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LSS Tariff Review — Phase 1 Report

June 2004

I. PURPOSE

The purpose of this report is to outline the work undertaken in Phase 1 of the Tariff Review, summarize the key results, and present recommendations to the Board for the Phase 2 process.

II. RECOMMENDATIONS

The following recommendations were approved by the Board:

1. Endorse the following as guiding principles for the purpose of the Tariff Review:
 - (a) *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.*
 - (b) *LSS will maintain tariffs that reward lawyers for efficient service within the justice system to achieve effective results for LSS clients.*
 - (c) *LSS will maintain tariff management processes that promote efficient and effective allocation of resources and are cost-effective and simple.*
 - (d) *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.*
2. Adopt the following plan for Phase II of the Tariff Review:

(a) Consultation

LSS staff will expand the focus of consultation in Phase 2 to include other justice system participants, but will also involve follow-up consultation with the bar.

(i) Justice System Participants

LSS should consult with two broad categories of justice system participants:

- Other justice system agencies, for example, the judiciary, court administrators, and Crown counsel
- Client-affiliated community organizations (e.g. Native Courtworkers, Elizabeth Fry Society, John Howard Society, Family Justice Counsellors)

The goals of these consultations will be as follows:

- to obtain relevant perspectives on the impact of the tariffs on the justice system;
- to convey and validate Phase I feedback about the impact of justice system processes on legal aid clients and lawyers;
- to elicit support for appropriate changes in the tariffs and justice system.

(ii) Follow-Up Consultation with Lawyers

In addition to other justice system participants, LSS will engage in follow-up consultation with referral lawyers, either directly or through local CBA subsections, to obtain input on potential tariff changes identified during Phase II.

(b) Research

Apart from consultations, LSS will conduct more in-depth research as follows:

- (i) a survey of referral lawyers regarding market rates, overhead costs, and incomes;
- (ii) a survey and/or interviews with former referral lawyers about their reasons for withdrawal from legal aid and factors that would encourage them to return to accepting legal aid referrals;
- (iii) an independent financial analysis to establish an appropriate range of tariff compensation;
- (iv) research on options for restructuring the tariffs to promote fair, results-oriented compensation.

(c) Results

Phase 2 activities will be directed to achieve the following results:

- (i) a budget envelope by September 15th, 2004, with provisional identification of options;
- (ii) a further report by October 31st, 2004, with an update on Phase 2;
- (iii) a Phase 3 plan for implementation of changes in the Tariff structure and rate and recommendations for future evaluation of the Tariff;
- (iv) a final report to the board of directors by June 2005.

III. BACKGROUND

1. Tariff Review Objectives

The Tariff Review proposal identified three objectives:

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

2. Phase 1 Process

The main purpose in Phase 1 was to obtain input from referral lawyers about the tariffs. LSS staff convened a series of focus groups in each of the seven Regional Centres. Local office staff assisted in organizing the meetings and selecting invitees to achieve, as much as possible, a representative sample of referral lawyers from surrounding communities. In addition, LSS staff 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 percent of the tariff bar, attended the focus groups on various dates between February 26 and May 13, 2004.

At each session, participants discussed specific questions. LSS staff prepared summaries of their views and circulated them to participants for any further comment. The questions were as follows:¹

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

¹ The question format varied somewhat between meetings, and Question 6 was added for the last three meetings in Prince George, Terrace and Vancouver.

IV. TARIFF HISTORY

Prior to embarking on the focus groups, LSS staff developed a capsule history of the tariffs since 1981 to help provide some context for the discussion. That history is included in the Appendix, but the key points may be summarized as follows:

- The current tariff structures originated with the first tariffs published in 1981. The criminal tariff has always been primarily a block fee system. The family/child protection tariffs began as a blend of block and hourly items, with an initial hourly rate of \$40.
- The 1984 Report of the Task Force on Public Legal Services recommended an immediate 70 percent tariff increase and a long term goal of setting tariff compensation at 75 percent of the rates for private clients of modest means. Without reasonable fees for legal aid lawyers, it stated, “in the medium to long term, the legal aid delivery service would suffer a major crisis.”
- In the late 1980s, LSS made regular increases to tariff funding, including raising the family hourly rate to \$50, but still 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.”²
- The current nominal tariff rate of \$80 dates from 1991, when a service withdrawal by lawyers resulted in a 100 percent increase in tariff funding.
- Since 1992, tariff compensation has been subject to varying reductions and holdbacks, generally in the range of 10 to 15 percent.

