

REPEALED

12 - 2012

NOTICE TO THE PROFESSION

On Call Issues for Legal Aid Manitoba Duty Counsel Service Providers

Justice stakeholders have enquired about the circumstances under which Brydges on-call counsel can be expected to attend at the police station for a youth in custody calls. Concerns have been expressed that on-call counsel may be refusing to attend the police station, thereby depriving youth of the presence of counsel when making a statement to police.

The *Youth Criminal Justice Act* (s. 146) precludes a statement from being entered into evidence where the young person giving the statement has not been given a reasonable opportunity to have a statement taken in the presence of, *inter alia*, counsel. This section does not place any obligation *per se* on counsel to attend the police station.

Our poll of service providers indicates that, in most instances, at the time of the call to counsel, youth indicate they are taking counsel's advice and not giving a statement. This does not prevent counsel from attending to assist particularly vulnerable young person, but many counsel in this situation determine their presence is not necessary. It is considered good practice in these circumstances for counsel to advise the police that the young person does not wish to make a statement so counsel will not be attending.

Our review of service providers indicates that both staff and private bar lawyers vary greatly in their approach to this situation. There are counsel who attend whenever requested, counsel who attend only when the young person indicates he or she is making a statement and wants counsel present, and counsel who refuse to attend in any circumstance. Frustration respecting the significant delays that can occur at the police station, and tie-up counsel for several hours, and lack of specific compensation in the tariff, appear to be major factors in some counsel deciding not to attend the police station in these circumstances.

Concern arises where counsel simply refuses to attend the station and a young person, in frustration, waives his/her right to have counsel present as a result, or where a young person indicates to counsel that they will be making a statement and wants counsel present, and counsel simply refuses to attend.

Legal Aid Manitoba does not have additional funds to provide on-call counsel for providing this service, nor does it have resources to provide alternate Brydges on-call services while counsel is tied up at the police station. The provision of such services by counsel, when provided, is carried out *pro bono*, and out of respect for the professional responsibilities of counsel.

When counsel undertakes to provide services, such as Brydges on call services provided to a young person being detained by police, they undertake a responsibility to provide that service diligently, and fully, whether the service is provided *pro bono* or is compensated. This responsibility can be fulfilled, in our opinion, in two ways:

1. by providing the full service including attendance at the station when necessary, and requested by the client;

2. by taking reasonable steps to find other counsel that will provide whatever services the originating counsel is not prepared to provide.

The fact that the Legal Aid Manitoba tariff does not provide specified compensation for these attendances does not remove the professional obligations of counsel providing on-call services.

May 2012

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NOTICE TO THE PROFESSION

Legal Aid Manitoba Domestic Tariff Requires Trial Approval

Counsel are reminded that the Legal Aid Manitoba Tariff requires trial approval for all domestic and child protection matters.

Trial approval is determined on a merit test based on likelihood of success. The test is independent of the "G" case ratio for child protection matters.

Counsel must meet this requirement prior to trial dates being set.

Where trial approval is denied, it is expected that counsel apply to withdraw from the record in compliance with the *Cunningham* decision.

Where counsel have not appropriately sought trial approval, or applied to withdraw from a case in a timely manner, trial will not be paid for (and in the case of staff counsel productivity, billing will not be allowed).

14 - 2012

NOTICE TO THE PROFESSION

Legal Aid Manitoba Automated *Brydges* On Call System Launch

The long awaited Automated *Brydges* On-Call Contact System will be piloted and launched next month. One expectation of this system is that persons in custody will be connected with a lawyer within 5 minutes of the call being made. In order to achieve this goal Legal Aid Manitoba is providing an opportunity for Private Bar who maintain an after-hours on call presence to participate in a Queue on the *Brydges* on-call system. All calls will be routed first to the paid after hours on-call *Brydges* counsel, and if not immediately answered by the dedicated *Brydges* counsel, will be routed to any private bar lawyers or firms signed into the Private Bar Queue.

