third sector).[266] While such arrangements are not entirely new, they have proliferated in the drive to streamline government services, and in some areas they increasingly reflect a "performance contracting" approach in which the public purchaser specifies standards and expected outcomes and, in some cases, links payments and penalties to fulfillment of targets. One study of results-based initiatives among US state governments found examples of performance contracting not only in traditional sectors such as road construction (where bonuses and penalties typically relate to meeting completion deadlines) but across a range of social services such as adoption, rehabilitation services, job placement assistance for refugees, nursing facilities, and services to children and families. Most relied on a request-for-proposal process to identify contractors, and used a conventional cycle of performance-monitoring activities (setting standards, collecting data, analysis, and reporting).[267] In the face of widespread privatization, some commentators have noted that the rise of the "contract state" raises some fundamental questions, including the real extent of cost savings (given the often high management costs involved), the fragmentation of service delivery, and the impact on public service values of equity, democratic control, and accountability.[268]

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[265] OECD, *Paying for Performance, supra* note 255 at 7.

[266] B.M. Evans and J. Shields, "The Third Sector: Neo-Liberal Restructuring, Governance, and the Remaking of State-Civil Society Relationships" in Dunn, *Canadian Public Administration, supra* note 218, 138 – 158; D. Zussman, "Alternative Service Delivery" in Dunn, *ibid.* 53 – 76.

[267] Liner et al., *Making Results-based State Government Work, supra* note 263 at 21.

[268] J.Gow, "Managing All Those Contracts: Beyond Current Capacity" in Charih and Daniels, *New Public Management*, *supra* note 218, 235 at 236.

IV. Results-based compensation in the legal profession

Developments in the legal profession share broad similarities with trends in other sectors. Compensation practices in the legal profession may be considered in three different respects: the internal compensation practices that law firms and corporate law departments use to remunerate in-house lawyers, the billing methods that lawyers employ to charge fees to clients, and the performance contracting regimes becoming more prevalent among large institutional purchasers of legal services.

Employee performance pay

Internally, private law firms and corporate law departments have followed trends within the wider private sector towards performance-based pay, adopting a variety of performance-related pay mechanisms to set the compensation levels for partners, associates, and staff.[269] Similar programs may also apply to in-house counsel in the public sector. For example, the salary scale for Canada's Department of Justice provides for permanent merit increases within a lawyer's salary range as well as one-time "performance awards" that must be re-earned each year, based on periodic performance evaluations by departmental managers.[270]

Alternative fee arrangements

As for lawyers' billing arrangements, with the exception of practice areas such as criminal law, the billable hour remains well entrenched as the industry standard, although the legal profession is under growing pressure to change.[271] In an intensely competitive market for legal services, with widespread criticism about rising legal costs, lawyers face increased demands to demonstrate that their services represent value for money. More and more, clients regard the billable hour as an outmoded payment method that rewards lawyers for the time invested rather than the result achieved or the value of the service to the client.[272] In 2002, an American Bar Association (ABA)

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[269] The website of the US legal consulting firm Altman Weil has articles on various topics relating to compensation management for private law firms and corporate law departments; online: www.altmanweil.com/about/articles.cfm.

[270] Treasury Board of Canada Secretariat, *Performance Pay Administration Policy for Certain Non-Management Category Senior Excluded Levels,* online: www.tbs-sct.gc.ca/.

[271] J. Middlemiss, "A Billable Revolution" *CBA National* (March 2005) 20; R. Pack, "The Tyranny of the Billable Hour" *Washington Lawyer* (January 2005), online: www.dcbar.org/for_lawyers/washington_lawyer/january_2005/billable.cfm; R.F. Pol, "Seven Steps to Value-Added Legal Services" *New Zealand Business* (August 2001), online: www.abanet.org/careercounsel/billable/toolkit/nzb.pdf.

[272] T.L. Sager and Steven A. Lauer, "The Billable Hour: Putting a Wedge between Client and Counsel" *ABA Law Practice Today* (December 2003), online:

commission described the billable hour as a "counter-intuitive measure of value" that is "fundamentally about quantity over quality," and decried its "corrosive" effects on the profession.[273] Although the billable hour remains the dominant compensation mechanism, some lawyers and law firms are responding to these concerns by exploring "alternative billing methods" or "alternative fee agreements" that attempt to overcome some of the difficulties with time-based billing, including flat fees (for routine, standardized work), capped fees (hourly billing to a specified maximum), and results-based fees.[274]

A further innovation is the concept of "task-based billing," which involves budgeting legal costs according to specific stages of a case, and billing based on the budget.[275] This method relies on the uniform task-based management system (UTBMS) developed by the ABA in the mid-1990s to enable law firms and clients to collect meaningful cost information on their cases, by dividing legal services into specific tasks that make up different stages of a case.[276] The system provides a simplified method for lawyer and client to collect and analyze cost and other data for each task and stage of litigation.

These alternative fee arrangements require a significant shift in the legal profession's approach to compensation.[277] Rather than simply accepting a case and starting to bill for their time, lawyers must engage in up-front analysis to estimate the required effort, develop a litigation plan, and choose a billing method and price that will enable them to meet the client's goals while generating an adequate return. Ultimately, it means that lawyers must accept a greater share of the risks and rewards with the client.[278]

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www.abanet.org/lpm/lpt/articles. Perhaps the one exception, in terms of common billing practices, is the contingency fee, which is, by definition, a results-based billing mechanism.

[273] ABA Commission on Billable Hours Report (2002), online: www.abanet.org/careercounsel/billable/toolkit/bhcomplete.pdf.

[274] J. Middlemiss, "A Billable Revolution," *supra* note 271 at 24.

[275] S.F. King, "Task-Based Billing Grows Up" (2002) 28:3 ABA Law Practice Management 33 – 35, online: www.abanet.org/careercounsel/billable/toolkit/bhcomplete.pdf.

[276] For example, the litigation code set contains five basic phases: case assessment, development and administration; pre-trial pleadings and motions; discovery; trial preparation and trial; and appeal. The work in each phase is further categorized according to 28 different task codes, which correspond to tangible steps in the litigation, and specific task-related activities (e.g., communicating, drafting). For an overview, see www.abanet.org/litigation/litnews/practice/uniform.

[277] P.J. Lamb, "Why Is Budgeting the Hardest Part of Litigation?" *Corporate Counsel* (June 2004) A6, online: www.abanet.org/lpm/lpt/articles/fin09042.htm.

[278] Arthur G. Greene, "Thinking Outside the Box: Leaving the Billable Hours Factory Behind" *ABA Business Law Today* (May/June 2004), online: www.abanet.org/buslaw/blt/2004-05-06/greene.html.

Performance contracting in the legal profession

In addition to seeking alternatives to the billable hour, an increasing number of institutional clients are turning to variants of performance contracting to manage costs and obtain value for money. In the US, the law departments of some large corporations are using contracting to dramatically reduce the number of outside law firms they employ, and to integrate the remaining firms more closely into their operations as virtual extensions of in-house legal counsel.[279] One of the pioneers in this form of contracting is DuPont, which in the mid-1990s developed a comprehensive strategy for rationalizing its relationships with outside law firms. The so-called DuPont Legal Model essentially applies the principles of RBM to outside law firms, incorporating elements of strategic planning, performance measurement, early case assessment, and alternative fee agreements. The architects of DuPont Legal's performance management system have described the resources required as "staggering," and emphasize the need to avoid overwhelming managers with a large number of performance measures. An overview of the DuPont Legal Model is included in Appendix 6A.[280]

Performance contracting in the BC justice system

As discussed in Chapter 6, the BC Ministry of Attorney General, the Insurance Corporation of BC (ICBC), and the Federal Prosecution Service (FPS) all use contracting regimes to obtain legal services from outside law firms, and each model has features of performance contracting. The ministry uses a competitive bidding process to select firms to provide legal services in certain areas of law such as child protection. The contracts provide for monthly billing on a lump sum basis, and various forms of monitoring and reporting.[281] Similarly, ICBC uses competitive bidding as part of a comprehensive program, the Strategic Alliance, to manage its relationships with outside law firms providing claims-related legal services. ICBC uses a sophisticated system for performance monitoring that includes a counsel evaluation program (based on feedback from the adjusters who handle individual files), in-depth billing analysis using UTBMS codes, and formalized trial evaluations. The Strategic Alliance incorporates incentives to the extent that hourly rate increases for intermediate and senior lawyers are tied to overall performance ratings.[282]

In the FPS contracting model, regional agent supervisors monitor agent billing and the conduct of cases, while the central office in Ottawa evaluates billing patterns using a risk management framework relating to case complexity and

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[279] Steven A. Lauer, "What Do Law Firms Sell? What Do Clients Buy?" *ABA Law Practice Today* (January 2004), online: www.abanet.org/lpm/lpt/articles/fin01042.html.
[280] For more information, see www.dupontlegalmodel.com.
[281] Information provided by the Legal Services Branch, Ministry of Attorney General.
[282] Information provided by ICBC.

seriousness. The FPS is currently developing a benchmarking system that will enable it to compare agent billing profiles. In the longer term, it is planning to broaden the scope of its performance evaluation system to encompass practice management, compliance with contract terms, and other matters, which will require it to perform peer review audits on a three-year cycle.[283]

Appendix 6 includes more detailed descriptions of the contracting models used by the ministry, ICBC, and the FPS.