V. SUMMARY OF PHASE 1 RESULTS

The feedback from lawyers may be summarized as follows:

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.

2. Tariff Compensation

- Tariff rates, for both hourly and block fees, are inadequate and should be increased
- The tariffs do not allot sufficient preparation time so that 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, unlike other professionals, such as psychiatrists and psychologists, who receive much higher rates under the tariff.
- To assess the appropriate tariff rates, LSS should consider factors such as:

² LSS Board Chair M. McEwan, *Legal Aid Bar*, December 1990

- 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)
- Lawyer overhead costs
- LSS should eliminate the holdbacks, or at least replace them with a straight reduction. Lawyers regard them as disingenuous, and a de facto deduction, even though LSS has made periodic holdback repayments.
- There was no clear consensus on whether to adopt differential rates based on seniority or region.

3. Tariff Structures

(a) General

- The tariffs do not properly recognize the time and court appearances required to properly represent a client. Lawyers feel that too often they must sacrifice their own financial well-being to fulfill their ethical duties to clients.
- The tariffs are geared to 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 the lawyer and, if appropriate, early resolution.
- Lawyers generally opposed block contracting.
- Many lawyers suggested implementation of client contribution mechanisms to raise funds for increased compensation and expanded services.

(b) Family/CFCSA Tariffs

- Family tariff coverage is far too limited. Coverage restrictions, and inadequate hours, mean lawyers can only “half solve” their clients’ family law problems.
- LSS should increase the billable hours allotted.
- Tariff compensation is based on hearings, so it encourages litigation, rather than compensating lawyers for the time they invest in negotiation, ADR, 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.
- LSS should consider reinstating the FCMP model of Non-Emergency and Approved Services to ensure adequate funding is allocated to more complex cases.
- Lawyers had somewhat mixed views on whether the family and CFCSA tariffs should be block or hourly, but on balance favoured the hourly tariff. Some lawyers suggested a hybrid model combining hourly preparation and block fees for hearings.

(c) Criminal Tariff

- Compensation under the criminal tariff is geared to trials, and does not compensate lawyers for the substantial work they must do to negotiate a plea agreement, a stay, or diversion.
- LSS must reduce the extent of unpaid services in the criminal tariff. It fails to compensate lawyers for necessary prison visits and, in particular, the numerous court appearances required under the Criminal Case Flow Management Rules in Provincial Court. The block fees for some services (e.g. complex bail hearings or breaches of conditional sentence orders) do not reflect the time involved.
- Lawyers generally supported the block fee tariff for criminal cases, however, many noted that the block system penalizes lawyers for last-minute collapses (e.g. Crown stays and adjournments on or near the trial date). There should be a better mechanism to compensate lawyers for their preparation time and lost trial time.
- 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).

4. Quality Assurance*(a) Quality Control*

- Low tariff compensation puts pressure on lawyers to “cut corners”, or increase case volumes, in order to generate adequate earnings, and thus increases the risk that service quality will suffer. Moreover, 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 good 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 clients receive proper service.
- Lawyers expressed concerns about
 - developing a cumbersome and costly administrative process
 - Ensuring fair procedures
 - Establishing, publicizing and applying clear standards
 - Defining what quality services are
 - Low tariff compensation contributing to substandard service
 - Triggers for quality control (e.g. single client complaints or a pattern of complaints)
- Lawyers discussed a range of remedial measures LSS might adopt, including practice reviews, mentoring, probationary periods, and billing restrictions.

