

REVIEW OF LEGAL AID MANITOBA

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INTRODUCTION

There is a bit of wisdom in the old maxim “If it ain’t broke, don’t fix it”. My review of Legal Aid Manitoba (“LAM”) concludes without much doubt that LAM certainly “ain’t broke”. It is extremely well managed, has excellent governance “hygiene” and delivers a lot of service in a cost-effective way.

Yet, in spite of all of that good stuff, there is a fundamental issue that needs to be fixed. LAM is failing to deliver on its core mandate to provide legal services for those who can’t afford them. This report will offer some ideas on how LAM can do what it does well now, even better, but more importantly, how it can fully deliver its core mandate without adding any additional cost.

While my mandate (see next section) does **not** constrain my work by requiring the recommendations to be cost neutral, nor is this work supposed to be about saving money, it would be naïve to ignore the current fiscal environment in Manitoba. It would be a waste to produce a report and have it sit on a shelf because it requires significant new expenditures that are inconsistent with the Government’s fiscal framework. As such, I have tried to produce a report that can be implemented, if the Government chooses to do so, without any significant new expenditures and which includes opportunities to spend less and do more.

MANDATE FOR THIS REPORT

In May of 2018, I was asked by Manitoba’s Minister of Justice to review LAM and provide a report by the end of September of 2018 (subsequently the mandate was

adjusted and the deadline extended). The goal was to look at the current structure (which was last reviewed 15 years ago) and provide an opinion on whether it is optimal. The mandate document (attached as Appendix A to this report) is very broad and includes a look at the Management Council, the Advisory Committee, the legislation, the relationship to Government, the delivery model, the tariff of fees paid to private bar lawyers, the staff lawyer component, the appeal process, the eligibility guidelines, service delivery to remote communities, the Public Interest Law Centre and opportunities to expand service.

WE ARE NOT ALONE

A survey of media shows that how to deliver legal aid services is a hot topic across the Country. In the last few months, media have reported:

- 400 lawyers in British Columbia formed a group to demand the British Columbia government “properly fund legal services”;
- In Alberta, the government announced an additional 70 million dollars to fund their legal aid program;
- Legal Aid Saskatchewan (which is primarily a staff lawyer model) announced it was laying off 6 people and keeping 3 additional positions vacant;
- In British Columbia a proposal was being promoted by private lawyers who do legal aid work to “tithe” all lawyers requiring them to do some pro bono (free) legal aid work or donate an equivalent amount of money;

- Also in British Columbia, the Canadian Bar Association requested an additional 38 to 49 million dollars for legal aid.

THE PROCESS

LAM has been studied before and LAM does a lot of “self studying”. There are reams of paper (some of it available online). I read it all. I also met with the LAM Management Council (twice), the Chair of the Management Council (three times), the Executive Director and the Deputy Executive Director, the Director of the Public Interest Law Centre and the Chair of the Public Utilities Board. I met with lawyer representatives both of Legal Aid staff lawyers and private bar lawyers who do Legal Aid work.

Everyone I talked to was open-minded, forthright and helpful. Much of what is in this report was tested with those audiences. As a result, I believe more than a few “wacky” ideas were left on the cutting room floor and some very good new ideas emerged that are incorporated into this report.

To be clear, not everything recommended in this report was supported by everyone I consulted with, but I did get good advice and I generally accepted it.

WHY ME?

I started my legal career just when LAM was opening for business. I did some legal aid work as a private lawyer (not a lot) and then went to work at LAM where I stayed for 18 years, 8 of those as its Executive Director.

In 1998, while serving as the Assistant Deputy Minister in charge of Prosecutions, I chaired a task force that studied LAM and produced a report for its then Board of Directors. I spent 16 years as the CEO of the Law Society of Manitoba where part of my job description required me to try and ensure that Manitobans had access to the legal services they needed.

When I returned to private practice in 2014, one of my first files was a retainer to study the legal aid plan in another Canadian Province. I have also been retained to assist in the development of legal aid plans in Africa and Asia.

I suspect that background is what lead the Minister to ask and it has generally served me well in doing this work.

BACKGROUNDER

It is important to understand some of the history of LAM and the context in which they now operate. LAM was created by an Act of the Legislature in the early 1970's. Their mandate was a simple one: to provide legal services to those unable to pay for them themselves. Most provinces created legal aid programs around the same time with similar mandates.

That's pretty much where the similarity ends however. How those services are delivered, how the programs are governed, which legal services are covered and which are excluded and how financial eligibility is determined is remarkably different in every Canadian province.

Manitoba chose a mixed delivery model, hiring staff lawyers in community law centres supplemented by the case-by-case appointment of private lawyers who enrolled on a list called the Legal Aid Panel and were willing to take cases assigned to them. I will say more later in this report about the mixed delivery model.

In 1982, the Legal Aid Act was amended to create the Public Interest Law Centre (“PILC”), a branch of LAM intended to address systemic issues but with a broad mandate set out in the Act allowing them to take on cases “relating to an issue of public interest including, without restricting the generality of the foregoing, any consumer or environmental issue”.

As a result of an independent review completed in 2004, the Legal Aid Act was again amended this time with a focus on governance, replacing the Board of Directors with a smaller Management Council and creating an Advisory Committee. I will have more to say about both of those later in this report.

