

ImmQuest

"Qui bene interrogat bene docet" "He who questions well teaches well"

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Making a Refugee Claim and Legal Aid

Edward C. Corrigan, B.A., M.A., LL.B.

Currently in Ontario the hourly pay rates under Ontario Legal Aid are as follows: less than 4 years experience \$77.56; 4 to 9 years experience \$87.26; 10 years and over \$96.95. This sounds good until you realize that the lawyer's office overhead must be also paid under this fee schedule.

The Legal Aid system is designed to cover overhead only and to help novice lawyers gain experience and to help establish their law practices. The theory is that once they are established they can

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Challenges of Intercompany Transfer Policy

Cobus Kriek

Immigration and Refugee Protection Regulation indicates that foreign nationals can be transferred to Canada and obtain a work permit to work in Canada without a positive Labour Market Opinion from Service Canada, if these foreign workers can "create or maintain significant social, cultural or economic benefits or opportunities for Canadian citizens or permanent residents".

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Please send your questions to *ImmQuest* care of Mario D. Bellissimo at mdb@obr-immigration.com. If you have any questions you would like asked of either Citizenship and Immigration Canada or the Canada Border Services Agency send it along and we will ask on your behalf.

Making a Refugee Claim and Legal Aid

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charge normal lawyers fees which typically run between \$300 to even \$500 per hour for a skilled legal professional.

Lawyers who charge these rates can make a decent living and have the financial resources necessary to run a proper law practice. Overhead for a law office typically exceeds \$100 per hour. With the cost of running a law practice it means that on virtually every refugee case lawyers lose money if they do the work on a legal aid certificate.

The time allocated on a Legal Aid certificate is limited to 16 hours of preparation before the refugee hearing. This includes preparation of a Personal Information Form (PIF), preparation of Identity documents, all other related matters including dealing with Legal Aid, Citizenship and Immigration, the Immigration and Refugee Board, Community Services and Social Assistance and other bureaucracies, all client communication, and including preparation for the hearing which includes preparation of country document briefs and the lawyer familiarizing themselves with the country conditions and the individual's refugee claim is limited to a total of 16 hours. If the refugee claimant requires the services of a translator this doubles the length of time required in interviewing the client, preparing documents and preparing the claimant for the hearing.

One Certificate Per Family

Legal Aid normally issues only one certificate per family. This rule means that the same 16 hour Certificate must cover the preparation of a claimant, their partner and sometimes a large number of children. Sometimes a lawyer has to prepare 8 Personal Information Forms on one 16 hour certificate. Sometimes claimants' have different stories that need to be brought forward within the same refugee claim.

If the lawyer wants to perform their duties at the standards set by the profession and give the claimant proper representation this is a difficult, if not impossible task, on the basis of a 16 hour legal aid certificate. This problem is especially true if interpretation is

required and there is more than one claimant. Legal Aid does cover the time spent at the hearing and covers normal disbursements including, copying, hotel and travel. However, some disbursements must be approved by Legal Aid and this can create difficulties.

If the time spent on preparing a file goes over the 16 hour limit then a special request for discretion must be made before the lawyer can be paid. This request for discretion will delay payment of the account for three months or more. Ontario Legal Aid in the past has been reasonable in paying justified time spent on a file that went over the 16 hour limit. However, they seem to be getting stricter on authorizing discretionary payments.

The longer the claimant is in the system the more time is used up on the Certificate. There are delays on hearing some refugee claims that now are exceeding two years. The claimant is understandably concerned about these delays and will make periodic inquiries and requests for letters to be sent to the Immigration and Refugee Board inquiring as to when their hearing will take place so that they can get on with their lives. All of this work takes time and quickly uses up the time on a 16 hour Certificate.

Post Hearing

A Legal Aid Certificate does not cover time spent on a file after a hearing. Sometimes the Member requires that the lawyer prepare written submissions to summarize the refugee case, review the pertinent country material and review the applicable law. This request is an order from the Member of the Board and must be followed. However, there is no guarantee that Legal Aid will pay for the work. This creates a huge disincentive in preparing time-consuming submissions.

If there is a negative decision a new certificate must be obtained for all Judicial Reviews and Appeals. An opinion of the merits limited to three hours must be prepared and placed before a Committee of Legal Aid who will consider the request for an Appeal. For a second certificate to be issued it must be approved by an Area Committee composed of local lawyers.

Working for free, and then not even getting paid for the work that you do at a rate that would only cover your overhead, is a strong disincentive to representing refugees on a Legal Aid Certificate. It certainly puts a lot of pressure on the lawyer to cut corners and not provide the representation that a client deserves. However, if

the lawyer is not getting paid for the work or makes no money on the file how else do you expect the lawyer to perform? When a lawyer takes on a case on a legal aid certificate there is no guarantee that their overhead costs are going to be covered.

This financial issue is the reason why the vast majority of established lawyers refuse to work on the basis of a Legal Aid Certificate. They cannot survive. For those lawyers who represent refugees for humanitarian and compassionate reasons this motivation comes into direct conflict with financial reality and the need to make a living. This conflict is a difficult dilemma if a lawyer wants to help people and represent refugees that have frequently come from horrible situations.

Quality of Representation

In an article titled, "Refugee Roulette: Disparities in Asylum Adjudication," published in November 2007 in the *Stanford Law Review*, the success rate for unrepresented asylum seekers in the United States was 16.3%. The success for represented asylum seekers, regardless of the quality or status of the representation, was 45.6%. The success rate for claimants represented by qualified, specialized lawyers varied between 89 and 96%. This study relates to asylum claims in the United States, however, the basic principles should also apply to Canada.

The importance of getting quality professional representation should not be underestimated. Getting represented on a Legal Aid certificate may not be the bargain the refugee claimant hopes for if the result is a negative decision.

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Challenges of Intercompany Transfer Policy

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In paragraph 5.29 of Chapter FW of the Immigration Manual significant economic benefit is mentioned as a separate and distinct benefit from social and cultural benefits. In Paragraph 5.30 it is mentioned that "Examples of indicators of 'significant benefit' include: general economic stimulus (such as job creation, development in a regional or remote setting or expansion of export markets for Canadian products and services) and advancement of Canadian industry (such as technological development, product or service innovation or differentiation, or opportunities for improving the skills of Canadians)". In paragraph 5.31 in Chapter FW 1 of the Immigration Manual it is mentioned that this policy was created for companies to "improving the management effectiveness, expanding Canadian exports, and enhancing the competitiveness of Canadian entities in overseas markets." This implies that paragraph 5.30 and 5.31 is the definition of significant economic benefit, which is also defined as "providing an important or notable contribution to the Canadian economy".

In Section A and E of paragraph 5.31 of the Immigration Manual also describes the general requirements of the foreign workers that must be met in order for a work permit to be issued under this Regulation. Some of these requirements include the following: The foreign worker must have worked at the foreign branch subsidiary for at least one year in the preceding three years in a similar position and are taking a position in an Executive, Senior Managerial or Specialized Knowledge Worker and the transfer must be for a temporary period only, etcetera. In Section F of paragraph 5.31 there is a slight change and it is indicated that the foreign worker "must be working in a similar position" which implies that the person must currently in a "similar position," not just working in one of these positions for one year in the preceding three years.

There are challenges with this policy which could be grouped into four types: