LEGAL AID MANITOBA
AREA DIRECTORS' MANUAL

Approved by Management Council April 1, 2009

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MISSION STATEMENT

Legal Aid Manitoba is committed to ensuring access to justice for eligible low-income individuals and groups in Manitoba.

AREA DIRECTORS' MANUAL

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INTRODUCTION

Revisions Approved by Management Council on May 24, 2016

The Area Directors' Manual and the Practice Notes related to its use were reviewed and revised as a result of Strategic Planning Process. This revision took place over four years from 2005 to 2008, culminating in a completely revised manual and a new process for intake.

Particular attention has been given to providing a clear, concise description of the duties performed by the Area Directors (ADs) and their staff. Time lines have been implemented on the assumption that financial information maintains its currency for no longer than six months. The systems department has provided invaluable assistance, both in creating processes to accommodate the changes made to operations, and in guiding us towards accommodation of the electronic processes that will eventually replace the physical file system we currently use.

Overall, the intention of this revision is to clarify and facilitate the decision-making and communication aspects of those crucial tasks.

CHAPTER 1: GENERAL DUTIES

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The Area Directors (ADs) have their own legislated mandate and authority. They are responsible for acting within the guidelines provided by the *Legal Aid Manitoba Act* and *Regulation*. This responsibility is in addition to, and complementary to, their accountability to the Executive Director (ED). Documentation of the various decisions made by the ADs and open communication with Senior Management respecting decisions made and the rationale behind them is crucial if Legal Aid Manitoba (LAM) is to fulfill its mandate.

Chapter 1 describes the General Duties of an AD and who may perform them.

1. GENERAL DUTIES

1.1 The ED, Deputy Director (DD), Legal Director (LD), Senior Area Director (SAD), and in the temporary absence of the AD, a lawyer appointed by the Management Council (MC) to be Acting AD, may all perform the duties of any AD.

1.2 The AD administers the Legal Aid plan with respect to the matters indicated in subsections 10(1), 10(2), 11(1), 11(2), and 11(3) of Legal Aid Regulation 225/91 (as am.) and shall ensure:

1.2.1 communication with the public, private bar, and LAM staff is professional and courteous;

1.2.2 Solicitor - Client Privilege and all legislated obligations respecting confidentiality of client disclosed information are rigorously maintained at all times;

1.2.3 eligible individual applicants in the AD's district receive competent and timely legal assistance, in accordance with available local resources, and in accordance with the guiding principle of equal access to justice for all Manitobans;

1.2.4 legal assistance is provided in accordance with the *Legal Aid Manitoba Act* and *Regulation*;

1.2.5 LAM policies and guidelines are followed;

1.2.6 the Government of Manitoba policy on French language services is followed, written forms and communications are provided in the French language on request, and oral French language services are provided in districts designated as “French language service areas” where possible;

1.2.7 all information relied upon in fulfilling the duties of the AD is retained in the file in a legible form. Where material is removed from a file a clear indication of the location of that material is maintained with the file;

1.2.8 staff assisting with the AD’s duties are properly supervised;

1.2.9 office staff are always aware how to contact another AD in case of emergencies; and

1.2.10 all correspondence with persons in custody is sent in an envelope clearly marked “SOLICITOR CLIENT PRIVILEGE” on both sides of the outside of the envelope in red ink and initialed by the AD or their designate in red ink.

PRACTICE NOTES: GENERAL DUTIES

APPEALS FROM DECISIONS OF THE EXECUTIVE DIRECTOR (ED)

Decisions made at LAM must comply with the requirements of the *Act* and the *Regulation*, as well as with the policies established by the MC and set out in the AD Manual. The Appeal Committee reviews the ED's decisions on the basis of "reasonableness".

The reasonableness standard is well known in administrative law. It means the Committee will not decide an appeal on the basis of whether the Committee might have decided differently. Instead it will focus on whether the ED's decision is justified under the *Act*, the *Regulations* and LAM's policies, whether it is transparent and intelligible and whether it falls within a range of possible, acceptable outcomes that are defensible in respect of the facts and law. [See *Dunsmuir* (2008) SCC 9 (CanLII)].

The Committee is not obliged to follow its previous decisions. As with all decisions at LAM, each case is decided on its own merits. However, consistency is very important; appeals that have similar facts and circumstances should end up with similar results.

In Appeal No. 22 the Appeal Committee outlines its application of the "reasonableness" standard on a case by case basis.

APPEALS DEEMED TO HAVE BEEN ABANDONED:

The decision in Appeal No. 24 indicates that where applicants do not participate diligently, the Appeal Committee may treat the appeal as having been abandoned and may dismiss it on that basis alone.

*see also comments made in Appeal No. 47, Appeal No. 48, Appeal No. 58, Appeal No. 05.

AVAILABILITY OF LAM FORMS IN FRENCH

LAM forms have been translated into French and are available for use on the Legal Aid home database at usr/legal/home/share/Forms.

CHAPTER 2: APPLICATIONS

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Most requests for legal aid are directed to Legal Aid Manitoba (LAM) through an application form. The form is created by LAM and the information sought from an Applicant by way of the form is the minimum personal information required to properly fulfill the Area Director's (AD's) responsibilities. The information is required in a timely fashion to ensure accurate decisions respecting eligibility are made. The time lines and other requirements in this section are intended to be enforced; exceptions to them are to be made rarely and by the AD personally.

2. APPLICATIONS

2.1 Applications on a current Legal Aid Application Form that has been signed in the preceding 60 days and submitted with:

a) sufficient information to determine the substance and limits of a certificate;
b) sufficient information to assess financial eligibility;
c) sufficient information to determine merit; and
d) the prescribed application fee, or waiver, where applicable;

are ordinarily assessed for eligibility within 14 days.

2.1.1 Applications that do not satisfy the criteria in 2.1 result in a request for further required information or explanation of why it is not available. These applications are either designated as pending further information, or rejected.

2.1.2 Applications disclosing income $2,000.00 less than the applicable yearly full eligibility guideline or higher, include documentation from a credible 3rd party source (pay stubs from employment, letter from employer or accountant, Income Tax documents, etc.).

2.1.3 Applications that do not satisfy the criteria in 2.1.2 result in an immediate request for the missing information or an explanation of why it is not available. These applications are either designated as pending further information or rejected.