SOME NUMBERS

It is important for context to understand some of the important numbers related to LAM extracted from LAM data bases or from its annual reports. LAM collects a lot of reliable and useful data. This is unusual in my experience with other similar organizations, where the data is often of poor quality or doesn't exist at all. Here are some key numbers:

- Just over 34,000 people apply for legal aid assistance annually and that number has been pretty stable for the last five years;

- About one-quarter of the applications for legal aid help were rejected in 2017/18. The percentage of rejections has been slowly increasing over the last five years;
- The bulk of legal aid resources are devoted to criminal law. Almost 24,000 adult criminal matters were opened in 2017/18. There were also another 3,000 youth matters (youths charged with offences under the *Youth Criminal Justice Act*) opened that year. Compare that caseload to a combined total of 8,000 family, child welfare, civil and immigration matters that were opened in 2017/18. It points to a clear picture of where legal aid spends most of its money. That number is even more dramatic when you add in the criminal duty counsel assists (42,000 of them annually) and the 19,000 drop-in and phone assists which are mostly criminal on-call matters. All put together, less than 10% of legal aid assists are for non-criminal matters;
- There are approximately 110 staff employed by LAM, and about 60 of them are lawyers;
- LAM revenue comes primarily from the Province and the total spent by LAM in 2017/18 was just over 39 million dollars. This is a large number but less dramatic in the context of the overall Justice budget of almost 600 million dollars in 2017/18 with much larger allocations for policing, corrections and Courts;

- Expenditures by LAM are split pretty much evenly between the private bar component and the staff component. The staff expenditures relate primarily to salaries and benefits;
- LAM spends about 5.5 million dollars annually on administration which, as a percentage of total expenditures, compares favourably with other legal aid plans in Canada.

THE FEDS

While delivery of legal aid services is a Provincial responsibility, almost from inception, the Federal government contributed to the cost. Criminal legal aid was supported because of the Federal government's responsibility for criminal law. Family law was supported, in part, because of Federal jurisdiction over divorce. Initially, the Federal government paid an open-ended 50% of the provincial expenditure for criminal legal aid and provided a fixed amount each year for family law services.

This arrangement ended years ago as criminal expenditures grew dramatically. In part, the Federal government wanted to cap its exposure because it had no control over delivery and was understandably uncomfortable with writing a blank cheque each year. It is, however, worth noting that often expenditure is driven by criminal law changes over which the provinces have no control. In 2017/18, the Federal government contributed approximately 6 million dollars to LAM's expenses.

THE MANITOBA LAW FOUNDATION

The Manitoba Law Foundation receives the income from lawyers' trust accounts and distributes it in accordance with its governing legislation. That legislation requires that half of its annual revenue go to LAM. The actual amount of money can fluctuate significantly as it is a function of activity in lawyers' trust accounts and of interest rates. In 2017/18, LAM received approximately 2 million dollars from The Manitoba Law Foundation. This will almost certainly go up significantly in 2018/19 because of rising interest rates.

CLIENT CONTRIBUTIONS

LAM has an eligibility model whereby clients nearing the top of the financial eligibility guidelines contribute to some or all of the cost of the legal services they receive. Because the vast majority of LAM clients are the poorest of the poor, that revenue potential is quite limited. In 2017/18, LAM collected \$800,000 from client contributions. This amount includes costs awarded by courts and recovered in LAM cases, and the revenue from real property sold by legally aided clients, often as the result of a family matter funded by LAM.

OTHER FUNDING SOURCES

LAM is interested in diversifying its funding and in the course of meeting with the Management Council Chair, he identified four potential new revenue sources. I note these below with some brief comment but have not explored them because each requires consultation and it is not my role to speak for the LAM Management Council or

the government in engaging in that kind of a consultation. These are the revenue ideas that were suggested:

1. Paying some of the victim surcharge to LAM. While this certainly represents a potential revenue source and there is an obvious connection between the legal aid expenditure and this surcharge, it is taking existing Government money which is used elsewhere and essentially reallocating it to LAM. It should be noted also that after these ideas were discussed the Supreme Court of Canada came out with a decision suggesting that victim surcharges are unconstitutional. This and suggestion 3 below will need to be reviewed in the context of that decision as well.
2. Requiring mandatory pro bono (free) work by the private lawyers. Those lawyers unable or unwilling to do that pro bono work would be required to contribute a fixed amount representing the cost of a pro bono case. While requiring lawyers to do cases for free (there are 2,000 lawyers in Manitoba) would have a significant impact on the cost of delivery of legal aid services, the government may not want to create a mandatory "donation" program to fund a public service.
3. Creating a special legal aid surcharge on criminal matters which would essentially require the "bad guy" to contribute to the cost of legal aid services. While this would be new money, research would need to be done to determine how the cost of implementation compares to potential revenue and whether there realistically is room for an additional surcharge (remember that those in the criminal justice system are disproportionately low income Manitobans).

4. Creating an initiative where lawyers doing work for legal aid for free would receive a tax receipt for that work. This might be an inducement that saved LAM money but it would also reduce tax revenue to the province.