V. Results-based management and legal aid

Given the widespread adoption of NPM principles by governments in the common law world, it was perhaps inevitable that legal aid organizations, as major recipients of state funding, would face increasing demands for accountability and demonstrable value for money. In the legal aid context, the advent of NPM saw the prevailing community-based "mutual interest" model of legal aid replaced by a market-oriented "purchaser-supplier" model, in which roles and responsibilities were clearly delineated through contractual arrangements designed to regulate service delivery, control expenditures, and monitor performance.[284] The transformation was evident in the adoption of RBM frameworks, contracting arrangements with service providers, and formalized quality assurance systems, as well as the proliferation of applied research and systemic review activities.

Results-based management

The techniques of RBM are well-entrenched in the legal aid systems of the United Kingdom, Australia, and New Zealand, where successive governments have aggressively pursued NPM-inspired reforms. In England and Wales, for example, the Legal Services Commission (LSC) annually publishes a corporate plan setting out its vision and objectives for the next three years. The plan lists key priorities and specific targets for civil and criminal legal aid services, as well as its own administrative capacities. One of the LSC targets for 2004/2005 was to put in place a performance measurement system.[285] In New Zealand, the Legal Services Agency (LSA) also includes performance measurement and reporting in its annual three-year business plans and annual

[283] Information provided by the Federal Prosecution Service, Department of Justice. See also Department of Justice, *Federal Prosecution Service Renewal: Year in Review — Renewing the FPS Commitment to Canadians* (Ottawa: Communications Canada, 2002), online: www.canada.justice.gc.ca/en/dept/pub/fps/fps_renewal_yir.html; and the materials collected at www.canada.justice.gc.ca/en/dept/legal_agents/index.html.

[284] Fleming, *The Purchaser-Supplier Approach in Legal Aid, supra* note 43 at iv – v.

[285] Legal Services Commission, *Corporate Plan 2004/05 – 2006/07,* online: www.legalservices.gov.uk/docs/about_us_main/Corporate_Plan_04-05.pdf.

reports.[286] For each strategic area, the LSA defines performance measures in terms of quantity, quality, and timeliness, and specifies quantifiable performance standards for each fiscal year. The standards are generally based on outputs and efficiency measures. Legal aid commissions in Australia also use performance management techniques to measure and report on their results.[287]

In Canada, Legal Aid Ontario (LAO) has also incorporated an RBM approach into its planning and operations. A 2001 review recommended that LAO develop performance standards and indicators to monitor and report on the effectiveness of its programs and services.[288] In that year, LAO implemented client service performance measures for its head office and outlined plans to develop measures relating to client satisfaction, staff development, financial accountability, and operational outcomes. It has continued to develop and refine its performance measurement system and extend it across its core areas of operation. In 2003, LAO implemented client service measures for all its area offices, with ongoing tracking and reporting on the timeliness of certificate issuance. It is currently working on outcome measures that track results for each of the main components of the service delivery system (clinics, certificate system, and duty counsel).[289]

Notwithstanding LAO's recent efforts, a 2001 technical report by the Department of Justice found that there was virtually no performance information available to evaluate the overall effectiveness of the federal funding contribution to provincial legal aid plans in terms of accessibility and quality of legal services. Among other things, the report called for the development of a set of common performance measures to enable assessment at the provincial and national level.[290]

Performance contracting and legal aid

With the NPM paradigm reshaping legal aid delivery along purchaser-supplier lines, it is not surprising that contracting models have gained increased prominence. The earliest contracting programs began in the US in the late

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[286] Legal Services Agency, *Annual Report 2003/04; Business Plan, 2003 – 2006; Statement of Intent, 2004 – 2007,* online: www.lsa.govt.nz/general/documents.

[287] Legal Aid Commission of New South Wales, *Annual Report 2003/2004,* online: lacextra.legalaid.nsw.gov.au/internet/ar0304/legalaidannrpt.pdf; Legal Aid Queensland, *Annual Report 2003/2004,* online: www.legalaid.qld.gov.au/publications/annual_report.htm.

[288] Office of the Auditor General of Ontario, *Annual Report 2001*, *VFM Section 3.02 — Legal Aid Ontario* at 47, online: www.auditor.on.ca/english/reports/en01/302e01.htm.

[289] Legal Aid Ontario, *Business Plan 2001/2002; Business Plan 2002/2003; Business Plan 2003/2004; Business Plan 2005/2006;* LAO Quality Service Office, *Annual Report 2003 – 04* (June 2004); all reports online: www.legalaid.on.ca/en/publications/Reports.asp.

[290] Department of Justice, Evaluation Division, Policy Integration and Coordination Section, *Evaluation Document: Department of Justice Legal Aid Program* (Ottawa: Department of Justice, 2001) at 32 – 37.

1970s, and attracted strong criticism on service quality grounds as studies in the 1980s demonstrated that the tendency of local governments to rely on low-bid contractors without adequate monitoring frequently led to poor-quality service.[291] Despite this, contracting remains a common form of service delivery in the US, although concerns about the quality of service provided by poorly paid and overworked public defenders remain.[292]

Perhaps the most far-reaching reform in the past two decades was the transformation of service delivery in England and Wales through system-wide contracting. The original impetus was to meet government calls for improved cost-control and efficiency, but, perhaps influenced in part by the US experience, the legal aid authorities made quality assurance a central feature of the model. The overall aim was "better services at a cheaper price within a fixed cost."[293] The initial "franchising" scheme was purely voluntary and the contracts were not exclusive: private law firms seeking designation agreed to adhere to certain practice management standards for their office systems and resources (now termed the Quality Mark or QM after several earlier iterations), as well as "transaction criteria" that required lawyers to follow a checklist of prescribed steps in each case and record service details on each file to enable later review by quality auditors.[294] The Legal Aid Board (predecessor to the current LSC) required applicant firms to submit to an initial QM audit as a condition of acceptance, along with periodic follow-up audits for compliance with the QM and transaction criteria. In exchange for accepting these conditions, the board offered contractors devolved powers to

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[291] Goriely, T. "Revisiting the Debate over Criminal Legal Aid Delivery Models: A View from Britain" in F.H. Zemans, P.J. Monahan, and A. Thomas, eds., *A New Legal Aid Plan for Ontario: Background Papers* (North York: York University, 1997) 187 at 202 – 203; A. Paterson and A. Sherr, "Quality Legal Services: The Dog that Did Not Bark" in F. Regan, A. Paterson, T. Goriely, and D. Fleming, *The Transformation of Legal Aid: Comparative and Historical Studies* (Oxford: Oxford University Press, 1999) 232 at 234 – 235.

[292] National Association of Criminal Defense Lawyers, *Low-Bid Criminal Defense Contracting: Justice in Retreat* (October 1997), online: www.nacdl.org/INDIGENT/ind00006.htm; US Department of Justice, Bureau of Justice Assistance, *Contracting for Indigent Defence Services: A Special Report* (May 2000), online: www.ncjrs.org/pdffiles1/bja/181160.pdf; and B. Boruchowitz, "Lessons from the United States Public Defender Experience," Paper presented at the International Legal Aid Conference, Vancouver, June 1999, online: faculty.law.ubc.ca/ilac/Papers/.

[293] Roger Smith, "Appendix: The Community Legal Service in England and Wales" in *Forum Report: European Forum on Access to Justice* (Budapest: Public Interest Law Initiative, Columbia University Kht., INTERIGHTS, Bulgarian Helsinki Committee, and Polish Helsinki Foundation for Human Rights, 2003) 57 at 77, online: www.pili.org/2005r/dmdocuments/SB_two.pdf.

[294] A. Sherr, R. Moorhead, A. Paterson, *Lawyers: The Quality Agenda* (London: Legal Aid Board, 1994); Roger Smith, "Quality and Criminal Legal Aid in England and Wales" *Justice Initiatives* (February 2004) 42 – 47. In 2002, the Legal Services Commission replaced the original practice management standards, the Franchising Quality Assurance Specification, with the Quality Mark scheme, which consolidated all the standards created for different areas of work.