Private Bar counsel or offices who wish to participate will sign on to the system at the commencement of the evening and receive calls when the duty counsel lawyer is not available as a result of being on another call, in a situation of conflict, or temporarily indisposed. When a call is routed to a private firm, the firm will proceed with the call as if it had come into the firm as a call at first instance. Where the person qualifies for legal aid in the ordinary course, the Executive Director will waive the application of section 46 of the *Regulations* and permit a certificate to issue to the lawyer, or their firm.

The Automated On-Call system has an established protocol for police to follow in connecting the client with the lawyer. It is intended to help ensure the lawyer taking the call has all the information necessary to determine the jeopardy faced by the client and give effective legal advice. It is expected that counsel will be able to rely on that process in cross-examining police on the steps taken to fulfil their obligation to facilitate meaningful access to counsel. All calls routed through the automated system are required to follow this process and counsel will be able to rely on that protocol in the conduct of the case.

The Legal Aid Manitoba Automated *Brydges* On-Call Contact System tracks calls received. The routing of those calls and any future inquiry respecting a particular call routed to Private Bar counsel or a Firm will be referred to that firm for answer or resolution. It is expected that counsel that participate in this Queue will provide competent legal services.

Legal Aid Manitoba, as the owner/operator of the system, reserves the right to remove the Private Bar Queue and/or to deny or withhold access to participation in the Private Bar Queue in its sole discretion.

Any private bar counsel or firms that wish to have access to the Private Bar Queue may contact Gayle Zacharias at gazac@legalaid.mb.ca or by facsimile at 204-944-8582 to register.

Big Case Management Contact Change

Elizabeth Lutz has taken over duties as the contact person for all BCM matters. She can be contacted respecting these matters by email at ellut@legalaid.mb.ca, by phone at 204-985-9740, or by facsimile at 204-944-8582.

15 - 2012

NOTICE TO THE PROFESSION

Child Protection Matters

Management Council of Legal Aid Manitoba on May 22, 2012 directed that the following communication be given to all Area Directors:

All Area Directors in Manitoba are directed to strictly adhere to the merit test in 5.1 (independent of the “G” case) when assessing Child Protection matters for Trial Approval.

Changes to the Area Directors' Manual

The following changes to the Area Directors' Manual were also directed by the Management Council of Legal Aid Manitoba on May 22, 2012:

- **Guardianship Applications**

Section 5.3.1 (l) of the Area Directors' Manual which formerly read:

Applications have merit where... (l) guardianship is contested, and there is a reasonable likelihood of success; ...

is amended to read:

Applications have merit where... (l) guardianship is contested and the Area Director has determined that, in accordance with s. 2(1) of the *CFS Act*, there is a reasonable likelihood of success....

- **Social Assistance Appeal Board Applications**

Section **5.4.2(e)** of the Area Directors' Manual which formerly read:

Applications have merit where there is sufficiently concrete and compelling evidence that supports the Applicant's case, and it involves:

...

e) a Social Assistance matter where the Applicant has been wrongly denied Social Assistance, or an appropriate benefit, or is liable for a substantial overpayment

is amended to read:

Applications have merit where there is sufficiently concrete and compelling evidence that supports the Applicant's case, and it involves:

...

e) Social Assistance Matters at the “Social Assistance Appeal Board” where the

applicant has been wrongly denied Social Assistance, or an appropriate benefit, or is liable for a substantial overpayment;....

- Appeals in the Court of Appeal

A new section is added to **5.2 MERIT IN CRIMINAL MATTERS** to read:

5.2.7 Subject to s. 5.2.2(d), applications for persons seeking an appeal of conviction to the Court of Appeal and/or the Supreme Court of Canada have merit where:

a) the Executive Director determines that there is sufficient funding to cover this discretionary area of coverage and that

- i)** there is a likelihood of success; and
- ii)** issues of wrongful conviction exist; or
- iii)** important systemic issues affecting the Administration of Justice exist.

5.2.8 Subject to s. 5.2.2(d), applications for persons seeking an appeal of sentence to the Court of Appeal and/or the Supreme Court of Canada have merit where:

a) the Executive Director determines that there is sufficient funding to cover this discretionary area of coverage and that:

- i)** there is a likelihood of success; and
- ii)** the sentence imposed is outside of the range established by case-law for a particular offence.