2.1.4 Applications that remain pending further information after 30 days are rejected.

2.1.5 Applications that have been rejected pursuant to 2.1.4 will be reconsidered without a further application if the requested information or explanation is provided within 60 days of the date of issuance of a Rejection.

2.1.6 In exceptional circumstances an AD may personally waive any or all requirements of the formal application process and authorize representation on information the AD determines to be reliable. The representation authorized shall not exceed what is reasonably necessary in light of the exceptional circumstances. Each exercise of this discretion must be reported to the ED or his designate.

PRACTICE NOTES: APPLICATIONS

UNSIGNED APPLICATIONS

An application which has not been signed may not be entered into the system. Where an application has been taken over the phone and the interviewer has complied with Telephone Application Procedure, the application is deemed to be signed.

APPLICATIONS TAKEN OVER THE TELEPHONE

There are situations where a client is unable to attend to a Drop-In Centre to have an application taken in person.

RESPONSIBILITY FOR TAKING THE APPLICATION:

The Area Office closest to where the client is currently residing (being held) will take the application.

PROCEDURE:

- Where an application is taken (in writing) over the phone the interviewer will read the entire backing and waivers to the client. The client must confirm that he is agreeing to the conditions and would sign the application. The verbatim responses by the client must be kept by the interviewer. An Attestation form is completed by the interviewer.

- The original application will be sent (faxed, mailed or electronically sent) to the client for signature and the notes and attestation taken during the phone interview scanned and attached to the file electronically. If the application is not returned within 14 days then the application shall be deemed to be abandoned by the client. If the application cannot be signed because there is no ability to get a copy to and from the client in a reasonable period of time, the application is to be treated as if it were signed. If the application is not signed then the attestation may take the place of the actual client signature where the application cannot be signed.

- A faxed or electronically reproduced signature is acceptable.

- Where the application pertains to charges or a matter in another area of the province, the application and any supporting material will be entered, scanned and emailed to the appropriate area office.

APPLICATIONS REFERRED TO THE EXECUTIVE DIRECTOR (ED)

Applications, or requests for amendments on active certificates, for the following are directed to the ED:

a) Civil lawsuits involving damages;
b) Appeals to the Court of Appeal or the Supreme Court of Canada;
c) Test cases;
d) Charter challenges to legislation;
e) Wrongful Conviction proceedings;
f) Applications under section 745.6 Criminal Code (Faint Hope Applications);
g) Coverage for Groups and Public Interest Cases;
h) Court appointed counsel other than under s.25 of the *Youth Criminal Justice Act* and section 34 of the *Child and Family Services Act*; and
i) Cases and Appeals in Federal Court and the Federal Court of Appeal.

APPLICATIONS FOR APPEALS TO

- **THE SUPREME COURT OF CANADA**
- **FEDERAL COURT OF APPEAL**
- **MANITOBA COURT OF APPEAL**

A number of issues regarding the information required to properly process these applications were commented on in the Appeal Committee's decision in Appeal No. 41.

Issues raised by the Appeal Committee in "*C.C.*" have been addressed in Notice to the Profession 22-2014.

CONFLICTS OF INTEREST

Where an actual or apparent conflict of interest between an Applicant and the AD comes to the attention of the AD, the application will be immediately referred to a different AD for consideration.

APPLICATION FEE

Every application must be accompanied by a $25.00 application processing fee, an assignment of $25.00 from a prisoner's account, or a valid waiver. Only one fee, assignment, or waiver is required per application. The application processing fee must be paid by cash, money order, certified cheque, or lawyers trust cheque.

APPLICATION FEE WAIVERS

The application processing fee is waived for:

a) persons in receipt of social assistance;
b) women applying from women's shelters;
c) persons applying from Mental Health facilities;
d) adults in full-time attendance at a secondary or post-secondary institution and in receipt of student aid or student loans;
e) remand prisoners who were dependent on social assistance at the time of arrest;
f) prisoners who have signed a form assigning $25.00 from the inmates account;
g) youths whose parents/legal guardians (or parent/legal guardian) are in receipt of social assistance benefits;
h) persons incarcerated as a result of a sentence under the *Youth Criminal Justice Act* applying for a review or an appeal;
i) infants who are a ward of a Child and Family Service Agency (including children subject to a Voluntary Placement Agreement);
j) court appointed counsel; or
k) persons in receipt of disability payments, regardless of source, where the disability payment makes up more than 75% of their gross income.

The AD may waive the application processing fee:

a) if the Applicant indicates an intention to apply for social assistance and appears to be eligible for social assistance;
b) if a young person is denied release and reasonable efforts to have the parents/legal guardians pay have been unsuccessful; or
c) where payment of the fee would cause undue delay or hardship.

Where release is arranged for a person in remand custody, an assignment form is not used, and the representing counsel and Applicant are advised that the fee must be paid within 14 days of their release or their application will be rejected.

APPLICATION FEE REFUNDS

The AD may refund the application processing fee where it appears to have been collected in error or where the Applicant withdraws the application prior to it being entered into LAMAS.

2.1.6 NATURE OF SECTION

Section 2.1.6 grants the AD/ED discretion to waive compliance with the formalities of the application process in exceptional circumstances; however, the language of the AD Manual places restrictions on the scope of discretion granted in this section. The policies set out in the manual are the product of careful deliberation by the MC in consultation with and with the advice of LAM management and the MC's Policy Committee. An unlimited power to ignore them would make the AD Manual meaningless. The policies in the AD Manual should only be waived carefully, exceptionally and in an objectively defensible manner.

*see comments starting at page 7 in the Appeal Committee's decision in Appeal No. 21.

CHAPTER 3: COURT APPOINTED COUNSEL

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There are limited situations where Legal Aid Manitoba (LAM) routinely assumes conduct by providing counsel pursuant to an appointment by the courts. These situations are outlined in this section. Court appointments that are made in situations other than those set out in this section must be dealt with by the Executive Director (ED) or his/her delegate personally.

3. COURT APPOINTED COUNSEL

3.1 Appointments of counsel made by a Judge pursuant to section 34(1.1) of The *Child and Family Services Act* result in the immediate appointment of a lawyer.

3.2 Directions for the Attorney General to provide counsel pursuant to section 25(4)(b) of the *Youth Criminal Justice Act* result in the immediate appointment of a lawyer.