"self-grant" certain types of legal aid, and more flexible, enhanced rates of remuneration.[295]

After piloting franchises in Birmingham in the early 1990s, the board implemented the model in stages beginning in 1993, gradually developing a range of quality standards for different types of work, including non-lawyer organizations providing advocacy and assistance. By 1997, the board took initial steps to transform the hitherto voluntary franchising model into a system of exclusive contracts in which only contracted suppliers were entitled to receive legal aid work. By April 2000, only law firms and organizations with contracts could undertake publicly funded work in civil law, and by April 2001, the contracting model extended to private solicitors practicing criminal law.[296] The LSC has also introduced policies for contracting on a case-by-case basis for large and expensive criminal and civil cases.[297]

The contracting system is large and complex: over 10,000 organizations have entered the QM system, and for civil matters alone there are "two types of contracted work, with two types of provider for seven levels of help in fifteen categories of work."[298] Recently, the LSC introduced a preferred supplier pilot that offered a range of incentives to participating firms, such as streamlined administrative procedures, dedicated management support, and enhanced financial rewards. The goal was to promote closer integration of the LSC and service providers and improve efficiency. The LSC has also put forth a proposal for price-competitive tendering for certain criminal legal aid services, with the aim of reducing costs and "removing poor quality suppliers." Law firms, community groups, and the Law Society have been highly critical of the proposal, with some alleging that the proposals fail to address the systemic cost drivers in criminal cases, which are beyond the control of law firms and legal aid.[299]

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[295] Sherr et al., *Lawyers: The Quality Agenda, ibid.* at 1.

[296] T. Goriely, "The English Approach to Access to Justice," Paper presented to a World Bank Workshop, December 11, 2002, at 5, online: www1.worldbank.org/publicsector/legal/EnglandWales.pdf.

[297] P. Pleasence, "Targeting and Access to Justice: An Introduction to Legal Aid Reform in England and Wales," Paper presented to the Pan Pacific Legal Aid Conference, Tokyo, December 6 – 7, 2001, at 8, online: www.lsrc.org.uk/publications/PPLAC.pdf; United Kingdom, Department for Constitutional Affairs, *Consultation Paper: Delivering Value for Money in the Criminal Defence Service* (June 2003), online: www.dca.gov.uk/consult/leg-aid/cdserv.htm.

[298] Smith, "The Community Legal Service," *supra* note 293 at 77. The two versions of contracted work are "controlled contracts," block contracts for strictly delimited legal services with devolved granting powers and fixed annual payments, and "licensed work" for representation services in which the LSC retains grant-making powers.

[299] LSC, News Release, "Rewards and Incentives for Legal Aid Firms Are Announced under the Preferred Supplier Pilot" (July 5, 2004); LSC, Consultation Paper, *Improving the Audit Process* (January 2005); Legal Action Group, *Improving Value for Money in the Criminal Defence Service in London: Response of the Legal Action Group* (May 2005), online: www.lag.org.uk/shared_asp_files/uploadedfiles/; "Judgment Day for Legal Aid Firms" *Daily Telegraph* (May 3, 2005).

Legal aid programs in the rest of the common law world, which tend to be smaller and less generously funded, have refrained from implementing contracting schemes on the same scale as England and Wales. In Australia, Legal Aid Queensland and Legal Aid Victoria both conducted pilot projects involving competitive tendering for criminal cases in the mid-1990s, using contracting arrangements that incorporated quality standards and audit requirements. Although subsequent evaluations showed no discernible depreciation in service quality or outcome compared with the prevailing system, the minimal cost savings were more than offset by the administrative costs of auditing, and neither legal aid commission pursued system-wide tendering. Instead, Legal Aid Queensland opted to introduce a preferred supplier network — in effect, a scaled-down version of contracting — under which private lawyers entered three-year service agreements incorporating quality and practice management standards, auditing, and electronic authorization and billing.[300] Ireland's Criminal Legal Aid Review Committee recommended against adoption of widespread contracting on the basis that cost efficiency and quality standards could be achieved by less expensive means while preserving client choice of counsel and administrative simplicity.[301]

Quality assurance

Much of the NPM-inspired reforms in legal aid have been expressed in terms of quality assurance, and the LSC's contracting regime undoubtedly represents the most comprehensive attempt to introduce concepts of total quality management into legal aid service delivery. From the outset of its franchising experiment, the Legal Aid Board took a systematic approach to implementing quality assurance. It commissioned academic researchers to develop the transaction criteria based on a review of legal aid files and consultations with experts and other interested groups about appropriate practice standards. Drawing on theory and research about quality assessment in medicine and other fields, the researchers defined quality for legal aid purposes, not in terms of excellence but as a threshold level of competence below which performance would be judged inadequate. They developed and refined the transaction criteria while extensively evaluating the original franchising pilot project, in which they had applied various methods to measure the participating firms' quality standards. The researchers identified

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[300] Fleming, *The Purchaser-Supplier Model in Legal Aid, supra* note 43; J. Hodgins, "Surviving Fiscal Cuts; The Purchaser-Provider Paradigm and Beyond," Paper presented at the International Legal Aid Conference, Vancouver, June 1999, online: faculty.law.ubc.ca/ilac/; Legal Aid Queensland, *Annual Report 2003/2004,* online: www.legalaid.qld.gov.au. In his paper, Hodgins notes (at 5) that the introduction of the preferred supplier model reduced the number of private law firms from over 1,000 to about 400.

[301] Ireland, Criminal Legal Aid Review Committee, *Final Report, supra* note 171 at 49 – 56.

four principal quality measurement categories, which overlap with the performance measures employed in RBM —[302]

- Input measures — In legal practice, as elsewhere, these have the advantage of being readily collectible but bear little direct relationship to quality. Typical input measures would include various qualifications, such as specialist accreditation, professional courses completed, practice experience, etc.
- Structural measures — These concern the organizational elements of legal practice, and include standards for law office management, staffing, technology, etc. The LSC's QM regime is an example of a structural measure.
- Process measures — These focus more directly on actual service provision, and typically take the form of practice checklists such as the LSC's transaction criteria.
- Outcome measures — These have been slower to develop in the legal context, due to the inherent challenges of assessing case outcomes that may be influenced by a multiplicity of factors unrelated to the lawyer's performance. Methodologically, there are two basic options, each operating at opposite scales: peer review may be used to evaluate quality in an individual case, while statistical analysis of a sufficiently large sample of cases may reliably detect service provision patterns.

With respect to outcome measures, the researchers used four basic indicators, all of which raise certain methodological problems —[303]

- Average case cost — Although, strictly speaking, this is an efficiency measure, it is a common evaluation tool. The researchers note that low costs should not be equated with good quality, and that variances among service providers may be due to factors other than efficiency, such as complexity of the lawyer's caseload.
- Time spent — To be useful, this measure must focus on time actually spent by the lawyer, rather than duration of the case, which may be influenced by a host of extraneous factors. The premise is that, quality and other aspects of service being equal, the lawyer who takes less time is providing better, more efficient service.
- Results and impacts — The first focuses on the immediate "win-loss" assessment of the case, while the latter aims to capture broader social

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[302] Sherr et al., *Lawyers: The Quality Agenda*, *supra* note 294 at 6 – 12; Paterson and Sherr, "Quality Legal Services," *supra* note 291 at 238 – 242.

[303] A. Sherr, R. Moorhead, and A. Paterson, "Assessing the Quality of Legal Work: Measuring Process" (1994) 1:2 *International Journal of the Legal Profession* 134. The researchers address some of the challenges in measuring legal outcomes in criminal cases in A. Sherr, T. Goriely, L. Webley, and A. Paterson, *Interim Report: Outcome Measures for Criminal Representation* (London: Institute for Advanced Legal Studies, 1997).

outcomes, as in test-case litigation. In both instances, defining and measuring success presents a basic challenge, given the inherent subjectivity of the assessment. For example, a win in a family case may be a loss over the longer term if it destroys the potential for co-operation between the parties and sets the stage for further litigation.