A new section is added to **5.3 MERIT IN DOMESTIC MATTERS** to read:

5.3.7 Applications for persons seeking an appeal of a decision made in Family and/or Child Protection proceedings to the Court of Appeal and/or the Supreme Court of Canada have merit where:

a) the Executive Director determines that there is sufficient funding to cover this discretionary area of coverage and that

- i)** there is a likelihood of success; and
- ii)** it can be shown that the lower court judge considered the wrong factors or tests, grossly misapprehended the facts, or made some other palpable error of law.

16 - 2012

NOTICE TO THE PROFESSION

1. Cancellation of Certificates

It has come to our attention that some counsel may not understand Legal Aid Manitoba practice respecting payment of counsel on cancelled certificates. A concern has arisen due to counsel representing to the court that Legal Aid Manitoba will not pay their fees if a certificate is cancelled and they are not permitted to withdraw on a case. This is not correct.

A Certificate for Legal Aid Manitoba services is certification that the person named qualifies for legal aid services. The cancellation of the certificate means that person no longer qualifies for legal aid services. The cancellation also means no more compensable work may be done pursuant to that person's certificate.

Counsel retained by Legal Aid Manitoba to provide services to a client are named in the client's certificate, and are required to undertake to provide the services indicated in the certificate.

Legal Aid Manitoba's contract with counsel is not, however confined to the certificate. It is governed also by *The Legal Aid Manitoba Act and Regulations* and the general law relating to contract. There are a host of rights and responsibilities in the *Act* and *Regulations* that govern the relationship between counsel who apply to be on the Legal Aid Manitoba Panel of lawyers and Legal Aid Manitoba. Legal Aid Manitoba also manages its contracts with counsel in accordance with the law of contract.

The fact that the client's certificate for legal aid services and Legal Aid Manitoba's retainer agreement with counsel are not the same thing appears to have caused significant difficulty in recent cases. Counsel on the Legal Aid Manitoba Panel have a responsibility to be familiar with the *Act* and *Regulations*, these set out important rights and responsibilities that govern the relationship between Legal Aid Manitoba and counsel who participate on the panel. Legal Aid Manitoba also fulfils its contractual obligations to counsel and counsel should be familiar with these.

When a certificate is cancelled, counsel are under an obligation not to do any more work pursuant to the certificate, and to make a *bona fide* effort to get off the record to preserve the resources of Legal Aid Manitoba for use by persons who are eligible for legal aid services. The cancellation of the certificate, however, does not end the agreement between counsel and Legal Aid Manitoba respecting the case. Any formal withdrawal application is paid in spite of the cancellation. Furthermore, where counsel makes a *bona fide* effort to withdraw and counsel are not permitted to withdraw, counsel fees are paid in accordance with the terms of the Legal Aid Manitoba certificate to the point where the hearing is concluded or counsel is permitted to withdraw. This has been the historical practice of Legal Aid Manitoba without exception.

To act otherwise would result in liability on the part of Legal Aid Manitoba, since counsel has taken on an obligation (such as setting a trial date) in good faith and in reliance on our agreement. Legal Aid Manitoba has no intention of defaulting on its legal obligations in this manner. We ask that counsel govern the course of their representation in accordance with the good faith that Legal Aid Manitoba has demonstrated in this matter and ensure the court is apprised of Legal Aid Manitoba practice in this regard when seeking to withdraw on a case.

2. Junior Counsel

Legal Aid Manitoba at times provides a client with Junior counsel in extremely complex cases. Legal Aid Manitoba is not provided with additional funding for this purpose and the provision of Junior counsel is always subject to availability of funding. All Legal Aid Manitoba plans have very restrictive provisions in this regard that reflect the reality that when Junior counsel is provided, it is often at the expense of providing no counsel on another case elsewhere. Legal Aid Manitoba generally limits the provision of Junior counsel to Category A cases that are in the Big Case Management program, and even there provides such counsel only where a cogent case for the need of such counsel is presented.