THE MIXED DELIVERY MODEL

While all legal aid plans in Canada could be called mixed delivery models, most are primarily staff lawyer programs or, primarily, private bar models. The beauty of a true mixed delivery model such as we have in Manitoba is as follows:

- It is a very effective cost-control mechanism. If staff lawyers collective salary demands (legal aid lawyers are part of a union called the Legal Aid Lawyers' Association) get too high or their productivity gets too low, more work can be shifted to the private bar. If the private bar demands tariff increases that are unreasonable, more work can shift to staff. Going "on strike" to raise the tariff or to raise salaries is not a very effective option when there are alternative service providers available;
- The private bar offers expertise in some areas of law where staff lawyers don't see enough of it to develop their own expertise and vice versa. LAM has the ability in a mixed delivery model to appoint the right lawyer for the right job;
- LAM demand can be volatile. When volume becomes unmanageable for staff lawyers, the private bar offers an immediate safety valve without the

need to invest in permanent infrastructure which may prove redundant if demand were to drop down again;

- A mixed delivery model allows (with some limits) choice of counsel. A poor person need not feel that, because they are poor, a particular lawyer is being foisted upon them. (While the quality of both legal aid lawyers and private bar lawyers on the legal aid panel is quite good, this is about perception, not reality).
- In a location where insufficient volume exists to justify a staff office, the availability of a private bar lawyer in the community allows for cost-effective delivery of services in that community. In parts of the province where there are no private lawyers willing or able to do legal aid work, a staff lawyer office is an option to bring service to that community.

My recommendation is that the mixed delivery model be retained and supported.

The current model is, however, under threat. For whatever reason, a dramatic shift of caseload away from staff to the private bar has occurred and what had been a pretty even split of cases between the two alternative delivery models has now dramatically tilted towards the private bar. In 2017/18, 72% of cases went to the private bar. This significantly undermines many of the advantages set out above. When asked about this shift to the private bar, LAM management offered three explanations:

1. Allowing choice of counsel means clients generally get to choose who they want and they are currently choosing more private bar than staff lawyers;
2. Staff lawyers are a fixed resource. When staff lawyers have reached capacity, new cases must go to the private bar;
3. Legal aid's costing models show that for many types of cases, private bar lawyers are considerably cheaper.

LAM has recently taken steps to reduce choice of counsel in some matters and that will help shift more work back to staff but, unless the other impediments are addressed, the problem will continue and for the reasons set out earlier, the highly desirable mixed model is at risk. Later in this report, I recommend changes which will address the other two impediments.

THE TARIFF

The tariff of fees paid to the private bar is set by the Province by way of Regulation. The tariff currently is based on an hourly rate of \$80 per hour which has not materially increased in the last ten years. While normal hourly rates for lawyers vary greatly, it is fair to say that \$80 is well below what most lawyers ordinarily charge their private clients.

This is especially so because the hourly rate is often irrelevant and the effective hourly rate paid turns out to be much lower. The tariff sets "block fees" for most matters which caps the hours that will be paid for a particular matter. The result is that,

unless lawyers are able to carry on high volume practices, with the resulting efficiency of that high volume, in most circumstances the effective hourly rate is much lower than \$80.

As noted earlier, the Government sets the tariff of fees paid to private bar lawyers by Regulation. This was no doubt intended to keep in check spending on private bar fees. It is, in my opinion, an unnecessary and ineffective constraint. Spending will be constrained by the budget Legal Aid is given and micro-managing the tariff is not an effective cost-control tool. The Executive Director and Management Council already have the authority to raise the block fee the tariff provides in appropriate cases and they frequently use that authority.

More importantly, why not let the experts manage the tariff? This allows them to make adjustments quickly that may be proving an impediment to service, unfair or unreasonable. It allows them to quickly make adjustments (up or down) when law or procedure change, to reflect whether more or less work is now required.

It is noteworthy that LAM has always been free to set the financial eligibility guidelines as they see fit (an authority that could also significantly drive expenditure if not exercised responsibly) and has always used that authority prudently, guided by the resources available. **I recommend that the tariff of fees be removed from the Regulations and the Legal Aid Act be amended to give the Legal Aid Management Council the authority to set the tariff as they see fit.** If this change is made, it should result in less frustration for the private bar that participate in Legal Aid, a more appropriate tariff and flexibility available to those with the knowledge, data and skill to manage the tariff effectively. It will not, in my view, result in any unreasonable increase in expenditure

and could, in fact, have the opposite effect if changes in law or procedure result in fewer hours being required to complete certain tasks.

One particular anomaly with the tariff is that the hourly rate is not reflective of experience or seniority. In the private sector, junior lawyers have a significantly lower hourly rate than more experienced ones. It might make better sense to create two or three hourly rates based on experience and seniority. This might allow more experienced lawyers to be paid more and encourage them to participate more actively in legal aid without incurring additional expense. Tinkering with the tariff is complex and can sometimes have unintended consequences. For that reason, **I recommend that LAM give serious consideration to the viability of a tariff that rewards seniority with a higher hourly rate.** If my recommendation to amend the Legal Aid Act is accepted, they will be in a position to implement this kind of change if they deem it advisable and even if the government decides not to turn control of the tariff over to the Management Council, LAM will be in a position to recommend this to government if they think it is viable. To be clear a graduated hourly rate should not cost more because more experienced lawyers should be more efficient (fewer hours spent). It also means that very junior lawyers could be paid less than \$80 per hour.