3.3 A request of the court pursuant to section 672.24 and 672.5(8) of the *Criminal Code* will result in the immediate appointment of a lawyer. An application shall be taken and an assessment of financial eligibility made, where possible. The cost of representation is recovered from the Applicant, their trustee or committee, or the Crown.

PRACTICE NOTES: COURT APPOINTED COUNSEL

AMICUS CURIAE (CHILD WELFARE)

Pursuant to section 34 of *The Child and Family Services Act* children over the age of 12 may, upon direction of the court, instruct counsel. When LAM receives an Order from the court advising that a lawyer is to be provided to the child pursuant to section 34(2), a certificate is issued in accordance with *The Department of Justice Act and Government-Funded Legal Representation Regulation.*

SECTION 25 OF THE *YOUTH CRIMINAL JUSTICE ACT*

Section 25 (4)(a) of the *Youth Criminal Justice Act* authorizes a Judge to refer a young person to the Legal Aid program to obtain counsel. This referral will result in an application being taken and will be dealt with in the ordinary course.

Where a young person is unable to obtain counsel, section 25(4)(b) authorizes a Judge to order the Attorney General to provide counsel.

In order for a section 25(4)(b) order to be made, an application must first be taken and rejected. A section 25(4)(b) appointment made before a Legal Aid Application has been rejected will not be honoured by LAM unless it will result in undue delay or detriment to the defence of the accused youth.

OTHER COURT APPOINTED COUNSEL

All other decisions to grant certificates or otherwise fund Court appointed counsel must be referred to the ED immediately for assessment.

CHAPTER 4: FINANCIAL ASSESSMENTS

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The focus of this section is determining the financial resources available to a person to fund their legal matter. Certain monies are excluded on the basis that they are properly needed for extraordinary necessities or exigencies. Other monies are included because they are reasonably available in spite of the need for further steps to make them actually available. In order for a proper assessment to be made, the information relied upon by this section must be less than six months old.

4. FINANCIAL ASSESSMENTS

4.1 FINANCIAL ASSESSMENTS GENERAL GUIDELINE

4.1.1 Every application will be assessed for financial eligibility prior to a certificate issuing.

4.1.2 Financial assessments require examination of all available financial resources that are reasonably available to fund the legal matter. Indebtedness may restrict the availability of financial resources to fund the matter and must be considered alongside an Applicant's income and assets.

4.1.3 Financial eligibility is based on the number of individuals in the family unit. The family unit is defined as one or, where applicable, two adults cohabiting in a married, or common-law relationship and:

a) any child(ren) under the age of 18 who are in the legal care and control of the adult(s);

b) any child(ren) over the age of 18 who reside with, and are dependent on the adult(s) because they are enrolled in a full-time education program, and may be eligible to receive child support based on current legislation and jurisprudence;

c) any individual who is 18 years of age or older, and

i) resides with the adult(s);

ii) is related to the adult(s) by biology, marriage/common-law relationship, or adoption; and/or

iii) is dependent on the adult(s) for their personal needs and care because of a physical or mental impairment.

4.1.4 The income of a common-law partner or spouse that resides with the Applicant is deemed to be reasonably available to fund the legal matter in issue as long as the common-law partner or spouse is not adverse in interest in the legal matter.

4.1.5 Adult persons cohabiting for over one year are presumptively living common-law for the purposes of financial eligibility for legal aid. Self-declaration or other evidence of common-law status may also be conclusive where cohabitation is less than one year.

4.1.6 Income for a financial assessment means gross income. Tips, gratuities, bonuses, earned interest, annuities, personal income drawn from a business, spousal and child support and similar resources are all included in income for the financial assessment.

4.1.7 Daycare expenses, maintenance payments actually paid out, monies garnished, the Canada Child Benefit (CCB), money received as a foster parent, grants or bursaries received for education programs, and residential school settlements are not included in income.

4.1.8 Where an Applicant under the age of 18 is in the care of a parent or guardian, or is a ward of an agency, the responsible person or agency has a legal obligation to assist the Applicant. The financial resources of that person or agency are reasonably available to the Applicant and are included in the assessment of financial eligibility.

4.1.9 An asset is reasonably available to fund a legal matter if it:

a) is not reasonably needed to secure food, shelter, clothing, ongoing training, education programs, or a means of income to an Applicant or their immediate family;

b) can be borrowed against, used as security for a private retainer, or otherwise readily converted into cash;

c) is not security for a debt greater than its value that will become due upon its disposition;

d) is reasonably capable of funding the costs associated with the legal matter on a private fee basis;

e) is available to an Applicant in the reasonably foreseeable future; or

f) Cash and assets readily turned into cash (securities, bonds, etc.), shall be considered for financial assessment purposes as income.

4.1.10 Where an application under section 462.34 of the *Criminal Code* would not prejudice the defence of an Applicant, cash and/or property in the Applicant's possession on arrest, and seized as proceeds of crime, is deemed to be reasonably available until a judge has denied such an application.

4.1.11 Where a legal settlement or monies otherwise exempted under this section have been converted into an asset, such as a motor vehicle or house, the asset shall, for purposes of financial eligibility for legal aid, be treated as any other asset.

4.1.12 Where an Applicant is not reasonably cooperating with the process required for a proper financial assessment, the Area Director (AD) has the discretion to reject their application on this basis alone. This discretion is exercised rarely and only in clear cases.

4.2 FINANCIAL ELIGIBILITY GUIDELINES

4.2.1 Legal Aid Manitoba (LAM) assesses eligibility as set out in the chart below.

Family	**Fully Eligible** (per Notice to the Profession 61-2025)	**Agreement to Pay** (per Notice to the Profession 61-2025)
1	$31,500	$43,500
2	$39,500	$57,500
3	$48,500	$67,500
4	$58,500	$78,500
5	$66,500	$86,500
6	$75,000	$95,000
> 6	$83,500	$103,500

4.2.2 These guidelines are established by Management Council (MC) and reflect the present ability of LAM to provide ongoing funding for eligible low-income Applicants. An AD has discretion to waive strict compliance with these guidelines to prevent an apparent injustice or, with reference to all aspects of the Mission Statement of Legal Aid, to ensure the guiding principles of Legal Aid are fulfilled. The AD should avoid any marked or regular departure from the guidelines. Each exercise of this discretion must be reported to the Executive Director (ED) or his designate.