- Client satisfaction — Although useful to measure aspects of client care such as communication or timeliness of advice in a professional context, clients may often lack the requisite knowledge to assess outcome quality.[304]

Perhaps due to the inherent variability of factors influencing outcomes, over time the LSC has de-emphasized outcome measures in its quality assurance program and is applying the transaction criteria more selectively. It now focuses on alternative evaluation methods, such as "mystery shoppers" (audits using evaluators posing as clients) and peer review mechanisms using specially trained reviewers who conduct targeted audits of files in different areas of law.[305]

As might be expected, the comprehensive and relatively intrusive English approach to enforcing quality standards through contracting has attracted sustained criticism from some quarters.[306] Critics complain that the system is bureaucratic and costly to administer, and that it offers no assured link between compliance with supposed quality proxies (QM standards and transaction criteria) and actual quality of service to clients. Studies of lawyers in England and Australia found a profound skepticism, even cynicism, among

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[304] Paterson and Sherr, "Quality Legal Services," *supra* note 291 at 236 – 237. Hilary Sommerlad argues for a client-centred approach to quality that asks clients themselves to define what they wanted from the service and how well it met their needs: see H. Sommerlad, "English Perspectives on Quality: The Client-Led Model of Quality — A Third Way?" (2000) 33:2 U.B.C. L. Rev. 491. Legal Aid Services of Oklahoma has recently made an attempt to introduce outcome measurement using client surveys: see G. Dart and D. Caudill, "Outcome Measurement: Assessing Client's Perspectives of the Impact of Legal Aid Services in their Lives," Paper presented at the 2004 Equal Justice Conference, online; www.lri.lsc.gov/pdf/04/040039_okoutcomes.pdf.

[305] Legal Action Group and Advice Service Alliance, *On the Right Track? Debating the Future of the CLS,* Conference Report (December 2003) at 8 – 12, online: www.asauk.org.uk/fileLibrary/pdf/confntes.pdf; United Kingdom, Department for Constitutional Affairs, *The Independent Review of the Community Legal Service* (London: Department for Constitutional Affairs, 2004) at 35 – 37, online: www.dca.gov.uk/pubs/reports/cls_review.htm; R. Moorhead and A. Sherr, *An Anatomy of Access: Evaluating Entry, Initial Advice and Signposting Using Model Clients* (December 2002), online: www.lsrc.org.uk/publications/modelclientpaper.pdf.

[306] Karen Mackay, "Auditing the Auditors — New Approaches to Quality" (Legal Action Group, May 2001), online: www.lag.org.uk/shared_asp_files/uploadedfiles/; A. Benson and P. Waterhouse, "The Quality Mark: A Mark of What?" *The Adviser* (November 2001), online: www.lasa.org.uk/policy/qm.shtml; J. Fearnley, "Quality — Where to Now?" *The Adviser* (May 2002), online: www.lasa.org.uk/policy/asa-qm-lasa.shtml; Paterson and Sherr, "Quality Legal Services," *supra* note 291 at 244 – 247; J. Hickman, "Speech to United Against Injustice" (2003), online: www.unitedagainstinjustice.org.uk.

many lawyers regarding the value of audit and quality control mechanisms, which many viewed as an affront to their professionalism.[307] There is some indication that administrative burdens and low remuneration have increased attrition rates among private suppliers.[308] Moreover, although the quality assurance systems associated with contracting may have helped avoid some of the quality problems found in US models, they have not succeeded in containing overall system costs: between 1999/2000 and 2003/2004, legal aid expenditures increased from £1.242 billion to £2.076 billion, including a 51% increase in overall criminal legal aid costs (from £780.2 million to £1,178.5 million) and a 44% increase in administrative costs (from £62.4 million to £90.2 million).[309] During the same period, the number of civil cases funded has declined by 42%.[310]

Apart from the LSC's far-reaching quality assurance initiatives, legal aid organizations in the common law world have thus far tended to implement quality standards on a more modest, incremental scale.[311] An increasing number rely on an accreditation model that requires lawyers to make formal applications to qualify as legal aid service providers. To qualify, they must meet various standards relating to "input" measures of quality in the form of entrance qualifications based on education, specialist credentials, practice experience, and references. In some cases, they must agree to submit to periodic auditing. In Scotland, the SLAB introduced a system-wide quality assurance scheme for civil legal aid in October 2003. Under the scheme, which is the subject of an agreement between the SLAB and the Law Society, solicitors must register to receive legal aid cases, and will be subject to periodic SLAB administrative reviews, as well as quality assurance peer

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[307] H. Sommerlad, "The Implementation of Quality Initiatives and the New Public Management in the Legal Aid Sector in England and Wales: Bureaucratization, Stratification, and Surveillance" (1999) 6:3 *International Journal of the Legal Profession* 311; R. Hunter and A. Genovese, "Qualitative Aspects of Quality: An Australian Case Study" (2000) 33:2 U.B.C. L. Rev. 319; A. Paterson, "Legal Aid in the Eye of a Storm: Rationing, Contracting, and a New Institutionalism" (1998) 25:3 *Journal of Law and Society* 365.

[308] Goriely, "The English Approach to Access to Justice," *supra* note 296 at 9, indicates that between March 1999 and March 2002, the number of firms accepting civil work dropped from 8,900 to 3,800, while participating criminal firms dropped from 7,300 to 2,900. Legal Action Group and Advice Service Alliance, *On the Right Track?, supra* note 305 at 9; Access to Justice Alliance, "Call this 'Access to Justice'?" (April 2005), online: www.lag.org.uk/Templates/Internal.asp?NodeID=88869.

[309] Figures for 2003/2004 are derived from Legal Services Commission, *Annual Report 2003/2004*. Figures for 1999/2000 are cited in Ireland, Criminal Legal Aid Review Committee, *Final Report, supra* note 171 at 41, 43. See also Goriely, "The English Approach to Access to Justice," *supra* note 296 at 10, noting that between 1999 and 2002, costs for advice and litigation services increased by 20% and 22%, respectively.

[310] Access to Justice Alliance, "Call this 'Access to Justice'?" *supra* note 308 at 2.

[311] S. Wain, "Quality Control and Performance Measures" in McCamus, *Report of the Ontario Legal Aid Review,* vol. 2, *supra* note 150 at 609 – 628; Paterson and Sherr, "Quality Legal Services," *supra* note 291 at 233.

reviews by the Law Society on a triennial cycle.[312] In New Zealand and Australia, the legal aid commissions use registration procedures to enforce entry level standards and, in some cases, service agreements to specify detailed quality standards for different types of legal aid. Victoria Legal Aid, which uses panel registration to qualify solicitors, has recently introduced a simplified grants process to allow registered solicitors' firms to expedite grant authorization using a checklist procedure, thereby reducing administrative costs.[313]

In Canada, LAO, which has a statutory obligation to establish a quality assurance program, implemented quality assurance for its clinic programs in 1997. The Quality Service Office was established in 2003 and has broadened the scope of quality assurance by implementing performance standards for private bar lawyers providing refugee and duty counsel services.[314]

Private lawyer compensation

As discussed in Chapter 7, legal aid agencies in most common law jurisdictions face similar challenges regarding low compensation rates for legal aid lawyers.[315] The recent Strategic Review of legal aid in Scotland stated principles for lawyer remuneration that echo those the LSS board endorsed for the tariff review —[316]

- **Fair reward** — Efficiency in the conduct of cases should be encouraged and rewarded. Pay rates should be set at levels that will attract and maintain a sufficient supply of practitioners.
- **Regular review of pay levels and structures** — A fair reward system needs to be regularly reviewed to ensure that it maintains payment at the level intended and continues to reward the work it intended to reward.
- **Maximum certainty** — Certainty of cost for the board and certainty of fees for the practitioner. The introduction of a block fee system for solemn (i.e., indictable) criminal legal aid should be considered.
- **Best possible value for public money invested** — Inefficiencies in payment systems and structures as well as in administration should be continuously identified and tackled.

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[312] Scottish Legal Aid Board, *The Recorder,* No. 37 (Summer 2003) 1 – 5, online: www.slab.org.uk/profession/recorder/index.htm.

[313] Victoria Legal Aid, *Ninth Statutory Annual Report 2003/2004* at 17, online: www.legalaid.vic.gov.au.

[314] F.H. Zemans, "The Community Legal Clinic Quality Assurance Program: An Innovative Experience in Quality Assurance in Legal Aid" (2000) 33:2 U.B.C. L. Rev. 243; Legal Aid Ontario, Quality Service Office, *Annual Report 2003 – 04* at 3 – 4.

[315] See Chapter 7, section V, "Tariff rates and lawyer participation."

[316] Scotland, *Strategic Review, supra* note 214 at 113.

- **Quality assurance** — It is recognized that cost and efficiency alone do not determine value for money. Quality needs to be maintained and assured by introducing quality assurance throughout the delivery of legal aid.
- **Alignment with policy objectives** — Payment structures and levels should, where possible, be used to encourage the behaviours and prioritization that policy objectives, within legal aid or the wider justice system, require.

Another area of concern, particularly in Britain, has been the link between lawyer compensation and rising legal aid costs. In the mid-1990s, some conservative commentators proposed a theory of "supplier-induced demand," suggesting that legal aid creates built-in incentives for lawyers to increase their case volumes and conduct cases so as to maximize their billings rather than efficiently resolve their client's legal problem.[317] Subsequent studies suggested that lawyers, as rational economic actors, likely adjust their behaviour in response to changing tariff rules. Where a client's needs and ethical considerations do not favour one course of action over another, financial factors may influence a lawyer's approach. There is, however, no empirical support for the proposition that "greedy" lawyers seek to inflate their incomes by unethically manipulating the system or providing unnecessary services. Indeed, a recent UK study cast doubt on the supplier-induced demand thesis, concluding that the major factors driving cost increases in criminal legal aid are broader social and justice system trends (such as changes in police or prosecution practices, or increased case complexity), over which individual lawyers and legal aid administrators have little control.[318]

Applied research and systemic reform activities

The role of legal aid authorities under the purchaser-supplier model has increased demands for reliable information about trends in the legal aid and justice systems. Thus, another prominent feature of the rise of NPM in legal aid administration has been the proliferation of applied research and systemic review activities, not only to make legal aid service delivery more cost-

[317] See H. Stewart, "An Economic Analysis of Legal Aid Delivery Mechanisms," in McCamus, *Report of the Ontario Legal Aid Review,* vol. 2, *supra* note 150, 585 at 590 – 592, 601 – 603; Goriely, "Revisiting the Debate over Criminal Legal Aid Delivery Models," *supra* note 291 at 198 – 202.

[318] Goriely, "The English Approach to Access to Justice," *supra* note 296 at 3-4; Goriely et al., *The Public Defence Solicitor's Office in Edinburgh, supra* note 169; E. Cape and R. Moorhead, *Supplier Induced Demand? Identifying Cost Drivers in Criminal Defence Work* (London: LSC, 2005), online: www.lsrc.org.uk/publications/camocrim.pdf; David S. Wall, "Legal Aid, Social Policy, and the Architecture of Criminal Justice: The Supplier Induced Inflation Thesis and Legal Aid Policy" (1996) *Journal of Law and Society* 549 at 556 – 561.

effective but also to advise government about the impact of legislative and policy changes on legal aid.[319] Legal aid authorities may undertake research and consultation activities in response to government justice reform proposals or independently to address issues of need, efficiency, quality, and cost. In England and Wales, the LSC has engaged in almost continuous consultation and research activities to support reform proposals for service delivery in different areas of law. Since its establishment in 1996, the Legal Services Research Centre (LSRC), the independent research branch of the LSC, has carried out or sponsored a wide range of strategic research projects in criminal and civil justice, using both qualitative and quantitative methods, to support ongoing legal aid reform.[320] The government has launched a "fundamental review" of legal aid that will examine the long-term future of the system, including needs assessment and alternative service delivery methods.[321] In Scotland, the Scottish Executive and the SLAB have also undertaken major research activities on legal aid reform, summary criminal justice, and overall strategic direction.[322] Similar, if less comprehensive, efforts are evident in New Zealand, Australia, and Canada, including the 1997 Ontario legal aid review and 2000/2001 tariff review.[323] Across the wide range of research and review activities, there are some common lines of inquiry.

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[319] Fleming, "The Purchaser-Supplier Approach in Legal Aid," *supra* note 43 at 12; A. Longo, "Current Legal Aid Ontario Issues," Paper presented at the Legal Aid Congress, Brisbane, November 2004, at 8, online: www.legalaid.on.ca/en/news/PDF/Current_Ontario_Legal_Aid_Issues-2004.pdf.

[320] The LSRC began as the Legal Aid Board Research Unit (LABRU) in 1996. Much of the LSRC research is available on its website at www.lscrc.org.uk.

[321] United Kingdom, Department for Constitutional Affairs, News Release, "Legal Aid Review to Target Funds Effectively" (May 17, 2004), online: www.dca.gov.uk./consult/crimdefser/press-notice.htm.

[322] Scotland, Justice 1 Committee Report, Legal Aid Inquiry (2001), online: www.scottish.parliament.uk/business/committees/historic/justice1/reports-01/j1r01-08-02.htm#02; Scottish Legal Aid Board, *Proposals for the Review of Summary Criminal Legal Assistance* (March 2005), online: www.slabpro.org.uk/about_us/consultation/summary_criminal/CLA_review_report_march2005.pdf; Scotland, *Strategic Review, supra* note 214; Scotland, *Advice for All: Publicly Funded Legal Assistance in Scotland – The Way Forward* (Edinburgh: Scottish Executive, 2005), online: www.scotland.gov.uk/Publications/2005/06/16153135/31522. A variety of research papers on aspects of the justice system and legal aid are collected on the website of the Scottish Executive's Central Research Unit, at www.scotland.gov.uk.cru.

[323] See R. Hunter, "Legal Aid Research in Australia and Future Needs," Paper presented at the Legal Aid Congress, Brisbane, November 2004, online: www.legalaid.qld.gov.au/congress2004/content/papers/Thu18-Plenary2-RosemaryHunter.ppt; P. Pleasence, "The Direction of Legal Services Research," Paper presented to the Legal Aid Congress, Brisbane, November 2004, online: www.legalaid.qld.gov.au/congress2004/content/papers/Thu18-Plenary2-PascoePleasence.ppt; A. Currie, "Unmet Need for Criminal Legal Aid," Paper presented at the Legal Aid Congress, Brisbane, November 2004, online: www.legalaid.qld.gov.au/congress2004/content/papers/Thu18-Plenary2-AbCurrie.doc.

Assessment of low-income people's legal needs

Legal aid agencies are increasingly focusing on needs assessment as a foundation for policy formation, priority setting, and service delivery. In England and Wales, the LSRC has undertaken the English and Welsh Civil and Social Justice Survey, a mammoth study involving in-person, hour-long interviews with over 5,600 people in their own homes. This research aims to obtain better information about the characteristics of socially marginalized groups, the inter-related nature of their problems, the impact of their problems on their lives, and the ways they resolve their problems.[324] Research in Australia has also focused on client needs and impacts, examining, for example, the effects of innovations in legal aid service delivery on client needs, the relationship between reduced family law coverage and the increase in self-represented litigants in family courts, and the differential impact of restrictive legal aid funding on particular groups of women.[325] In Canada, the federal Department of Justice has sponsored research on "unmet need" in criminal and, to a lesser degree, civil law as part of an effort to develop a coherent policy framework for any new injection of federal funding into legal aid. The criminal law research focused on trends among unrepresented accused in the courts, and served as the empirical foundation for the creation of a new federal Investment Fund to support innovative approaches designed to address unmet needs.[326]

Justice system reforms to increase efficiency

There is recognition that legal aid costs are driven to a large degree by external justice system factors. In a number of jurisdictions, broader justice system reforms are geared towards reducing litigation, implementing simpler and more cost-effective procedures, and emphasizing early resolution. As part of this effort, legal aid authorities are conducting research on how legal aid lawyers work within the justice system, and are adapting their service delivery models and payment mechanisms to support systemic changes.[327] In Scotland, the 2003 reforms to the system of civil legal aid included substantial fee increases coupled with conversion of the tariff system to a simplified block fee structure featuring "front loading" of the funding to encourage early

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[324] Pleasence, "The Direction of Legal Services Research," *ibid.*

[325] Hunter, "Legal Aid Research in Australia," *supra* note 323.

[326] Currie, "Unmet Need," *supra* note 323.