It should be noted that some private bar lawyers clearly do make a good living doing legal aid work. These are high volume practices doing criminal, youth or family legal aid matters and they produce some remarkably high dollar amounts paid to individual lawyers on the Legal Aid Panel each year. This information is published as part of the Public Sector Compensation Statement in the Legal Aid Annual Report. In 2017/18,

for example, one criminal lawyer was paid \$558,000 and one family lawyer \$321,000. These numbers are not typical and also are misleading for three reasons:

1. A lawyer may bill and get paid in one year for work done over several years;
2. A particular lawyer may have a legal aid certificate in hand, but most of the work on it is done by others in her firm. Payment for all the work is made to the nominal lawyer but she may be sharing that money with a small army of junior lawyers in her firm;
3. These numbers represent fees and disbursements and the latter is not really income to the lawyer.

All that said, it is abundantly clear that volume is the key factor in making a decent income doing legal aid work. I will come back to that point later in this report because it creates an opportunity to reduce expenditure.

STAFF LAWYERS

Staff lawyers are organized into offices throughout the Province. In Winnipeg, multiple offices allow LAM to manage conflicts. Staff lawyers and other staff including paralegals, articling students and administrative support staff are employed as civil servants and participate in government pension and benefit programs. The lawyers are represented by their union, the Legal Aid Lawyers' Association ("LALA") and the other staff are represented by the Manitoba Government Employees Union ("MGEU").

For many years, Legal Aid staff lawyers were paid significantly less than Crown lawyers. This was understandably seen by them as unfair. More recently, the salary scale is pretty much on par with Crown lawyers and when coupled with their benefits and excellent pension plan, represents a pretty reasonable compensation package.

Productivity is measured using a number of different models depending on the purpose for the data. One model is intended to allow for easy comparability with the private bar. Staff lawyers are issued Legal Aid Certificates, the same way the private bar is, and once the work is completed, their reports are “taxed” and a fee estimated which is what would have been paid to a private bar lawyer for the same matter handled in the same way. Annual “billing” targets are established for staff lawyers and lawyers’ performances are reviewed in part based on what they produced. In 2017/18, the billing target was \$130,000. The average staff lawyer “billed” \$153,000.

LAM also calculates what each staff lawyer costs them using the lawyer’s actual salary and benefit costs plus a portion of the overhead (support staff, rent etc.) of each office. The average cost of a staff lawyer using that formula is \$187,000 which appears to be more than their average annual billings. In my view, this tells us not that staff lawyers are inefficient but that that particular system of measurement has some artificiality and arbitrariness about it.

A less artificial model would be to use the data available to produce a real hourly rate i.e.: a rate that is the actual hourly cost of that particular lawyer. For example, we know the average lawyer costs \$187,000. Divide that by the number of “billable” hours

(hours recorded on LAM work) recorded in a year. When LAM set its current billing target, it used a target of 1,625 billable hours per year. Assume an average lawyer actually works exactly 1,625 billable hours. The hourly rate would be \$187,000 divided by 1625 or \$115 per hour. If a lawyer takes 5 hours to complete a particular case, we know it actually costs legal aid \$575 to have that work done. In my view, this methodology produces much more meaningful data on cost of staff lawyers. LAM does in fact use this methodology but it is not clear what use it makes of it. To me, it is the best measure of what it costs for each particular case a staff lawyer handles and by analysing that data across the system valuable management information can be gleaned. I am not suggesting that the primary method now used doesn't have value for some purposes, but I do think knowing the real cost also is of value. **I recommend LAM shift away from its current costing model to a model that calculates actual cost as its primary tool for measuring staff lawyer costs.**

There is another issue with the "billing" targets used by legal aid. It is hard to understand why every lawyer has the same target. A first year lawyer's salary is much lower than a very senior one, presumably because with experience comes efficiency. It might be reasonable to expect significantly higher "billing" from your most senior and most expensive lawyers. Most law firms have higher billing targets for higher paid associates and so should LAM. **I recommend that LAM adjust to productivity targets for staff that are scaled to seniority.**

FINANCIAL ELIGIBILITY GUIDELINES

LAM assesses financial eligibility based on a set of guidelines based on family size. These guidelines are based on gross income which is not the best guideline to use because disposable income, not gross income, is what is available to be used to pay legal fees. Gross income is used by all legal aid plans in Canada because it is relatively objective and easy to determine and apply and I do not, for that reason recommend a change.

LAM recently increased their guidelines and introduced a new category of eligible clients that are required to repay the full cost of the legal services they receive. This new category has brought their guidelines very close to the Statistics Canada low income cut-off levels. LAM believes their guidelines should be increased a bit further yet, so they match the low-income cut-off guidelines. LAM estimates this could be accomplished for as little as \$250,000 each year.

Unlike the tariff, guidelines are entirely in the control of LAM itself and constrained only by the resources available to them. This report contains a number of recommendations which would produce savings far in excess of the \$250,000 LAM management believes is necessary to increase its guidelines. Should these recommendations be adopted, LAM would certainly be free to increase the guidelines to the level they feel is appropriate.