4.2.3 Applicants on social assistance are presumptively financially eligible for legal aid. Where a social assistance recipient has equity in real property, a Charge on Land is required so the cost of representation can ultimately be recovered upon the sale of the property.

PRACTICE NOTES: FINANCIAL ASSESSMENTS

INTRODUCTORY NOTE

The guidelines are straightforward. They set out maximum annual incomes that can be earned by different sized family units in order to qualify for legal aid funding.

The guidelines play a critical role in LAM's management of the funding it receives. LAM operates under severe financial constraints. It has a finite amount of money available to fund cases. Every dollar LAM spends on one case means there is one less dollar to spend on another. The tariffs set out in *Legal Aid Regulation* (Man. Reg. 225/91, as amended) fix the amount of money LAM pays to lawyers for different types of cases and different steps within a case. At the same time, LAM seeks to fund as many deserving cases as it can.

In the face of these competing priorities the guidelines set dollar caps to determine who is and who isn't financially eligible for legal aid. The caps reflect the "present ability of Legal Aid Manitoba to provide ongoing funding for eligible low-income Applicants". Of necessity they are set at very low income levels.

*see comments starting at page 6 in the Appeal Committee's decision in Appeal No. 16.

4.1.3 DETERMINATION OF FAMILY SIZE

Equal periods of Physical Care and Control of Children

Where parents share equal periods of physical care and control (50% each), the family size is determined by crediting 1/2 of the total number of children, (whose care and control is being shared equally between the parties) and, where applicable, using the mid-point between the two financial guidelines.

For example:

- a mother sharing equal periods of care and control of one child, would be a family unit of 1.5 with a financial eligibility guideline of $25,000.00.
- a father sharing equal periods of care and control of two children, would be a family unit of 2, (1 adult + 1/2 x 2 children)

4.1.6 NATURE OF SECTION

For the purpose of determining financial eligibility - daycare expenses, maintenance payments actually paid out, monies garnished, the universal child care benefit, the child tax credit, money received as a foster parent, grants or bursaries received for education programs, and residential school settlements - are not included in income.

Past practice and the AD Manual dictate that only daycare and maintenance payments **actually made** can be deducted and the terms "daycare" and "maintenance" are seen as legal terms of art limited to payments specifically and expressly made as such. The AD Manual does not contemplate payments that are merely analogous to maintenance or daycare.

In the Appeal Committee's decision, (starting at page 7) in Appeal No. 21 the Committee exercised its discretion to make a finding that payments that are analogous to maintenance or daycare, should not be included in income for the purpose of determining financial eligibility.

4.2.2 NATURE OF SECTION

4.2.2 provides some latitude to move away from the strict application of the guidelines. The Appeal Committee's decision, (starting at page 6) in Appeal No. 16 examines how the Committee approaches a discretionary decision made by the ED.

*see also comments starting at page 5 in the Appeal Committee's decision in Appeal No. 46 and Appeal No. 71.

EXERCISE OF DISCRETION

LAM's governing legislation and the AD Manual provide ADs and the ED with the discretion to waive certain aspects of the AD Manual; however, that discretion is not unlimited. Even where a discretionary power is granted, the language of the AD Manual places restrictions on its scope. The policies set out in the AD Manual are the product of careful deliberation by the MC in consultation with and with the advice of LAM management and the MC's Policy Committee. An unlimited power to ignore them would make the AD Manual meaningless. The policies in the AD Manual should only be waived carefully, exceptionally and in an objectively defensible manner.

*see comments starting at page 7 in the Appeal Committee's decision in Appeal No. 21.

FOSTER PARENTS

Foster parents generally receive funds in that capacity only to provide for the needs of the foster child(ren) in their care. They do not receive funds as pay for employment. The funds foster parents receive to provide for the needs of foster children are not included in income. Since the money received is sufficient to cover the child(ren)'s needs, the child(ren) is(are) not counted when calculating family size.

FOSTER TREATMENT HOMES

Foster treatment programs sometimes hire foster treatment teams to parent high needs foster children. The teams or parents in these homes are often paid a substantial salary. In these situations, the funds received for the child(ren) result in their not being counted in family size, but the income is taken into account when assessing financial eligibility.

CHAPTER 5: MERIT ASSESSMENTS

Revisions Approved by Management Council on November 27, 2018

The assessment of merit is the most complex and difficult task faced by an Area Director (AD). A clear record of the rationale for the decision must be kept for audit and appeal purposes.

Section 5.1 provides the general principles for merit assessment to be applied in every case where the manual does not otherwise deem merit to exist.

Section 5.2 deals with merit in criminal cases. Some offences have merit as a result of governmental funding requirements, statute, or case law. In other cases, a full assessment of merit is required. Generally speaking, where the government or its agents have intervened with likelihood of significantly restricting the freedom or livelihood of a person, merit will exist.

Section 5.3 deals with merit in domestic matters. Some domestic matters have merit because they involve the welfare of children, the integrity of the family, the well-being of a dependent family member, or because of case law. Domestic matters are usually amenable to the tests set forth in 5.1 above and involve balancing the nature of the interest involved with the likelihood of success and the cost of proceedings.

Section 5.4 deals with merit in civil matters. Again, there are civil matters where governmental action can result in significant restrictions of liberty or the ability to continue a livelihood. Such cases are likely to have merit. The tests in 5.1 are the general guiding principles for these cases which must be balanced in the same fashion as 5.3 above.

Section 5.5 deals specifically with the determination process for applications which fall under the mandate of the Public Interest Law Centre (PILC) of Legal Aid Manitoba (LAM).

Section 5.6 deals specifically with the determination process for applications which fall under the mandate of the University of Manitoba Community Law Centre (UMCLC).

5. MERIT ASSESSMENTS

5.1 MERIT ASSESSMENTS GENERAL GUIDELINE

5.1.1 A Legal Aid certificate will not issue without a determination as to merit. The AD maintains on each file a clear and concise statement of the basis for the assessment as to merit and all materials upon which that assessment as to merit is based.

5.1.2 The AD assesses the reasonable likelihood of success and the potential benefit to the Applicant to determine if the cost of providing coverage is justified in light of the current resources available to LAM. The general test is whether the matter is "significant enough that a reasonable person of modest means would pay a lawyer to represent them".

5.1.3 The AD determines merit on the basis of the nature of the matter as disclosed in pleadings, and any summaries, reports, or opinion letters submitted on behalf of the Applicant or disclosed by reasonable investigation.