When such counsel is provided, Legal Aid Manitoba issues a certificate that is payable at 50% of the Senior counsel billings in the matter. The Junior billings in some cases may represent Junior counsel doing ½ the hours of Senior counsel or Junior counsel doing the same hours for ½ the fees, or some other variant of this scenario.

Legal Aid Manitoba leaves it up to Senior counsel, Junior counsel, and/or the law firm involved, to determine how the total funds allocated are divided. Legal Aid Manitoba does not otherwise interfere where counsel determine to allocate the total fees in a case on a different basis than is specifically stated in the certificate. This, however, will not change how Legal Aid Manitoba issues and pays the certificate. It will be paid at ½ the billings attributed to the Senior counsel and it will be paid to the lawyer whose name appears on the face of the certificate. Any allocation of fees on a different basis than Legal Aid Manitoba provides is a private matter between the counsel.

3. Private Bar Cheque Processing

Effective **July 9, 2012**, LAM will begin processing cheques for the private bar on Mondays. The last Friday cheque run will be on June, 29, 2012. This will allow for faster delivery of cheques through the regular mail service. Please note that the volume of processing has significantly increased over the past few months and the Legal Accounts department will no longer be calling firms/lawyers to advise them that cheques are ready for pick up.

17 - 2012

NOTICE TO THE PROFESSION

On August 30, 2012, in an effort to increase access to justice and the efficiency of the court process, the Chair, on behalf of Management Council of Legal Aid Manitoba, directed the following temporary measures be implemented until March 31, 2013. The effect these measures may have on Legal Aid Manitoba, access to justice and court efficiency, will be reviewed by Management Council on or before March 31, 2013.

- **Child Protection Trial Approval:**

All Area Directors in Manitoba are directed to comply with the merit test in 5.1 of the *Area Directors' Manual (ADM)* when assessing Child Protection matters for Trial Approval. In those instances where it is determined that there is little likelihood of success, but "G" case considerations exist, trial approval shall be granted.

- **Mental Health Court Duty Counsel:**

Legal Aid Manitoba shall make counsel available to provide duty counsel services at the regular sittings of the Mental Health Court in Winnipeg.

- **Full Service Duty Counsel in Criminal Courts:**

Legal Aid Manitoba shall remove the financial restrictions imposed when providing duty counsel services, such as early guilty pleas and remands to "in custody" and "out of custody" applicants where possible.

- **Changes to the Area Directors' Manual:**

- **Limited Purpose Certificates:**

Counsel providing services to detained youth and/or adult accused at police detachments in complex criminal matters may seek coverage as a result of the following changes to sections 9.8, 9.15 and 9.16 of the *ADM*. Legal Aid Manitoba will continue to work with its stakeholders to ensure that the *Charter* rights of detained youth and/or adult accused are protected.

- **Sections 9.8, 9.15 and 9.16** which formerly read:

9.8 Where a certificate is issued for a limited purpose the Area Director assesses the number of hours anticipated to conclude the matter and authorizes representation for a limited number of hours.

9.15 The Area Director may exercise discretion and grant a Legal Aid Manitoba certificate retroactively where counsel has:

a) provided services necessary to secure a legal benefit for a financially eligible person,

- b) demonstrated that the person would otherwise have been eligible for legal aid without contributions,
- c) provided a Legal Aid application that was taken prior to the disposition and that otherwise complies with Section 2.1 above, and
- d) provided a satisfactory explanation for not submitting the Application prior to providing services.

9.16 A certificate granted pursuant to 9.15 above is not eligible for consideration in the BCM program or a Discretionary Increase.

are amended to read:

9.8 Where a certificate is issued for a limited purpose, including but not limited to providing services necessary to secure a legal benefit for a financially eligible person, the Area Director assesses the number of hours anticipated to conclude the matter, authorizes representation for a limited number of hours, and may authorize disbursements and expenses pursuant to sections 9.12, 9.13, and 9.14.