Earlier in this report, I said LAM was not meeting its mandate. This is because there are many Manitobans who do not qualify for legal aid yet clearly cannot afford the legal services they need. This is especially acute in the area of family law. As

noted, recently LAM added a layer on top of existing guidelines and clients whose gross income falls into that layer are offered legal aid services and asked to pay back the full cost through monthly payments. Even with this excellent initiative, there is a significant gap in the family area. The cost of private legal services can be very high and the Courts are full of self-represented litigants too “rich” for legal aid (even with new guidelines) but clearly too “poor” to afford the private legal services they need.

A look at the numbers set out earlier reveals that more legal aid service dollars are going to criminal and youth law and less and less of its resources go to family law. In part, this is because criminal clients are generally poorer clients. In part, this is also because the criminal Courts will intervene and appoint counsel at a much higher cost if legal aid doesn't step up. Whatever the reason, there is a huge disparity and a failure to provide service to those who need it in family law matters.

Fortunately, there is a relatively easy fix. The expanded eligibility guideline initiative has produced some intriguing data. The cost to provide that significantly expanded service is essentially nothing. This is because clients eligible for this service can pay for it and are, in fact, paying for it themselves. They benefit from the dramatically cheaper legal aid tariff and the ability to pay in monthly instalments. That said, they are paying the cost themselves and legal aid is essentially a “broker” helping them buy cheap legal services and allowing them to make affordable monthly payments.

A similar initiative was piloted by The Law Society of Manitoba. In that pilot project, the Law Society paid lawyers approximately two-thirds of their ordinary hourly rate, uncapped (no maximum amount). Over the four years that pilot project ran,

amazingly the total expenditure by the Law Society was zero. That's because there was very little administrative cost and very few bad debts. The cash flow from the monthly payments exceeded the payments going out to the lawyers every year. In its first year of its expanded financial eligibility guidelines, LAM had exactly the same experience. Based on The Law Society of Manitoba's pilot project and LAM's own experience, it would be possible to significantly increase the legal aid guidelines to close the gap between those now eligible for legal aid and those unable to afford the legal services they need in family law matters (who are often forced to self represent). This would allow LAM to finally fulfill its mandate and do so without any significant additional expenditure.

In order to cover the small number of bad debts expected and the administrative cost of that initiative, LAM could ask those in the program to pay a small administrative fee in addition to the cost of the actual service they received.

I recommend that LAM significantly expand its eligibility guidelines on a full cost recovery basis with a small premium to cover administrative and bad debt expenses to ensure that everyone in Manitoba who can't afford the legal service they need is covered.

GOVERNANCE

By statute, LAM is governed by a Management Council of seven to nine members (there are currently nine members). The Chair is appointed by Government as are five other members. The remaining three are appointed from a list of seven names submitted by The Law Society of Manitoba. Council members have a variety of backgrounds in business, the community, the academy and law. By statute, three

members of the Management Council must be non-lawyers. The Management Council is supported by an Advisory Committee of eight people. Almost all of the advisory committee members currently are lawyers (7 of 8 members).

The Advisory Committee is appointed by the Management Council with a mandate to provide advice to the Council. They have a particular responsibility to consult on a review of the tariff which must take place every two years. Some members of the committee expressed frustration that their recommendations to increase the tariff are not followed noting that the last significant tariff increase was in 2008.

The Advisory Committee is supposed to include persons from northern and rural Manitoba and reflect the cultural diversity of the Province as well as including persons familiar with issues commonly faced by low income individuals. One appointee to the advisory committee is to be selected from a list of three criminal defence lawyers submitted by the Manitoba Branch of the Canadian Bar Association (“CBA”), one from a list of three family lawyers submitted by the Manitoba Branch of the CBA and one from a list of three names submitted by the Legal Aid Lawyers Association. The current advisory committee appears not to be diverse at all, and is basically seven lawyers and an Assistant Deputy Minister from Manitoba Justice. When asked about this odd composition, the Legal Aid Management Council had four explanations:

1. Who better than lawyers who act for low income people to be familiar with their issues?
2. Previous versions of the Advisory Committee with more community representatives were ineffective;

3. The current Advisory Committee adds value because of its expertise;
4. It would be difficult to find clients or former clients with the skills needed.

I found those responses unsatisfactory and had an excellent dialogue with the Management Council about it. I advanced two arguments. First, the lawyers on the committee, especially those with legal aid practices, will naturally reflect their self interest and not so much the public interest. Second, legal aid serves 34,000 clients every year and it is hard to fathom that not one of them had the skills needed to be on an Advisory Committee.

I recommend that the Legal Aid Management Council rethink who sits on the Advisory Committee and ensure that at least half of that Committee are people without a significant self-interest at play. I further recommend that at least two of these people be clients or former clients.

I looked closely at the work of the Management Council and it is clear that their leadership has a good grasp on modern governance principles. Management Council work is almost always about policy and strategy and they take seriously their responsibility to monitor organizational performance. They stay out of the weeds of management, but hold their senior managers accountable for outcomes, which is exactly what they should be doing.

Management Council has an adjudicative role as well, hearing eligibility and taxation appeals (taxation is the term used when a private lawyer's bill is reviewed and some times reduced). The current LAM Chair has worked hard to streamline that process

to enable timely and effective decision making. I am satisfied that the appeal process works very well and commend LAM for fixing what was an inefficient system.

