



# Criminal Law News

Robert Gee

## *Legal Aid Boycott – Enough is Finally Enough*

Even if you only have a passing interest in criminal law matters or even just a passing interest in legal aid generally, you're no doubt aware by now that the criminal bar started a legal aid boycott. The boycott initially began June 1, 2009 in Toronto. Calling it a "boycott" is a bit of a misnomer too. "Boycott" implies that all criminal lawyers are refusing all legal aid certificates. That's not the case. This boycott is much more precise and targets only a specific narrow range of the most serious legal aid matters. The areas being boycotted are murders, attempted murders and matters prosecuted by a special guns and gang prosecution team based out of Toronto. This prosecution team is a highly specialized team of Crowns and police officers who prosecute cases province-wide involving, as the name implies, gun charges and gang-related offences. This team is a relatively recent creation of the provincial government in its never-ceasing quest to appear to be proactive and tough on crime.

I'm not saying that the creation of this team is not a worthwhile effort, but it is a prime example of what the real problem is with the current system. The problem is that policy choices by successive governments over the past decades have created a two-tiered justice system in this province. In the

past decade or so, many hundreds of millions of dollars have been poured into all parts of the justice system, except the defence side. The investigative and prosecution branches of the system have in particular been the beneficiary of government largesse. Between 1997 and 2007, salaries for Crown attorneys have increased 57%. The numbers of Crown attorneys have increased dramatically as well. Police budgets have increased yearly and one of the McGuinty government's promises when first elected was the hiring of 1,000 new police officers. When you consider that salary and benefits for a first-class constable easily exceeds \$100,000 per year, when multiplied by 1,000, you can see that this is a \$100 million per year commitment. Similarly, salaries for Ontario court justices over the same 1997 to 2007 period have risen 83%. Meanwhile, legal aid increases since 1987 have been a paltry 15%.

This 15% increase is somewhat illusory though, when you consider it came after changes and cutbacks to the legal aid system in the mid 1990s that saw compensation to defence counsel on a per file basis fall by significantly more than that. The highest rate currently paid by legal aid to defence counsel is \$96.95. The problems with this are manifold. It's significantly below what lawyers could get for doing any other type of law. The rate itself is also a mirage. You

see, legal aid severely and arbitrarily limits the number of hours they will pay for on any given matter. For instance, legal aid will only pay two hours for a bail hearing. Two hours, no matter how many hours it actually takes, they will only pay you for two. The phone rings in the middle of the night. You've got a client on the other end making his proverbial one phone call from the police station upon arrest. You talk to him for a bit, hang up, call his family and friends to try to get some help for bail in the morning. By the time you get back to sleep you may have at least a half hour, if not a full hour into the matter. The next day you show up at court. You speak to the Crown, you get disclosure and review it, you speak to and prepare his family members or friends to act as sureties for his bail and most importantly you speak to your client in the cells to review the matter and prepare him for the bail hearing. Then you return to court and wait for the hearing to start. If you're lucky and there is time to run the bail hearing that day, you run a contested hearing in bail court and hopefully by the end of the day you get your client out. Either way, win or lose the hearing, by the end of the day you've got probably about 10 hours into the matter. And for that, legal aid will pay the grand total of \$193.90. So the effective hourly rate is not the \$96.95 the government will tell the newspapers it is when responding to the boycott, but really in this case \$19.39. Try paying for secretarial assistance and running an office on \$19.39 per hour.

In addition, the defence also start out cases with one hand tied behind their back in other ways as well. If we need an expert on a case we basically have to go cap in hand to legal aid and beg for permission to hire one. If they agree to allow it, and that's a big if, they will put severe limits on the

hours the expert can bill and will pay the expert an hourly rate that is about half of what the Crowns are allowed to pay their experts. Knowing that, guess where all the good experts go. Or, if the Crown feels it's necessary to have co-counsel on a case, no problem, they get it. These days getting legal aid to agree to co-counsel, or even junior counsel happens with about the same frequency as appearances by Halley's Comet. I could give more examples of the imbalances but just thinking about them makes my head hurt.

The only way the legal aid system has been able to continue operating for the last two decades is through the donated services of defence counsel. The defence bar has patiently explained to one Attorney General after another that the system is broken and now needs an immediate equilibrium adjustment. The Ministry of the Attorney General has commissioned three reports in the last three years on different justice issues: the *Code-Lesage Report*; the *Gouge Inquiry Report* and the *Trebilcock Report*. Each concluded that something must be done to improve the legal aid program. Code and Lesage describe legal aid underfunding as a key source of dysfunction in Ontario's justice system. Professor Trebilcock described a "palpable anger" in the defence bar about the inertia in improving the tariff. Each of these reports, at least as they relate to legal aid, appear to be gathering dust on a shelf somewhere.

It was as a result of this continual inaction in the face of overwhelming evidence of what needed to be done that prompted the defence bar to embark on the boycott as it has. It was a decision that defence counsel in this province were most reluctant to take and only took after exhausting all other avenues available to us to

prompt action on the issue by the government. Defence counsel in this province are a very committed bunch. For the most part we represent the poorest, most marginalized members of our society and for years we've been doing it with one, if not both hands tied behind our back. The time has come for us to stop subsidizing the government in this effort. We owe it to our current clients and most importantly to the clients who will be coming along in the future so when their cases do arise we can represent them properly and on an even footing with our opponents.

It's for these reasons that the defence bar in Toronto started this boycott on June 1, 2009. It's for these reasons that lawyers in Kingston and Thunder Bay followed their lead on June 15, and it is for these reasons that over 40 members of the defence bar in Hamilton joined the boycott July 3, along with defence counsel in Barrie and Sudbury who also joined the same day. By the time you read this either the government will have stepped up to the plate and offered real solutions or more jurisdictions will have come on board with the boycott. I can't predict how this will end, but what I am sure of is that the resolve of the defence bar is stronger than I have ever seen it, and either the government will do the right thing or all defence counsel from all jurisdictions across the province will be organized and part of the boycott before the summer is out. ■

*Robert Gee is the Past-President of the Hamilton Criminal Lawyers' Association. He can be contacted at:*

*120 Jackson Street East  
Hamilton, ON L8N 1L3  
905-777-1141  
rgee@on.aibn.com*