5.1.4 The AD considers the availability of other forms of assistance, as well as the ability of an unrepresented Applicant to meaningfully participate in the court process, when deciding the merit of an application.

5.1.5 The AD has discretion to find there is no merit to an otherwise meritorious application where it is apparent that the Applicant has been using the services of LAM for an improper purpose such as unreasonably delaying or frustrating the court process.

5.1.6 Applications in circumstances other than those specifically set out in this manual including but not limited to Chapter 5, and where the AD determines there is merit to appoint, shall be reviewed for merit by the Executive Director (ED) or his designate on a case by case basis.

5.1.7 The ED or his designate retains a discretion to assess and find merit based on any reasonable information to prevent an apparent injustice or, with reference to all aspects of the Mission Statement of LAM, to ensure the guiding principles of LAM are fulfilled.

5.1.8

a) Formal trial authorization is required for any certificate issued:

   i) under s. 5.3 of the AD Manual; or

   ii) any matter issued under s. 5.4.2(e) where the matter will appear in the Court of King's Bench.

b) Trial Authorization on Child Protection Matters:

Notwithstanding the above, the AD shall not withhold trial authorizations where "G" case considerations would justify the trial authorization.

PRACTICE NOTES: MERIT ASSESSMENTS

INTRODUCTORY NOTE

Section 5.1 sets out the principles to be followed when LAM assesses the merit of an application. It applies to all types of cases whether criminal, domestic or civil. As described in the introduction to Part 5, specific rules applicable to each of those three broad categories are set out in sections 5.2 (criminal), 5.3 (domestic) and 5.4 (civil).

5.1.2 NATURE OF SECTION

Section 5.1.2 sets out the most important element of the approach the ED is to follow in assessing merit, namely balancing the strength of the case, the potential benefit to the applicant and the cost of proceeding.

*see comments starting at page 9 in the Appeal Committee's decision in Appeal No. 22.

5.1.4 SCOPE AND NATURE OF SECTION

In the Appeal Committee's decision in Appeal No. 22 the Committee determined that the ED did not give adequate consideration to the ability of an unrepresented Applicant to meaningfully participate in his proceedings. On that basis, the Committee determined that the ED's assessment was unreasonable and directed that the Applicant be provided with legal aid coverage.

5.1.6 NATURE OF SECTION

LAM's governing legislation provides the AD/ED with discretion to issue coverage for matters not covered in the AD Manual on a case by case basis. The AD Manual reflects clear policy choices; some matters are eligible for coverage and some are not. Those policy choices are the product of careful deliberation by the Management Council (MC) in consultation with and with the advice of LAM Management and the MC's Policy Committee. The choices reflect LAM's expertise.

*see comments starting at page 5 in the Appeal Committee's decision in Appeal No. 26, followed in Appeal No. 31, and Appeal No. 32.

5.1.7 NATURE OF SECTION

Section 5.1.7 gives the ED a residual discretion to find merit in order to prevent an injustice or to ensure LAM's guiding principles are fulfilled. Even though s. 5.1.7 creates a residual discretion to move away from the specific provisions set out in Part 5, it should happen only rarely. The policies set out in the AD Manual are the product of careful deliberation by the MC in consultation with and with the advice of LAM Management and the MC's Policy Committee. An unlimited power to ignore them would make the AD Manual meaningless. Rather, departures from the policies should only be undertaken carefully, exceptionally and in an objectively defensible manner.

*see comments starting at page 9 in the Appeal Committee's decision in Appeal No. 22, and starting at page 8 in Appeal No. 28.

5.1.7 EXERCISE OF DISCRETION - REQUIRED FACTORS

The Appeal Committee, on more than one occasion, has said that discretion provided in 5.1.7 will be exercised only rarely. The factors required to exist for the exercise of that discretion are:

- to prevent an injustice; and
- to ensure the guiding principles of LAM are fulfilled.

The Appeal Committee has determined that the discretion will be engaged to prevent an injustice "when the ED perceives the person applying for Legal Aid is in some way being, or is at risk of being, treated unfairly by the *justice system.*" (emphasis added)

The Appeal Committee has indicated that engaging the discretion "to ensure the guiding principles of Legal Aid are fulfilled" would require a conclusion that there was something untoward or unfair about the way the system dealt with the Applicant.

*see comments starting at page 4 in the Appeal Committee's decision in Appeal No. 17.

TEST CASES AND CHALLENGES TO LEGISLATION

These are cases where the rights of a group of persons are deliberately put in issue. They are generally brought to determine an issue separate from the immediate matter before the court, or to establish a precedent that will assist LAM in fulfilling its mandate. There are often significant political issues involved, and these cases can be very costly. LAM has limited and fluctuating resources. Where a challenge to the legislation might have significant repercussions more generally it shall be treated as a test case. Appropriate information shall be collected and the application shall be referred to the ED.

A lawyer who wishes to challenge the validity of legislation as part of defending an action for which a certificate has issued needs further approval. If this is the most effective way of defending the action, an AD may grant approval.

CERTIFICATE OF INDEPENDENT LEGAL ADVICE

Where a certificate of independent legal advice is sought in relation to a matter LAM would ordinarily cover, there is merit. A good example is a collaborative law case where one party who has agreed to participate in the collaborative process, is self-represented, and requires independent legal advice for the purposes of executing a final agreement. A certificate will issue for the time necessary to review the agreement, give the advice, and provide a "Certificate of Legal Advice".

5.2 MERIT IN CRIMINAL MATTERS

5.2.1 Applications from adults and young persons charged with:

a) indictable offences;
b) offences under the *Extradition Act*;
c) offences under the *Fugitive Offenders Act*; or
d) a matter that includes a Crown application for preventative detention under PART XXIV of the Criminal Code (Dangerous Offenders and Long Term Offenders)

are deemed to have merit.

5.2.2 Applications have merit when:

a) conviction will likely result in a sentence of imprisonment;
b) conviction will likely result in the loss of the Applicant's primary source of income, or a student's anticipated primary livelihood;
c) counsel have been appointed under s.25(4)(b) *YCJA*;
d) a Crown appeal, if successful, will likely result in imprisonment;
e) breach of a conditional sentence order is alleged;
f) the Crown seeks a Peace Bond under s. 810.2 of the *Criminal Code; or*
g) a firearms prohibition will result from the conviction and hunting for food is a significant part of the family sustenance; or
h) conviction will result in the deportation of the client.