LAM speaks in its annual reports regularly about stakeholder engagement and says it governs in consultation with stakeholders. This is not true. The only real stakeholders consulted are lawyers. Most glaringly, the most important stakeholders, the clients, play no role in governance whatsoever and are never formally consulted. LAM serves tens of thousands of people each year but LAM has no process to engage with them. No clients participate on the Management Council or as indicated on the Advisory Committee.

In my view, this is not just about optics. Users will have a lot of useful ideas about the scope of coverage, how eligibility is assessed, the quality of service, access to justice, the delivery model, the use and allocation of scarce resources and LAM's strategic objectives and priorities.

In my opinion, it is no coincidence that virtually every single new dollar that goes to LAM is used to increase the tariff or to increase salaries while financial eligibility guidelines lingered for far too long at levels well below the poverty line.

Make no mistake, the tariff and salary adjustments were entirely appropriate and justified but the focus on putting money there instead of the financial eligibility guidelines can't help but be influenced by those who are consulted and those who make those important decisions. Aside from the recommendation to include clients on the Advisory Committee, **I also recommend that LAM undertake annual public accountability meetings where public input is sought about the work and strategic**

priorities LAM adopts. In addition, I recommend annual focus groups be held specifically with clients to get their input into LAM's policy making work.

MANAGEMENT

LAM has a team of very experienced senior managers. I reviewed a series of reports on strategic outcomes and looked at the data they collect and how they use it.

Here are my observations:

1. The size of the senior management team is appropriate for the size, scope and complexity of their work;
2. The administrative cost, at least as a percentage of overall cost, is reasonable and on the low end of all Canadian legal aid plans;
3. LAM has a remarkable data set. They gather a tremendous amount of management information and, more remarkably, use it to drive decision making. They are good analysts, they collect the right data and use it effectively. Every time I asked for management information data, they were able to supply it usually instantly. This is very rare and very commendable.

It is also noteworthy that all but one of the senior management team of LAM are lawyers. While lawyers primarily deliver LAM's services, the skill set required to manage is not expertise in the law. An organization run and governed and advised almost entirely by lawyers is at risk of focussing too heavily on the perspective of lawyers and not nearly enough on the public interest and the needs of the clients. **I recommend that as vacancies occur, LAM reflect on the skills required of that position and reflect**

on whether the senior management table could be enhanced by a wider diversity of backgrounds and skill sets.

THE STAFF

Earlier I spoke about how staff lawyers' productivity is measured. I noted that productivity targets are somewhat arbitrary and do not reflect differences in experience and salary. Because of the mixed delivery model, LAM knows what it costs to send a case to a private lawyer. For that reason, every additional case a staff lawyer takes on produces a saving because staff lawyers are a fixed cost.

This creates a significant opportunity. The practice of law requires judgment. A lawyer assesses how much time they need on each file to deliver competent service. There is no absolute guideline or limit. You can never be fully prepared or exhaust every option. Instead, a lawyer has to determine when they hit the sweet spot of enough work and not overworking or underpreparing a particular file. While I have no reason to think LAM lawyers don't do that, their situation as salaried employees is different than private bar lawyers. A private lawyer doing legal aid work is generally paid more, the more cases they are able to handle. This motivates them to manage volume. As noted, the annual report about what private bar lawyers get paid clearly shows that the path to success is volume.

Both of these factors (volume = profitability for private bar lawyers and the more cases done in house the greater the cost saving) create exciting opportunities which will be discussed shortly.

Earlier in this report, I noted that legal aid staff are employed as civil servants. This is something legal aid employees value because it brings with it the civil service benefits and, more recently, legal aid lawyers had been able to achieve salary parity with Crown counsel. There are no doubt some down sides as well. LAM is subject to hiring policies and vacancy management practices that constrain their ability to manage effectively. It is a system designed for fairness, cost control and transparency but it also is a barrier to the nimbleness necessary to manage a complex organization like LAM effectively.

One obvious example is legal aid's staffing pattern. Because LAM has good data, it is able to identify opportunities to shift resources where they are most effective. Take for example an area of law where it is more expensive to have the private bar do the work. LAM could save money by hiring additional staff lawyers to do that work, but doing so requires planning, creating new staff year positions, budget adjustments, all of which usually take a very long time and the opportunity or advantage may change or disappear altogether before the change is even in effect.

Another example is services that can be delivered cheaper by lower cost providers like students or paralegals. LAM is constrained in doing this by the need to go through a re-classification process and other steps to make that happen. These can be onerous and time consuming. This is a deterrent to LAM's ability to innovate and undoubtedly means good ideas don't get advanced.

Most importantly, LAM now has a rigid salary structure that does not permit much, if any, flexibility. Good performance is not financially rewarded, and high volume

producers are paid the same as low volume producers. Because of the opportunity to save significantly every time a staff lawyer takes a case that would otherwise go to the private bar, the opportunity to motivate staff lawyers by rewarding them for increased productivity, by paying, in addition to their salary, a share of that saving, is attractive but is not possible in the current environment.