(b) Quality Enhancement

- Lawyers valued the services LSS is already providing, such as CLE discounts, electronic case digests, and research memoranda from Legal Aid Ontario. Some lawyers noted, however, that such supports are not a substitute for proper compensation.
- Lawyers encouraged LSS to expand the range of support it provides, and offered a variety of suggestions, including an on-line resource database, Quicklaw or other

caselaw database access, on-line discussion forums, expanded CLE programming, and databases of experts and community resources.

5. Removing Obstacles to Participation

- To reverse attrition LSS must increase the tariff rates and billable hours and reduce the amount of unpaid work lawyers are required to perform.
- Lawyers urged LSS to reduce their administrative burden, by simplifying the tariffs and LSS procedures for authorization and billing. Some lawyers proposed an administration or file-opening fee, or block billing for disbursements.
- LSS should improve its communications with tariff lawyers, making sure to demonstrate trust in their judgment, respect, and appreciation for their work.
- Lawyers strongly approved of LSS innovations such as e-billing (including the e-billing fee) and expedited payment.

6. Current Tariff Impact on the Justice System

- 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.
- Many low-income people do not have the capacity to represent themselves. They may lack education, or have literacy problems. They may have mental health issues or psychological difficulties. 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.
- 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 a defence, 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.
- 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 persons who are not familiar with the court system.

VI. CONCLUSIONS

1. Concerns about the flight from legal aid are well-founded.

Lawyer feedback suggests many referral lawyers are reducing or eliminating their legal aid caseloads, and fewer young lawyers are entering the system. Statistical evidence supports these impressions. For example, between 1998-99 and 2003-04, the number of

referral lawyers in B.C. declined from 1634 to 1027, a drop of 37 percent. Also, between 1997-98 and 2003-04, the percentage of referrals issued to lawyers with under 5 years experience dropped from about 20 percent to just over 11.5 percent for criminal cases, and from about 37 percent to 15 percent for family cases. During the same period, the proportion of referrals accepted by lawyers with more than ten years experience increased from 55 to 70 percent for criminal cases, and from 35 to 60 percent for family cases.

2. *Lawyer attrition is a direct result of inadequate compensation under current tariff rates and structures.*

Lawyer feedback suggests tariff compensation is well below market rates for private clients of modest means and comparable rates for other publicly funded lawyers, such as ad hoc Crown counsel. Lawyers feel that low tariff rates undervalue their professional skills and expertise, and resent the degree to which they are expected to provide necessary services without payment.

3. *Tariff structures do not reflect the demands and realities of current legal aid practice.*

Changes in court rules and procedures, and increasing case complexity, require lawyers to invest more time in cases, produce more documents, and make more court appearances, but the tariff has not kept pace with these changes. Lawyers receive little or no compensation for many services they must perform to represent clients properly. While lawyers generally honour their professional obligations, the tension between ethics and economics can only lead to frustration, resentment and, ultimately, withdrawal from legal aid.

4. *The tariffs are not sufficiently geared to rewarding results.*

Tariff compensation is weighted too heavily in favour of litigation. The economic incentive is to conduct, and prolong, trials. Conversely, the tariffs do not compensate lawyers adequately for effectively resolving a client's problems without a trial, where appropriate. Again, the conflict between ethics and economics puts lawyers in an untenable position and, in the long run, can only undermine lawyers' willingness to accept legal aid cases. Moreover, this aspect of the tariff system does not promote overall efficiency within the justice system.

5. *Referral lawyers want LSS to find more ways to simplify tariff administration and reduce administrative burdens associated with legal aid cases.*

Referral lawyers suggested a number of ways for LSS to reduce and simplify administrative tasks, and strongly approved of initiatives that LSS has already undertaken (e.g. e-billing) to alleviate such concerns. Many suggestions involve operational matters that LSS staff will investigate and remedy within the next year.