5.2.3 Applications for persons in custody have merit where:

a) an application for release has not been made and Legal Aid duty counsel is not available to make a bail application;
b) a bail application has been made and denied; or
c) the Applicant has been sentenced to incarceration and a conviction is likely to lengthen the period of incarceration or result in a significant loss of freedom or livelihood while incarcerated.

Where the only basis of merit is this section, merit extends only to representation necessary to secure the release of the Applicant or relief from the loss of freedom or livelihood.

5.2.4 Applications to assist with a LERA complaint, or where the RCMP are implicated, to Division “D” professional standards unit, have merit where there is concrete and compelling evidence for complaint. LERA hearings that are already proceeding to a hearing have merit as a result of the pre-screening process of LERA itself.

5.2.5 Applications to pursue a Peace Bond do not generally have merit because the process to swear an Information to obtain a Peace Bond and the hearing are available as a summary process through the Provincial Court Clerk's Office.

5.2.6 Multiple Informations that arise out of a single incident have merit as a single Legal Matter unless counsel clearly indicates they are being prosecuted separately.

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

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

b) the appeal has merit given the current applicable legislation and jurisprudence;
c) notwithstanding 5.2.7(b), the ED determines that an important systemic issue(s) exists that affects the Administration of Justice.

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

a) the ED determines that there is sufficient funding to cover this discretionary area of coverage; and
b) the appeal has merit given the current applicable legislation and jurisprudence;
c) notwithstanding 5.2.8(b), the ED determines that an important systemic issue(s) exists that affects the administration of justice.

PRACTICE NOTES: MERIT IN CRIMINAL MATTERS

TREATMENT OF MERIT OPINIONS RECEIVED FROM COUNSEL

Pursuant to section 12 of the *Legal Aid Manitoba Regulation*, persons seeking to appeal to the above courts are required to provide additional information with their application, including an opinion from an Applicant's solicitor regarding the merits of commencing an appeal.

Merit opinions from counsel are just one factor in LAM's assessment of the merits of a possible appeal. They are an important factor to be sure, but ultimately it is the ED's assessment of the merits that is determinative.

*see comments starting at page 5 in the Appeal Committee's decision in Appeal No. 23, Appeal No. 06, and Appeal No. 07.

COURT APPOINTED COUNSEL UNDER SECTION 25(4)(b)

Where the court appoints counsel under section 25(4)(b) of the *YCJA*, and the parents do not qualify due to excess income, a staff lawyer will be appointed, since choice of counsel is otherwise available to the client through private retainer.

CHARGES WHICH ARE WAIVED IN FROM OTHER JURISDICTIONS

Where a financially eligible client wishes to waive in a charge from another province a certificate may be issued without proof of the charge (Information and particulars). The presumption is that the matter would be paid as a guilty plea Category "C" matter. Counsel may ask for an amendment upgrading the category once particulars are available. A Certificate may not be issued where it is clear on the basis of the information provided that the client would face no danger of jail.

5.3 MERIT IN DOMESTIC MATTERS

5.3.1 Applications have merit where:

a) counsel have been appointed pursuant to section 34 of the *Child and Family Services Act;*

b) parents/legal guardians are newly separated and only *ex parte* orders, or no court orders, have been made for decision making responsibility (custody), parenting time (access), or child support;

c) decision making responsibility (custody) or parenting time (access) are in issue and there is evidence that the physical or psychological well-being of a child, or an established parent-child relationship is at stake;

d) spousal maintenance alone is sought by a wholly dependent spouse or common-law partner in a long-term, traditionally dependent role;

e) an Applicant in receipt of social assistance seeks, and is reasonably likely to receive, child support;

f) a declaration of parentage is needed to determine responsibility;

g) parenting time (access) is denied or seriously restricted contrary to a court order;

h) an Applicant entitled to arrears seeks to have a *Divorce Act* order varied to include a maintenance enforcement clause;

i) a payor has a reasonable case to substantially reduce arrears and the costs of serving the payee are known and reasonable;

j) a grandparent seeking a contact order (access) has a strong relationship to a child and there is a reasonable likelihood of success;

k) Child and Family Services have apprehended a child, or advised apprehension will take place absent a court order;

l) guardianship is contested, and the AD has determined that, in accordance with s.2(1) of the *CFS Act*, there is a reasonable likelihood of success;

m) adoption proceedings are opposed and there is a reasonable likelihood the Applicant will ultimately be granted decision making responsibility (custody) or parenting time (access); or

n) an application is made to set aside a Protection Order, or to defend against the setting aside of a Protection Order, in a matter that meets the definition of "domestic violence" pursuant to *The Domestic Violence and Stalking Act*, and there is a reasonable likelihood of success.

5.3.2 Applications for divorce have merit where a client has waited, or will wait, one year from the date of separation to pursue the divorce proceedings and corollary relief respecting children, or any other relief set out in 5.3.1, is in issue.

5.3.3 Applications for divorce without other relief have merit where one year has passed since separation and the costs of serving the opposite party are known and reasonable.

5.3.4 In all other circumstances applications for decision making responsibility (custody), parenting time (access), child support, or divorce will be assessed on the basis set out in 5.1 above.

5.3.5 Applications to vary or set aside existing orders in circumstances other than 5.3.1 above only have merit in exceptional circumstances and are determined by the AD on a case by case basis.

5.3.6 Applications to defend Maintenance Enforcement proceedings have merit where a matter has been referred to the Master and there is a reasonable likelihood of incarceration or loss of employment.

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

a) the ED determines that there is sufficient funding to cover this discretionary area of coverage; and
b) the appeal has merit given the current applicable legislation and jurisprudence;
c) notwithstanding 5.3.7(b), the ED determines that an important systemic issue(s) exists that affects the administration of justice.

PRACTICE NOTES: MERIT IN DOMESTIC MATTERS

5.3.1(n) PROTECTION ORDERS

Applications for Protection Orders do not generally have merit as they are provided in a timely manner by a Judicial Justice of the Peace. A legal matter issued pursuant to s. 5.3.1(n) is deemed analogous to matters in Part 4 Item 2 of the Tariff and shall issue as a Tariff 1 Legal Matter.