[327] Goriely et al., *The Public Defence Solicitor's Office, supra* note 318; F. Leverick and P. Duff, "Adjournments of Summary Criminal Cases in the Sheriff Courts" (Edinburgh: Scottish Executive Central Research Unit, 2001), online: www.scotland.gov.uk/cru/resfinds/crf55-00.asp; P. Pleasence and H. Quirk, *The Criminal Case Profiling Study* (London: Legal Services Research Centre, 2001), online: www.lsrc.org.uk/publications/criminal.pdf; A. Gray, P. Fenn, and N. Rickman, *An Empirical Analysis of Standard Fees in Magistrates' Court Criminal Cases* (London: Lord Chancellor's Department, 1999); Legal Aid New South Wales, *Indictable Crime Cost Issues, supra* note 196.

settlement.[328] Similarly, in England and Wales, the LSC has recently issued a consultation paper outlining its proposals for civil legal aid reforms that "encourage early resolution" and "discourage unnecessary litigation."[329] In criminal legal aid, there is recurring emphasis on the importance of promoting early preparation, and concern that existing fee structures do not adequately support such work. In England and Wales, the LSC is currently reviewing options for incorporating an early preparation fee, while in Scotland, the SLAB has recognized that its tariff structures may need revision to promote early preparation and, where appropriate, early resolution. The SLAB also acknowledges, however, that legal aid payment is only one of many factors influencing the progress of cases through the justice system.[330]

There is also recognition that in seeking to support justice system reforms to increase efficiency, legal aid authorities face competing objectives. On the one hand, their fundamental purpose is to meet the legal needs of legal aid clients, and protect their rights and interests. On the other hand, as part of their accountability to government, they must seek cost-effective ways to deliver services and co-operate with other elements of the justice system. But the interests of clients conflict at times with the requirements of systemic efficiency, as clients may benefit individually from procedures that cost more money. Indeed, in the criminal context, the whole purpose of a criminal defence is to test and, if possible, undermine the prosecution's case. One commentator has described the resulting conflict between an efficiency-driven "crime control" model and a "due process" model emphasizing fundamental rights —

> … the fundamental problem with respect to controlling legal aid expenditures as they relate to criminal cases is there exists an irreconcilable conflict between the demands of uniform, managerial control of spending and the demand that criminal lawyers treat each and every case as a unique human drama. To make matters worse, there is a tendency for criminal lawyers to associate a uniform, assembly-line approach to justice with the crime control model of justice in which system efficiency is worshipped as the primary goal. In a crime control model, it has been said that 'the process must not be cluttered up with ceremonious ritual' and that the system should operate as an 'assembly line'; whereas, in the due process model,

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[328] Justice Minister C. Jamieson, "Legal Aid: A Modern System for a Modern Scotland" *The Recorder,* Issue 39 (May 2004) 3, online: www.slab.org.uk.

[329] Legal Services Commission, *A New Focus for Civil Legal Aid: Encouraging Early Resolution, Discouraging Unnecessary Litigation* (London: LSC, 2004).

[330] Scotland, *Strategic Review, supra* note 214 at 44. See also S. Warner, *Research into Criminal Legal Aid under Summary Proceedings in Scotland: A Review* (Edinburgh: Scottish Executive, 1996) at 34 – 36.

> justice is seen as an 'obstacle course', and not an 'assembly line', in which the state's case must be put to a rigorous testing process.[331]

Despite this tension between efficiency and due process objectives, it is also important to recognize that by providing legal advice and assistance to persons who would otherwise be unrepresented, legal aid can actually improve efficiency by "oiling the machinery of the courts."[332]

Evaluation of delivery models

Even before the advent of NPM, the assessment of quality and cost was central to perennial debates regarding the choice of service delivery models. As discussed in Chapter 7, governments and legal aid administrators have undertaken various research projects to evaluate the relative cost and service quality of staff and judicare systems.

From the standpoint of RBM, one of the advantages of retaining a staff component in the service delivery model is that, with timekeeping and data management systems, legal aid programs can overcome some of the difficulties involved in collecting information on actual costs and time requirements in a judicare model. Data from the staff model can thus provide a basis for evaluating the rates and methods of compensation for private lawyers.[333]

Lawyer attrition and new lawyer recruitment

The problems of lawyer attrition and new lawyer recruitment are not unique to LSS. As a direct consequence of low compensation, legal aid authorities in other jurisdictions are also facing difficulties in attracting and retaining legal aid lawyers. The Legal Services Commission in England and Wales has identified attrition as a significant concern —

> [LSC is] picking up intelligence through our regional offices that up to 50% of firms are seriously considering reducing publicly funded work … We believe that this is overwhelmingly because of remuneration and profitability. Our studies show that at current legal aid rates many firms are at best marginally profitable.[334]

There are indications that attrition also stems from resistance to the increased bureaucratization and surveillance activities associated with NPM-influenced reforms, which many lawyers regard as a challenge to professional autonomy and a pointless diversion from lawyering — as one lawyer put it, "the

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[331] Alan N. Young, "Legal Aid and Criminal Justice in Ontario" in McCamus, *Report of the Ontario Legal Aid Review,* vol. 2, *supra* note 150, 629 at 635.
[332] Scotland, *Strategic Review, supra* note 214 at 7 – 15.
[333] Goriely, "Revisiting the Debate over Criminal Legal Aid Delivery Models," *supra* note 291 at 202 – 203.
[334] Legal Services Commission, *Annual Report 2001/2002*, para. 2.7, quoted in Goriely, "The English Approach to Access to Justice," *supra* note 296 at 9.

bureaucracy of franchising is frustrating and demeaning."[335] As a result, some regions of England and Wales, particularly outside major urban centres, are becoming "advice deserts" where low-income people have increasing difficulty finding lawyers to accept their legal aid cases. The Legal Aid Practitioner's Group (LAPG) in England described the pressures on legal aid lawyers in terms that resonate with the concerns that the LSS Tariff Review Working Group heard during its consultations —

> It is now widely acknowledged that there is a recruitment problem within the field of legal aid. Senior staff are moving out of the legal aid field. Although this is in part due to the higher remuneration rates available in other fields, it is also in part due to the degree of unpaid administration, bureaucracy and supervision required in publicly funded work. In family in many parts of the country it is easy to switch to more lucrative private work. In crime, many solicitors reach a point when they are no longer prepared to give up their nights and weekends, and look for alternatives within or, increasingly, outside private practice. Across all fields, senior staff doing legal aid work simply cannot bill at the levels required to ensure a reasonable income for them and their firms. Where there is no private work to subsidise the legal aid sector, it is difficult to make a reasonable living. Where there is, those partners doing private work increasingly resent having their income so significantly reduced by the comparative lack of income from the legal aid parts of the firm.[336]

The LAO tariff review also emphasized the link between low pay and attrition, citing the phenomenon of the "greying of the legal aid bar" as a major concern.[337] This highlights another problematic aspect of lawyer supply that will pose long-term challenges: the fact that young lawyers are no longer entering the legal aid system. In the United Kingdom, the Access to Justice Alliance has recently described this phenomenon as a "demographic time bomb ticking at the heart of publicly-funded community legal services."[338] The LAPG describes the challenge as follows —

> … it is becoming difficult to attract new entrants into the legal aid profession. This problem itself can be subdivided into two aspects. Students are seeking firms who can offer them sponsorship through the Legal Practice Course, rewarding prospects in and after training and the expectation within a reasonable period of time of a salary sufficient to enable them to pay off their student loans; yet few legal aid practices can offer such attractions. Legal aid firms cannot compete

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[335] Legal Action Group and Advice Service Alliance, *On the Right Track?, supra* note 305 at 34.

[336] Legal Aid Practitioners Group, *Legal Aid: The Next Generation — Recruitment Problems and Possible Solutions* (January 2002) at 3, online: www.lapg.co.uk.

[337] Legal Aid Ontario, *Tariff Reform Business Case, supra* note 3 at 10.

[338] "Access to Justice Alliance Pans Govt for Legal Aid Laxity" *The Lawyer* (May 2, 2005).

> when city lawyers can start their employment on a salary that a legal aid lawyer will not see at any time in their career. The disparities are now too large even for many altruistic students who might otherwise prefer to choose legal aid practice. Meanwhile legal aid firms feel reluctant to take on trainees because at the end of their traineeship, the newly qualified legal aid solicitor will be such a scarce commodity that there is a high risk of him being poached, so that the firm that has invested in training the solicitor will see no return on that investment.[339]

LAO has observed that the problems associated with recruiting new lawyers into the legal aid system — the lack of interest in legal aid, the limited articling options in legal aid firms, and large student debts that effectively preclude taking on low-paying professional work — are exacerbated in smaller, more remote communities. Fewer and fewer students are interested in living outside large metropolitan centres, and for those who are, local law practices cannot hire due to limited opportunities for growth. Moreover, there are value differences between the "baby boomers," "Generation X" (born from 1965 to 1980), and "Generation Y" (born from 1980 to the present) that create additional challenges for recruitment and retention.[340]

VI. Results-based management and the tariff system

By the late 1990s, although LSS was adopting NPM-influenced techniques to cope with its continuing fiscal challenges, engaging in strategic planning, and experimenting with contracting, its essential governance structure and service delivery method remained rooted in the "mutual interest" model reflected in the 1979 *Legal Services Society Act.*[341] This model was founded on the partnership between the province, LSS, community law offices, Native community law offices, and the private bar, with the latter three constituencies

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[339] Legal Aid Practitioners Group, *Legal Aid: The Next Generation, supra* note 336 at 3.

[340] A. Longo, "How Do We Keep Legal Professionals in the Bush? Are There Alternative Ways to Provide Legal Services to Rural and Remote Australia?" Paper presented at the Legal Aid Congress, Brisbane, November 2004, online: www.legalaid.qld.gov.au/congress2004/content/papers/Thu19-Workshop2B-AngelaLongo.ppt; A. Longo, "Current Legal Aid Ontario Issues," *supra* note 319 at 4 – 5, 18 – 19.