The average cost of a file sent to the private bar is \$630. If LAM were to set up a productivity target for staff lawyers based on their current productivity levels, by office, and then pay the lawyers a \$300 bonus for each additional case they took on in that office, legal aid lawyers could earn more and legal aid could save a lot of money.

It is noteworthy that this proposal is on an office-wide basis rather than on an individual lawyer one. I believe that productivity can be best managed if colleagues share the “profits” and are, therefore, more likely to motivate the less productive lawyers in that office. While either model (paying the lawyers or paying the offices) works, the bonus by office in my view holds the most opportunity for saving.

In order to make that happen, legal aid lawyers and support staff should become employees of LAM itself and not government employees. To be clear, this does not give legal aid a free hand to spend as it sees fit on salaries. The constraint is the global funding provided. LAM is freed up to manage those resources (something they have a good track record of doing) and using the most cost-effective delivery model they have available.

I recognize there are many details to consider. It may be possible for legal aid employees to continue to participate in government pension and benefit plans, even

though they are not civil servants. Discussions will also need to take place with the MGEU and LALA, but none of that should impede this from happening and the opportunity to manage better and save very significant amounts of money should not be ignored. For example, if this were to motivate staff lawyers to each pick up an additional five cases per month, it would save LAM over one million dollars each year. **I recommend that, after appropriate consultation with LALA and MGEU, the appropriate legislation be amended to make LAM the employer of their staff (both lawyers and other staff).**

BLOCKS OF CASES

Earlier in this report, I noted that the road to making a decent income doing legal aid work as a private lawyer is volume. LAM should consider leveraging that concept. Instead of sending cases to private bar lawyers on an ad hoc basis, LAM could bundle cases into larger groups. If a lawyer knows they are getting the next 25 cases in their area of practice, they would almost certainly be willing to discount the fee for those cases.

I recommend LAM conduct a form of tender, offering blocks of cases to lawyers willing to do them at a reduced fee. Because of the efficiency of doing the work in volume and the certainty of cash flow, LAM could save money distributing cases in blocks rather than one off at a time. It should be noted that in order to achieve this, it might be necessary to interfere with choice of counsel. While choice of counsel is certainly desirable, it is not a necessity and the benefit of the savings that would be achieved outweighs the disadvantage of interfering with full choice of counsel.

PUBLIC INTEREST LAW CENTRE

PILC was created in 1982 through an amendment to the Legal Aid Act. The concept was to create a vehicle for groups to receive legal aid services (up to then legal aid was provided to individuals only). The idea was the client groups could access legal services to address systemic issues rather than fund individuals each time a particular problem arises. A group could use PILC to develop an advocacy strategy, to get a legislative amendment, mount a constitutional challenge, participate in an important regulatory proceeding or conduct “test case” litigation.

PILC gets its funding from a wide variety of sources. They get an annual grant from the Manitoba Law Foundation. The amount varies but, in recent years, the grant averages around \$200,000 per year. They get donations from individuals and organizations (not a lot). PILC gets grants from a wide variety of funders and other sources like foundations. Sometimes they get cost awards when they are successful in Court. They get donations in kind through a pro bono initiative of the Manitoba Bar Association. This is valued by PILC at approximately \$215,000 per year. Some regulatory tribunals (the National Energy Board, the CRTC and the Public Utilities Board are examples) provide funding to some interveners to cover a portion of their legal costs.

PILC also provides services to individuals through direct representation by staff paralegals of individuals before the Immigration and Refugee Board, the Residential Tenancies Commission and other administrative tribunals. Provincial funding covers the salary and benefits of some employees and other contract staff, but PILC revenue offsets a great portion of that. The offset varies greatly from year to year but the net cost to

government seems to average out somewhere between \$250,000 and \$350,000 annually.

There are other public interest advocacy centres in Canada but many of them are not attached to a legal aid plan. That model might be viable in Manitoba as well because a relatively small amount of PILC's funding comes from government. Because of its government connection, few private donors have stepped up to endow initiatives or give large donations. There is no doubt that to many donors, PILC might otherwise be an attractive place to endow. This cannot happen over night but if given sufficient time PILC could put in place the modest additional financial infrastructure to enable it to replace government funding with private donations, and operate like many other public interest law centres as a free standing organization.

There are benefits to the association that now exist with LAM. First, a synergy exists between LAM and PILC. Staff lawyers and paralegals in the trenches are often well positioned to identify systemic issues that need to be addressed. The ability to cross refer and to share information and resources has some value. If PILC is to become free standing it will need time to establish a mechanism to retain the benefits of cross referrals when it leaves LAM. With time this will not be hard to do.

Even more importantly, PILC needs to build up its financial infrastructure before it can thrive as a free-standing organization. There are two components to that infrastructure. PILC needs to build relationships with the donor community. That engagement will lay a foundation for future "asks". Secondly, PILC needs to set up a more robust governance infrastructure.

PILC's statutory mandate set out earlier is very broad and virtually any type of matter would qualify for their services. Many groups would be thrilled to have PILC represent them. It is very clear that PILC has an excellent reputation in the legal community and among Manitoba's social service and consumer organizations as well as among the Indigenous community. As a result, PILC has to be selective and cannot take up most of the opportunities that present themselves.