5.3.5 NATURE OF SECTION

This section deals with applications to vary or set aside existing orders in situations where s.5.3.1 does *not* apply (s.5.3.1 lists domestic matters in which merit is automatically found). It says merit will only be found “in exceptional circumstances” and “on a case by case basis.”

*see comments starting at page 5 in the Appeal Committee's decision in Appeal No. 38, and starting at page 7 in the Committee's decision in Appeal No. 50.

DECISION MAKING RESPONSIBILITY (CUSTODY) AND PARENTING TIME (ACCESS) VARIATIONS

LAM will generally not issue a certificate to vary an existing decision making responsibility (custody) or access agreement. The Applicant will have a heavy onus to show that the *status quo* is no longer in the best interests of the child. A Winnipeg or Brandon client seeking such a variance will generally be referred to Family Conciliation for mediation.

DECISION MAKING RESPONSIBILITY (CUSTODY) AND PARENTING TIME (ACCESS): DELAYED APPLICATION

There is generally no merit to an application for decision making responsibility (custody) or parenting time (access) of a child where a substantial period of time has elapsed before the Applicant makes an effort to establish a relationship with the child. An AD may find merit where the person has a satisfactory explanation for the delay, or where the Applicant is the only defence to an application for guardianship by a CFS agency.

CHILD SUPPORT VARIATION: CHILD SUPPORT GUIDELINES

The Provincial Child Support Recalculation Service (PCSRS) provides services relating to the variation of ongoing child support orders. There is usually no benefit to the Applicant beyond what PCSRS can provide and hence no merit for Legal Aid purposes.

COSTS FOR SERVICE OF DOCUMENTS

The costs of service are a substantial factor in assessing merit where the costs would reasonably cause a person of modest means to forego legal action. In some cases the cost of service (or substitutional service) will not be known until a ruling determining the means of service has been obtained. When assessing the impact of such costs on merit, consideration must be given to whether the issue of costs can be addressed by placing conditions on the certificate or effecting service by registered mail followed by a motion to validate improper service.

INTER-JURISDICTIONAL SUPPORT ORDERS (IS0)

Applications that invoke the *Inter-jurisdictional Support Orders Act* have merit where an order is needed to ground other relief. Where all that is sought is the relief available under an ISO, the application does not have merit but the client should be referred to a paralegal for assistance with making the application.

5.4 MERIT IN CIVIL MATTERS

5.4.1 Applications for the matters listed below will be assessed for merit in the ordinary course. Applications for matters that affect a significant number of low-income persons will be assessed for merit by the ED and directed to the PILC.

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

a) a Residential Tenancies Branch or Commission hearing that could result in eviction;
b) a WCB matter before a Review Officer or Appeals Commission;
c) a CPP matter at or above the Reconsideration level;
d) Social Assistance matters where the Applicant has been wrongly denied Social Assistance, or an appropriate benefit, or is liable for a substantial over-payment;
e) opposing a finding that the Applicant is not competent to arrange their affairs, or to remove the Public Trustee or other person as the Applicant's committee; or
f) a person being detained under the *Mental Health Act*.

5.4.3.1 Applications to oppose registration on the Child Abuse Registry have merit where there is no criminal conviction and registration would significantly restrict opportunities for work in the Applicant's primary employment or a student's anticipated livelihood.

5.4.3.2 Applications for early removal from the Sex Offender Information Registry (SOIRA Registry) have merit where:

a) the prescribed period of time has passed since the SOIRA Order was imposed:
- after 5 years if given a 10 year order;
- after 10 years if given a 20 year order; or
- after 20 years if given a lifetime order.; and

b) there have been no related convictions since the SOIRA Order was imposed; and
c) there is a reasonable likelihood of success; or
d) the Applicant has received a record suspension (pardon) for the designated offence.

5.4.4 Crown requests to represent persons who are the object of a third party records application will result in the immediate appointment of a LAM staff lawyer. The Crown will reimburse LAM in full together with an administration fee.

5.4.5 Applications for representation in immigration matters have merit where:

a) a finding of Refugee Status is sought;
b) a deportation or removal order is opposed;
c) a detention review or bail hearing is to be contested; or
d) a person will continue to be resident in Manitoba pending an admissibility hearing

and there is a reasonable likelihood of success.

5.4.6 Applications to appeal a decision of an Administrative Tribunal to the Manitoba Court of Appeal, Federal Court and/or the Supreme Court of Canada, have merit where:

a) the ED determines that there is sufficient funding for this discretionary area of coverage; and
b) the appeal has merit given the current applicable legislation and jurisprudence;
c) notwithstanding 5.4.6 (b), the ED determines that an important systemic issue(s) exists that affects the administration of justice.

PRACTICE NOTES: MERIT IN CIVIL MATTERS

5.4.2 NATURE OF SECTION

Section 5.4.2 deals specifically with assessing merit in civil cases. The inter-play with s. 5.1.2 means that the ED has to consider whether “sufficiently concrete and compelling evidence that supports the Applicant's case” exists, and whether the “cost of providing coverage is justified in light of the current resources available to LAM”. These provisions reflect the reality that LAM has a finite amount of money available to fund cases. If one case is given legal aid, it means there is that much less money available to fund other cases. These financial constraints mean every decision to fund a particular case has to be carefully examined to ensure it has a reasonable chance of success. LAM simply cannot afford to spend money on weak cases.

*see comments starting at page 6 in the Appeal Committee's decision in Appeal No. 25.

5.5 PUBLIC INTEREST LAW CENTRE

5.5.1 The Public Interest Law Centre (PILC) is mandated to represent eligible groups and individuals in cases which will have a broad impact on the interpretation or application of the law and/or will affect groups of people. As PILC cases often fall outside of the usual coverage areas of LAM, applications will only be approved by the ED in the following circumstances:

a) there are sufficient resources within PILC and funding available to pursue the matter throughout the proceedings;

b) a legal merit opinion is provided by the Director of PILC or his/her designate to the ED indicating the following:

i) the matter must impact a systemic issue in the law and the facts of the case make it a suitable test case on that issue, and/or:

ii) the issue must impact a discernible segment of the population of Manitoba; and

c) there must be a reasonable likelihood of success.

PRACTICE NOTES: PUBLIC INTEREST LAW CENTRE

APPLICATION ASSESSMENT PROCEDURE

If the individual or group is not financially eligible or there are insufficient resources or funding there is no need to determine merit. A memo shall be provided to the ED who will then either refuse the application, approve the application, or seek further input from the Director of PILC.