9.15 The Area Director may exercise discretion and grant a Legal Aid Manitoba certificate retroactively to counsel requesting coverage pursuant to section 9.8, or where counsel has:

- a) provided services necessary to secure a legal benefit for a financially eligible person,
- b) demonstrated that the person would otherwise have been eligible for legal aid without contributions,
- c) provided a Legal Aid application that was taken prior to the disposition, and that otherwise complies with Section 2.1 above, and
- d) provided a satisfactory explanation for not submitting the Application prior to providing services.

9.16 A certificate granted pursuant to 9.15 above is eligible for consideration in the BCM program or a Discretionary Increase.

- **Financially Motivated Major Crimes**

The operation of section 4.1.10 in its entirety is suspended. All Legal Aid Manitoba applications will be assessed without the requirement of following the additional steps outlined in 4.1.10.

- **Appeals in the Court of Appeal**

The operation of sections 5.2.7 and 5.2.8 in their entirety are suspended. Merit for all Legal Aid Manitoba applications for persons seeking an appeal of conviction and/or sentence to the Court of Appeal and/or the Supreme Court of Canada will be assessed by considering the basis of the right to appeal as provided in the *Criminal Code of Canada*, and current jurisprudence.

September 2012

18 - 2012

NOTICE TO THE PROFESSION

The Chair of Legal Aid Manitoba, on behalf of Management Council, has directed that the following letter replace Notice to the Profession #12, which was repealed September 20, 2012.

September 20, 2012

Keith McCaskill
Chief of Police
City of Winnipeg Police Service
P.O. Box 1680
Winnipeg, MB., R3C 2Z7

Kim Carswell
City of Winnipeg Police Service
151 Princess Street
P.O. Box 1680 Stn. Main
Winnipeg, MB., R3C 2Z7

Dear Sir and Madam:

RE: Provision of Advice to Youth in Custody

Further to the above noted matter, our organizations have been made aware of recent incidents where attorneys are being intimidated and threatened with arrest if they do not attend police detachments, even when youth clients have advised police that they are exercising their right to silence. Furthermore, lawyers that have attended to the police station to assist young persons have been threatened with criminal charges for giving advice to their clients to exercise their right to remain silent during the course of an interrogation. These actions by members of the Winnipeg Police Service are unacceptable.

Legal Aid Manitoba has canvassed all other Legal Aid plans across the country. The information received by Legal Aid Manitoba indicates that these tactics are non-existent in any other jurisdiction in Canada, including the other judicial districts in the Province of Manitoba.

Legal Aid Manitoba provides *Brydges* on call duty counsel services. The provision of *Brydges* services flows from the decision of the Supreme Court of Canada in 1990 which ruled that an individual has the right to be informed by the police of the existence and the availability of the applicable systems of Duty Counsel, and to be given an opportunity to consult with counsel.

The failure by the police to provide such information and the opportunity to consult with counsel constitutes a violation of an accused's *Charter* rights, and consequently any evidence obtained may subsequently be excluded by the Courts.

By their very nature, *Brydges* services are limited to telephone advice services. For example, the lawyer providing advice to a detained person is not, by doing so, agreeing to do a bail application, speak to sentence, or conduct a trial.

Similarly, unless specifically required by the terms of the retainer with the lawyer providing *Brydges* services, the lawyer has neither agreed to, nor is ethically obliged, to attend at a police detachment where the detained person indicates that they are exercising their right to remain silent, or when the detained person indicates that they wish to make a statement.

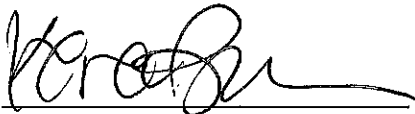
Counsel retained by Legal Aid Manitoba to provide *Brydges* duty counsel services are retained only to provide telephone legal advice to detained persons. This practice is consistent with s. 46 of the *Legal Aid Manitoba Regulation*:

A solicitor who represents or advises a person on a matter as duty counsel, and any solicitor who practises in association, or shares space or facilities, with the solicitor shall not be issued and shall not accept a certificate to represent the person in the matter unless the solicitor who wishes to represent the person obtains the approval of the executive director or area director.