- 6 *Low tariff compensation increases the risk of poor quality service and reinforces the widely held perception that legal aid clients get second-rate lawyers.*

While some referral lawyers may at times compromise the quality of service in order to avoid losses or improve their earnings, there is no evidence that this is currently a systemic problem. Indeed, most lawyers who participated in Tariff Review focus groups insisted that they continued to meet their ethical duties to provide quality services to clients even when it meant losing money. However, it is clear that the compensation offered under the current tariffs creates conditions in which “overworked and underpaid” referral lawyers are more likely to compromise service quality.

APPENDIX — OUTLINE OF TARIFF HISTORY

The following chronology offers a capsule summary of the development of the tariffs following the establishment of LSS in 1979.

- 1981**
- The origin of the current tariffs may be traced to September 1981, when LSS published its first tariffs after assuming responsibility for payment of tariff accounts from the provincial government.
 - The criminal tariff, then as now a block fee system, divided offences into two categories: major offences (now Category 4) and the rest (now Categories 1, 2, and 3). Trial rates for major offences were \$360 for the first half day, and \$140 for each subsequent half day. For the rest, rates were \$235 and \$80, respectively.
 - In the Family Tariff (covering both family and child protection cases), trial rates were \$260 for the first half day, and \$100 thereafter. For uncontested matters, the tariff allowed up to 6 hours at an hourly rate of \$40.
 - These first tariffs represented a 38% increase over the previous compensation scheme.
- 1982**
- The provincial government's restraint program forced across-the-board billing reductions of 12.5 percent. The tariffs did not return to 1982 levels until January 1986.
- 1984**
- The 1984 *Task Force on Public Legal Services Report* (the Hughes Report) recommended an immediate 70% increase to the tariffs, with a long term goal of achieving remuneration equal to 75% of what lawyers would charge a paying client of modest means.
- 1986**
- At the end of the year, LSS announced funding increases of 25 and 65 percent for the criminal and family tariffs, respectively.
- 1988**
- The Justice Reform Commission appointed by the then Attorney General released its "Access to Justice Report", which urged immediate implementation of the Hughes Report recommendations.
- 1988–91**
- The late 1980s saw increases to the tariffs effected by adding new items and increasing remuneration for existing items. In 1988, LSS raised the tariff rate for family cases to \$50, and introduced a general preparation item (6 hours, increased to 7 in 1989). LSS also increased the block fees for criminal trials.
 - Overall, LSS increased the criminal and family tariffs by 25% in August 1987; 32% in January, 1988; 10% in October 1988; 5% in October 1989; and 6% in January 1991.

- Despite these increases, the Society recognized that tariff compensation was below any realistic level, and that this posed problems for referral lawyers in meeting overhead and other expenses.

- 1991** - Referral lawyers withdrew services in April to protest low compensation. The negotiated settlement resulted in a dramatic 100% increase in the tariffs.
- LSS increased the hourly rates for family matters to \$80, and the general preparation hours to 16. LSS modified the criminal tariff by introducing the current 4 categories of offences, with trial rates per half-day ranging from \$400 to \$800, and the rate for criminal duty counsel doubling from \$40 to \$80.
 - LSS replaced the temporary immigration tariff introduced in early 1990 with a permanent tariff (setting an hourly rate of \$80 with general preparation of 9 hours).
- 1992** - The 1991 increases put financial pressures on the Society that eventually led to new reductions. The December 1992 criminal tariff saw cuts to various block fees to achieve an overall tariff reduction of 15 percent. LSS considered but rejected the option of converting the criminal tariff to an hourly system.
- 1993** - LSS made tariff reductions in October – 4.3% in criminal; 1% in family; and 3.2% in immigration
- 1994** - July saw introduction of the first holdbacks, including 22.5% for all tariffs for the first month. From August 1994 to July 1999, holdbacks ranged between 10 and 15% depending on the tariff.
- In September 1994, LSS issued its first comprehensive tariff guide in the current binder format. The family tariff changed significantly, with the implementation of the Family Case Management Program (FCMP), creation of new service categories (emergency, non-emergency and approved services) and the creation of a separate tariff for child protection cases.
- 1999** - Holdbacks remained at 10% between 1999 and 2004.