[341] *Legal Services Society Act*, R.S.B.C. 1979, c.227. The society's experience in the late 1990s is described in more detail in S. Poulos, M. Benton, F. Kraemer, C. McEown, and D. Duncan, "Mixed Service Delivery: Lessons from British Columbia," Paper presented at the International Legal Aid Conference, June 1999, online: faculty.law.ubc.ca/ilac/Papers/06%20Duncan%20MSD.html; Henderson, "The Dilemma of Choice and the BC Experience," *supra* note 170; and N. Henderson, "Issues Concerning Legal Aid and Some British Columbia Experiences" in F.H. Zemans and P.J. Monahan, eds., *A New Legal Aid Plan for Ontario: Background Papers* (North York: York University, 1997) at 91.

directly involved in service delivery and represented on the LSS board. The changes mandated in 2002, however, marked a decisive break with this community partnership approach and a dramatic shift towards a purchaser-supplier model. The provincial government amended the society's enabling legislation to implement an NPM vision of legal aid, thereby enhancing its control over legal aid expenditures and service delivery priorities; excluding community groups from the governance structure; redefining the LSS mandate to emphasize efficiency, effectiveness, innovation, and flexibility in service delivery; and establishing a contractual framework (the MOU) to define the respective roles of the province and LSS in funding and service priorities. Combined with a phased budget reduction of 38.8%, which forced the closure of most offices, discharge of about 68% of staff members, and restriction of coverage to a range of constitutionally mandated or emergency services, the transformation was fundamental. Among other things, the restructuring represented an abrupt end to the complex mixed model that had evolved since the 1970s, and a return to a delivery model that rested almost entirely on judicare.[342]

Results-based management

Even before the enactment of the *Budget Transparency and Accountability Act* (BTAA), LSS as an organization was engaged in a regular process of performance evaluation and reporting. In the 1990s, LSS was the subject of an evaluation by the auditor general and at least two external management reviews, which produced changes in its structure and operations. In the years before the BTAA requirements came into effect, LSS generated annual business plans and longer-term strategic plans that defined its mission and objectives, and reported on progress towards those objectives in its annual reports. In 2001, however, LSS became subject to the new performance and financial reporting requirements of the BTAA. It produced its first annual service plan in 2002/2003, but the 2002 budget reductions and consequent restructuring disrupted implementation of the new performance planning and reporting standards. In November 2002, having largely accomplished the restructuring and undertaken an extensive consultation process, LSS adopted a new strategic plan articulating its mission, vision, and strategic objectives for the new service delivery model.

In 2003, with the new structure in place, LSS staff worked to develop new performance measures that were included in the *2004/2005 Annual Service*

[342] More details about the changes wrought in 2002 may be gleaned from the Legal Services Society *Annual Service Plan Report 2002/2003.* This and subsequent service plans may be found online at www.lss.bc.ca. There are parallels between the BC experience in 2002 and the Australian experience in the 1990s, when the Commonwealth government implemented system-wide reforms and budget reductions with far-reaching implications for legal aid delivery in the states and territories. See D. Fleming, "Australian Legal Aid Under the First Howard Government" (2000) 33:2 U.B.C. L. Rev. 343.

Plan. LSS used a formal logic model to analyze how best to direct its resources and activities to support its strategic objectives, and to define performance measures and targets for the organization as a whole. During 2004/2005, LSS proposed to establish baselines for six different performance measures relating to satisfaction levels among clients, staff, tariff lawyers, and justice system intermediaries, as well as measures of time invested in justice reform activities.

To date, LSS has engaged in performance management largely at an organizational level, and has yet to extend RBM to the operational level of the tariff system. Although LSS has engaged in regular evaluation of the tariffs as part of existing management processes, and has regularly adjusted the tariffs in response to budgetary constraints, changes in the law, and feedback from tariff lawyers, the overall approach has tended to be ad hoc rather than systematic and goal-driven. The last in-depth examination of the tariff system as a whole was the 1984 *Hughes Report.* As for quality assurance, LSS has been developing initiatives to promote quality of service and to identify and remedy instances of poor service quality since 1999. At present, however, LSS lacks an integrated system for continuous monitoring of the relationship between what — and how — it pays lawyers, the services those lawyers provide, and the resulting outcomes.

An RBM approach to tariff management would incorporate a number of features: defining performance measures and targets, collecting and analyzing relevant performance data, adjusting both the tariff system and the RBM framework itself, and reporting on results. As a starting point, LSS could apply a logic model to identify tariff system inputs, activities, outputs, and outcomes and select related performance measures and targets. Initially, at least, the management framework could incorporate the principles the board has endorsed for the tariff review as the core objectives of the tariff system. Furthermore, the information collected and analyzed for the tariff review could serve as a foundation for identifying key strategies, performance measures, and targets. LSS could also use the RBM framework to integrate tariff system management and compensation with its quality assurance initiatives as it works to expand these in ways that are administratively feasible and cost-effective. For example, within its quality assurance program, LSS is developing options for less experienced lawyers to receive mentoring assistance from senior counsel, and to act as junior counsel in trials. These initiatives have an obvious quality assurance component but, through the RBM framework, could form part of a broader strategy for attracting lawyers to legal aid work and encouraging them to remain active.

LSS would face some obstacles in moving to a performance-based tariff system. It would be much easier to adopt performance planning, evaluation, and performance-based compensation in a staff model, since LSS as an employer would exercise greater control over the staff lawyers providing services. The 2002 budget reductions and restructuring forced LSS to dismantle most of its staff delivery model, and only a small number of staff

lawyers remain. Since LSS only recently abandoned its staff model, it would be unreasonable to recommend a reversal in this direction, so LSS will have to find ways to introduce performance management in the context of a judicare system. This could make data collection and analysis more challenging, particularly when tariff lawyers have already made plain their discontent about excessive administrative burdens. LSS will have to develop creative methods of gathering information from private bar lawyers, reporting to them about results, and convincing them of the value of an RBM approach that would, over time, change the focus of the tariff system.

In implementing RBM, apart from the basic obstacles arising from its reliance on external suppliers for service delivery, LSS would face challenges similar to those encountered by other public service agencies. The threshold task would be to identify appropriate performance measures that emphasize outcomes as much as possible, although measures for inputs, activities, and outputs could also be adopted. LSS would need to find a balance between quantitative and qualitative indicators to help it capture the full impact of legal services for clients. This would require the society to enhance its ability to track information about legal aid cases and find new ways to evaluate outcomes, perhaps through client surveys and other means. The implementation of a performance management system would thus raise significant capacity issues and require LSS to dedicate more of its limited resources to administration. Of course, an RBM system would have to be cost-effective, and LSS would need to remain watchful of the potential pitfalls, such as introducing too many performance measures or bureaucratic processes, and overwhelming managers and staff with new tasks.

The design of an RBM system would have to incorporate a training and communication strategy to educate staff about the techniques, purposes, and benefits of performance management. Any RBM system would involve a degree of culture shift within the organization, and to achieve buy-in LSS management would have to effectively communicate the reasons for change. Careful design and planning would be required to ensure that the RBM system is integrated into regular tariff system operations, rather than being a useless paper process. LSS would also have to develop and implement the system so that it is effectively co-ordinated with the management and planning processes used by other departments within LSS.

Results-based compensation

Our review of compensation principles and practices in other sectors offers some insights into current tariff compensation. Monetary compensation is not the only, nor even the most prominent, factor in motivating people to perform. This may be especially true of legal aid lawyers, who, like other public sector workers, may be less driven by financial rewards. For tariff lawyers, other significant incentives may include professional growth, peer respect, public service and social justice concerns, and the intellectual challenges of the law.

Suggesting that compensation is likely not the primary motivation for most tariff lawyers is not to say that it is irrelevant, however. If a compensation system fails to meet the basic standards of fairness, it will alienate people, and it appears that this has been the result of tariff stagnation over the past 14 years.

LSS already utilizes the sort of payment mechanisms (the alternative fee arrangements of block fees and capped hours) that are gaining acceptance in the wider legal profession and among those legal aid plans that retain elements of time-and-line billing. To this extent, the basic elements of the tariff system remain sound, and it is the inadequacy of the compensation they offer that poses a basic challenge. Lawyers believe that the compensation system does not achieve substantive equity, either internally (compared with what the tariffs pay other professionals) or externally (compared with private market rates and public sector comparators). Nor does it meet the basic principles of procedural equity, since it often fails to allocate rewards fairly. In addition to the low level of compensation, the tariffs tend to undervalue preparation outside of court and early resolution, and in some ways penalize lawyers for efficient practice. Fewer lawyers are willing to help LSS meet its mandate to provide access to justice for low-income people. There is evidence that poor compensation affects service quality. Thus, the feedback in the tariff review suggests that the current tariff compensation system is not effectively aligned with the overall goals and strategies of LSS.