Pursuant to Rule 2.02(1) and the commentary to Rule 4.01(1) of *The Code of Professional Conduct*, a lawyer's ethical obligations to a client can only flow from a retainer agreement, the nature of which is privileged. Furthermore, lawyers or articling students that are contracted with Legal Aid Manitoba to provide *Brydges* services to in custody clients are NOT RETAINED for the purposes of attending the police station.

We trust that you will give due consideration to the foregoing, and that this local practise will cease immediately.

Yours Truly,



KAREN WITTMAN
President
Manitoba Bar Association



DARREN SAWCHUK
President
Criminal Defence Lawyers Association



AL LONEY
President
Legal Aid Lawyers Association



MARIO J. SANTOS
Chair
Legal Aid Manitoba



GIL D. CLIFFORD
Executive Director
Legal Aid Manitoba

cc

The Honourable Andrew Swan
Minister of Justice & Attorney General

Michael Mahon
Assistant Deputy Attorney General

The Honourable Chief Justice G.D. Joyal
Court of Queen's Bench

Heather Leonoff
Director Constitutional Law Branch

The Honourable Chief Judge R.K. Champagne
Provincial Court of Manitoba

19 – 2013

NOTICE TO THE PROFESSION

The Management Council of Legal Aid Manitoba have approved the following changes.

New Conditions to be added to Certificates

Following consultation with Legal Aid Manitoba stakeholders, including members of the Judiciary, CDLA, MBA, and LALA, the following new condition has been added to every Legal Aid Certificate:

- **“Continuation:** Where, following a *bona fide* motion to withdraw from a Legal Matter covered by this certificate, an order is made that counsel continue as counsel of record, or provide representation as friend of the court, counsel shall be compensated for all reasonable services rendered in accordance with the tariff and/or any other applicable agreement.”.
- This condition makes clear that Legal Aid Manitoba will pay counsel in the ordinary course where they have taken a certificate in good faith, gone on the record, and have been ordered by a judge to continue assisting a person after cancellation of the Legal Aid Certificate.

The following new conditions have also been added to every Legal Aid Certificate:

- **“Funds held in trust:** Any funds held in trust which are payable to the client at the conclusion of a legal matter covered by this certificate, other than funds specifically excluded by the Area Director's Manual, may in the sole discretion of LAM be applied against an amount payable on this or any other certificate issued to the benefit of the person named in this certificate. Counsel retained by LAM to represent the person named on this certificate must receive written permission from LAM before dealing with such funds in any manner.”.
- This condition makes it clear that pursuant to Legal Aid Manitoba *Regulation s. 32 – 36* Legal Aid Manitoba has authority to apply funds held in trust that would otherwise be released to the client, against the cost of providing Legal Aid in the current matter(s) or other matter(s) where a balance remains outstanding. Some funds held in trust (such as child support) are specifically excluded from being used in this manner pursuant to provisions in the Area Director's Manual. Counsel who have funds in trust to the benefit of a legal aid client at the end of a case are obliged to get written permission from Legal Aid Manitoba prior to releasing such funds.

- **“No Trial without Authorization:** On all Domestic Tariff legal matters, counsel must provide a written opinion to the Area Director, and receive Area Director approval, prior to setting a matter for trial.”
- This condition emphasizes the requirement that counsel receive authorization from the Area Director prior to setting domestic matters for trial. The obligation is imposed by Legal Aid Manitoba *Regulation* Tariff of Fees, (Part 4 Fees in Domestic Matters Item 4). Area Director’s Manual section 5.1.8 provides the policy respecting such authorizations in family and child protection proceedings.

Extension of Notice to the Profession 17-2012

The temporary changes noted in Notice to the Profession 17 - 2012 have been extended pending a final review by Management Council.

Changes to the Legal Aid Application

The next printing of the Legal Aid Application will have changes on the last page of the application in that the Privacy Statement will be moved to a position above the signature line and a section will be added to capture the name and, where possible, the signature of any interpreter used in taking the application. The interpreter will be asked to certify that the contents of the application were fully explained to the Applicant in their language of choice.