That important case selection process is far too "insular". While PILC does engage in community consultation, it tends to be generic. There is no consultation on specific case selection, only on strategic priorities. The director of PILC, in consultation with his staff, recommends cases to LAM's Executive Director. The Executive Director approves the recommendation (he can refuse but almost never does). To be clear, I am not suggesting there is anything wrong with the cases currently selected. In fact, my conclusion after reviewing PILC's current portfolio of cases and their historic one, is that they cover a broad spectrum of poverty law, environmental law, Indigenous issues and consumer issues. My point is that this comes about because of two individuals exercising their discretion and judgment.

In my opinion, PILC would be better off and certainly in a stronger position to move towards a free-standing (non-government funded) organization if it had an advisory committee that had meaningful input into case selection. Keep in mind that a decision by PILC to take on a case has significant consequences to whoever is on the other side. If that was me, I'd be more comfortable knowing a broad-based, highly credible group of individuals were involved in case selection.

I discussed this idea with PILC and with the LAM Management Council. They agreed it made sense and shortly after I met with the Management Council, the Council began to move forward on it. They have developed terms of reference for an advisory committee and an appointment process. While it is nice to have people take your ideas seriously, neither the terms of reference developed nor the composition of the advisory committee the Management Council created are what I envisioned and I do not believe that the model which the Management Council is currently in the process of implementing will be effective.

First, the mandate of the advisory group they created is once again generic. It invites input on case selection criteria and generally on the case portfolio, but does not contemplate the committee having any input into individual case selection. While I strongly believe that this advisory group should not be a decision making body, I think it is critical that the advisory group have input into individual case selection.

Second, I am concerned about the composition of the advisory group and how it is selected. The Management Council is now in the process of seeking nominees from the Law Society of Manitoba, the Faculty of Law at the University of Manitoba and the Manitoba Bar Association. They contemplate having the chair of the Management Council and the Executive Director participating in this group as well. In my view, this is simply the same old gang who currently make decisions about the activities of LAM and runs the risk of being ineffective as a result. It will not give outsiders looking at the work of PILC confidence that case decision making is being made with input from a broad spectrum of perspectives. My vision contemplates a group of highly respected individuals from the business community, the Indigenous community, the social services community

and other professions that might have backgrounds, expertise and skills beyond a bunch of lawyers. If the PILC advisory committee is to truly be successful in laying a foundation for an independent PILC and for a PILC which has credibility among potential funders, the model which the Management Council is currently implementing, in my view, will not achieve that. I do not know who has been selected by LAM and it may be that the individuals they are appointing will be exactly the kind of diverse group of people I am recommending, but I worry that by going to the same old gang for nominees, that may not happen. **I recommend that Management Council reconsider the PILC advisory committee mandate and look at those currently being appointed to determine if those they propose to appoint will achieve the goal of credible external scrutiny of cases selected.**

I recommend PILC begin to build the things it needs to move to a free standing organization (not part of LAM) including a mechanism for referrals to and from LAM, a solid governance structure and relationships with the donor community.

CONCLUSIONS AND RECOMMENDATIONS

1. I have concluded that LAM is appropriately governed. The Management Council focuses on the right things and discharges its appeal function efficiently and fairly.
2. I believe that LAM is very well managed. They have good data and use this data to make their management decisions. The senior management team is about the right size and the administrative expenditure is appropriate.

3. I recommend that the mixed delivery model be retained and supported and that steps be taken to restore the balance to a more even split between the private bar and staff lawyers.
4. I recommend that the tariff of fees be removed from the Regulations and the Legal Aid Act be amended to give the Legal Aid Management Council the authority to set the tariff as they see fit.
5. I recommend that LAM give serious consideration to the viability of a tariff that rewards seniority with a higher hourly rate.
6. I recommend LAM shift away from its primary costing model and rely more on their secondary model that calculates actual cost of staff lawyer case work.
7. I recommend that LAM set productivity targets for staff that are scaled to seniority.
8. I recommend that LAM significantly expand its eligibility guidelines on a full cost recovery basis with a small premium to cover administrative and bad debt expenses to ensure that everyone in Manitoba who can't afford the legal service they need is covered.
9. I recommend that the Legal Aid Management Council rethink who sits on the Advisory Committee and ensure that at least half of that Committee are people without a significant self-interest at play. I further recommend that two of these people be clients or former clients.

10. I recommend that LAM undertake annual public accountability meetings where public input is sought about the work and strategic priorities LAM adopts. In addition, I recommend annual focus groups be held specifically with clients to get their input into LAM's policy making work.
11. I recommend that as vacancies occur, LAM reflect on the skills required of that manager and reflect on whether the senior management table could be enhanced by a wider diversity of backgrounds and skill sets.
12. I recommend that, after appropriate consultation with LALA and MGEU, the appropriate legislation be amended to make LAM the employer of their staff (both lawyers and other staff).
13. I recommend LAM conduct a form of tender, offering blocks of cases to lawyers willing to do them at a reduced fee.
14. I recommend that Management Council reconsider the PILC advisory committee mandate and who is on it to ensure it achieves the goal of credible external scrutiny of case selection.
15. I recommend PILC begin to build the things it needs to move to a free standing organization (not part of LAM) including a mechanism for referrals to and from LAM, a solid governance structure and relationships with the donor community.