Given the focus on RBM, it may be tempting to try to remedy tariff problems by introducing elements of individual performance pay, so as to link enhanced lawyer compensation with improved results. Yet, as discussed earlier in this chapter, there is a risk that tinkering with individual performance-based pay may serve as a distraction from the requirements for more fundamental change. It is doubtful that an RBC system based on individual measurement and rewards offers a solution to the basic inadequacy of tariff compensation and resulting lawyer attrition. As we have seen, the record of performance pay initiatives is mixed at best. Because of the judicare model, LSS lacks the ability to monitor and reward lawyer performance that it would have as an employer under a staff lawyer model.

A more fundamental problem, however, is the difficulty of linking results and rewards in any meaningful way. Throughout the phase 2 consultations of the tariff review, tariff lawyers repeatedly emphasized the difficulty of defining simply and effectively what qualifies as a “good” result. Our research appears to support this view, as case outcome measures for the legal system remain crude and are not well equipped to capture the nuances of individual case results. Any system of outcome measurement would either require immense administrative resources to evaluate results case-by-case or use high-level statistical measures based on large case volumes, which may not provide a reliable foundation for assessing results and service quality, and allocating rewards. An incentive system might end up creating the wrong incentives, encouraging lawyers to “cherry pick” easy cases to improve their results profile, while casting lawyers who are willing to take on difficult, time-

consuming cases as inefficient or ineffective. Moreover, as many lawyers have pointed out, the results in individual cases, or even across a whole case load, may be influenced by many factors beyond lawyers' control. If compensation is contingent upon factors over which the lawyers have no influence, they will regard the compensation system as illegitimate and be more likely to refuse legal aid cases. Given current trends, LSS should be reluctant to introduce changes that risk increasing tariff lawyer attrition.

Performance contracting

LSS has a long history of contracting. Under the mixed-model system that existed up to 2002, LSS contracted with a large number of non-profit community law offices and Native community law offices to provide services in civil (non-family) law. In 1997, it introduced a pilot project involving six block contracts for criminal law services in adult and youth courts in Victoria and Vancouver. LSS also used block contracting in the late 1990s to cope with sudden increases in immigration case volumes because of refugee claimants coming to BC by sea (so-called marine arrivals). At present, LSS contracts with third-party providers to deliver services in mental health, prison law, circuit court, and the Brydges advice line. There is a modified contracting system for duty counsel services in criminal, family, and immigration law. Apart from contracting for legal services, LSS has used competitive tendering for other services, such as local agents (lawyers who provide local intake services outside the regional centres) and court transcription firms. The contracts in all these areas provide for fixed monthly payments, specific service delivery requirements and standards, and LSS auditing of financial records and service quality.

For the 1997 criminal contracting pilot project in Vancouver and Victoria, LSS used a request for proposal process to select experienced, well-regarded counsel in both communities, and assigned blocks of 50 cases under each contract, with an express emphasis on service quality. At the end of the project, LSS commissioned an independent evaluation that, while not serving as a definitive assessment, identified a range of concerns that remain relevant to any plan for longer-term contracts.[343] The evaluation found that block contracting yielded cost savings of about 19% compared with historical tariff averages, but the savings were confined to category III cases only and did not take contract administration costs into account. Participating lawyers indicated that the contracts were not sufficiently profitable — indeed, they reported that legal aid as a whole was not profitable and served mainly to preserve market share and fill blocks of time so that bare overhead costs could be paid. Given the low rate of return, the evaluation suggested that bid prices would be higher in future contracts, and the 19% figure was likely a ceiling on cost savings.

[343] Focus Consultants, *An Evaluation of the Legal Service Society's Pre-Pilot Block Contracting Project* (Vancouver: Legal Services Society, 1998).

The evaluation noted the risk that, despite the overt emphasis on quality, in the longer term, LSS financial objectives could prevail over quality standards. It also suggested that in a longer-term contracting system, LSS would need to incorporate a more comprehensive framework to ensure service quality, including an expanded audit function, and examine thoroughly the circumstances under which contracting would be advantageous. It recommended that LSS carefully weigh the trade-offs between the cost savings arising from block contracting and countervailing factors such as the importance of choice of counsel, the morale and trust of the private bar, and the need to attract younger lawyers to legal aid practice. There was some indication that attempts to introduce broader contracting initiatives would be met with greater resistance from the tariff bar, not only because of concerns about service quality and choice of counsel but also because of the perception that contracting would be driven primarily by the need to force prices down. The society's senior management later summed up the overall conclusions thus —

> [The LSS board of directors] was unwilling to risk the disruption and loss of good will of the private bar against an unknown potential for a more cost-effective model and concluded that, unless the tariff increased significantly, thereby increasing the cost differential and benefit of the contracted model, that there would be few advantages.[344]

VII. Conclusion: Managing for results and the LSS tariff system

Despite some risks and pitfalls, an RBM system could provide LSS with an effective method for managing a results-oriented tariff system on a sustainable basis. LSS would derive a number of potential benefits from an RBM strategy. Such a strategy would —

- enable a systematic approach to tariff management, involving a regular cycle of goal setting and evaluation of tariff performance;
- enable LSS management to improve the alignment between the tariff system and the LSS mission and service plan objectives;
- meet the tariff review objectives by providing a framework for continuous evaluation of the tariff system to ensure that the tariffs provide fair and reasonable compensation, reward lawyers for efficient service, and promote efficiency and effectiveness within both the legal aid and justice systems;
- offer LSS a way to develop, implement, and assess changes to tariff compensation rates and structures, and serve as a mechanism for

[344] S. Poulos and D. Duncan, *The British Columbia Experience with Contracting with Non-Profit Organizations, Block Contracting, and Use of a Predictive Formula for Resource Allocation* (Vancouver: Legal Services Society, 1999).

measuring progress in dealing with the issue of lawyer attrition and new lawyer recruitment;

- bring LSS tariff management into line with RBM practices adopted by other government agencies in BC and other jurisdictions, and help the society co-ordinate its performance planning with that of justice system partners and the provincial government; and
- assist LSS in setting goals, developing strategies, and measuring progress in tariff lawyer recruitment and retention.

With respect to RBC, although there is an urgent need for changes to tariff compensation, introducing individual rewards and incentives that affect only a small number of tariff lawyers will not solve the more fundamental problems and is unlikely to improve results in the tariff system overall. Thus, at this stage, it would be preferable for LSS to approach performance measurement and RBC at a systemic rather than individual level. In adopting this broader focus, LSS could use a combination of rate increases and structural changes to achieve fair and reasonable compensation, and allocate funding to those services that are more likely to improve results for clients and increase system efficiency. In this way, LSS could use the RBM framework to align tariff compensation practices in support of larger policy objectives. In the longer term, once LSS gains experience with RBM and its cycle of performance monitoring, measurement, and reporting, and develops reliable performance measures, it may then be in a better position to implement results-based rewards on an individual basis.

As for contracting, the current strategic approach is, at this stage, preferable to system-wide contracting, For one thing, the feedback during the tariff review suggested that lawyers' views on contracting have not changed significantly since the late 1990s, and they remain very skeptical. Undoubtedly, there is some element of economic self-interest involved, since system-wide contracting would likely entail a consolidation of service delivery among fewer lawyers and law firms, thereby denying a substantial number of lawyers any income from legal aid. Even if a contracting system was not designed to reduce the number of service providers, a substantial majority of tariff lawyers are sole practitioners or members of small firms who may not have the capacity to fulfill the increased administrative requirements that a contracting system would entail. Beyond this, however, there remain legitimate concerns about imposing limits on choice of counsel, which is a longstanding principle of legal aid in BC, as well as fears that contracting for blocks of cases would inevitably lead to a decline in service quality.

Finally, given the experience in other jurisdictions, and the provisional but nevertheless guarded prognosis offered by past LSS experience, the economic advantages of system-wide contracting are far from clear. Although introduced as a way to reduce costs and ensure service quality, the contracting regime in England and Wales has proven administratively complex and costly, and its quality assurance mechanisms remain controversial. LSS can ill afford

a contracting system that risks increasing costs and driving more lawyers out of the system. At this juncture, therefore, LSS would be well-advised to retain its current strategic approach, using contracting selectively where it is practical and cost-effective to do so.