5.5.1 NATURE OF SECTION

This section sets out the rules for obtaining assistance through PILC. By their very nature matters eligible for funding through PILC are outside the norm and the fact the Applicant's matter may not be in an area for which LAM provides coverage is not in itself a reason to refuse funding through PILC.

*see comments starting at page 5 in the Appeal Committee's decision in Appeal No. 51.

5.6 UNIVERSITY OF MANITOBA COMMUNITY LAW CENTRE

5.6.1 The University of Manitoba Community Law Centre (UMCLC) is mandated to represent financially eligible persons whose legal matter does not meet the applicable merit test for legal aid coverage.

5.6.2 Legal Aid's participation in the program is governed by s. 23 of the *Act* and Part 8 of the *Regulation*. The Legal Director of LAM has oversight of this program.

5.6.3 Subject to resource limitations, LAM may approve representation through this program on a first come, first served basis within the limits of the resources available for the program. Representation may be provided for Criminal, Family or Civil matters.

5.6.4 The administrator of the law school program shall refer eligible persons to the Managing Director of the Law Centre or to an Attorney who has been assigned to the program by the ED. The Managing Director or assigned Attorney will undertake formal responsibility for matters in accordance with the *Legal Profession Act,* and provide appropriate supervision; but conduct of the file will be assigned to a law student enrolled in the program.

PRACTICE NOTES: UNIVERSITY OF MANITOBA COMMUNITY LAW CENTRE

The University of Manitoba Community Law Centre, located on the University of Manitoba campus, has been a part of LAM since 1972. The office primarily handles *Criminal Code* offences that are not likely to end in jail time, including impaired driving, theft under $5,000 and assaults. If there is a reasonable possibility of incarceration, cases are referred back to LAM and a lawyer is assigned to the case. For more general information, visit LAM's website.

Acceptance into this program is not Legal Aid coverage, and is available on a first come first served basis within the limits of the program's resources.

The Managing Director or Supervising Attorney shall ensure the accepted application is entered into the Legal Aid Manitoba Application System (LAMAS). Time spent on the file, dispositions and other material information will be entered into LAMAS by the Managing Director, Supervising Attorney and law student in the same manner as for certificate legal matters.

6. CLIENT CONTRIBUTIONS

6.1 WARDS OF CHILD AND FAMILY SERVICES AGENCIES

6.1.1 Child and Family Services Agencies have an obligation to provide legal services to their wards. Legal Aid Manitoba (LAM) has an agreement to provide these services to some Child and Family Services Agencies, but not all. A certificate will issue to a ward of a Child and Family Services Agency only if they have a contract with us to provide legal services to their wards.

6.2 AGREEMENTS TO PAY – PARTIAL

6.2.1 An Applicant who falls into "Partial Contribution" categories in the eligibility guideline, and is able to pay for part of their legal representation, is required to enter into an Agreement to Pay - Partial. The Agreement to Pay - Partial will require partial payment of the costs plus an administration fee of 25% of fees of representation as determined by the Area Director (AD).

6.2.2 An Agreement to Pay - Partial is signed by the Applicant and the minimum retainer amount has been paid as a condition precedent to the validity of the certificate. An Agreement to Pay - Partial requires a monthly payment until the set amount is paid. The AD may vary or dispense with the Agreement to Pay - Partial where the financial circumstances of the Applicant change, the agreement is causing undue hardship, or the Applicant has paid more than will reasonably be required to cover the cost of legal services under the certificate.

6.2.3 If an Applicant fails to make a payment on the Agreement, the AD notifies the Applicant of the need to bring the payments up to date. Where a payment remains unpaid for 30 days without a meritorious explanation the certificate is cancelled. A cancelled certificate may be reactivated without a further application within 60 days if a meritorious explanation for the failure to pay is provided, the account is brought up to date, or where counsel is unable to remove themselves from the record due to a pending hearing date.

6.2.4 Where the amount collected on the Agreement to Pay – Partial exceeds the cost of the representation provided the excess is refunded to the Applicant following the expiration of the 30 day appeal period for taxation of accounts.

6.3 AGREEMENT TO PAY – FULL

6.3.1 Where an Applicant falls within the full contribution eligibility guideline, a certificate may issue subject to an agreement to pay the full cost of the representation in regular payments, usually on a monthly basis (an Agreement to Pay - Full, or "ATP – Full"), plus an administration fee of 25% of fees. Payments for these applicants are to be structured in such a way as permits full recovery of the anticipated cost prior to the conclusion of the matter/closing of the file.

6.3.2 An Agreement to Pay - Full is signed by the Applicant and the minimum retainer is paid as a condition precedent to the validity of the certificate. The AD may vary or dispense with the ATP - Full where the financial circumstances of the Applicant change, the agreement is causing undue hardship, or the Applicant has paid more than will reasonably be required to cover the cost of legal services under the certificate.

6.3.3 If an Applicant fails to make a payment on the ATP – Full, the AD notifies the Applicant of the need to bring the payments up to date. Where a payment remains unpaid for 30 days without a meritorious explanation the certificate is cancelled. A cancelled certificate may be reactivated without a further

application within 60 days if a meritorious explanation for the failure to pay is provided or the account is brought up to date.

6.3.4 Where the amount collected on the ATP - Full exceeds the cost of the representation provided, the excess is immediately refunded to the Applicant following the expiration of the 30 day appeal period for taxation of accounts.

6.3.5 Where an Applicant falls into the Agreement to Pay – Partial category, but has an interest in property that is to be subject to a Charge on Land as set out in section 6.4 below, a certificate may issue as an Agreement to Pay – Full, but will be paid at a rate consistent with the Applicant's ability to pay and full recovery prior to conclusion of the case may be waived.

6.4 CHARGES ON LAND

6.4.1 A Charge on Land is a special lien against the property of a person whose name appears on title or who has an interest in the land and who has been granted services by LAM. The lien secures the cost of representation provided to the person who has the interest in the property. A purchaser of the property will ordinarily insist that the lien be removed prior to purchasing the property. Where the cost of the representation is paid to LAM a discharge is provided.

6.4.2 Since the equity owned is often not known by Applicants, and property values can change rapidly, the client’s acknowledgement, is a condition precedent to the validity of the certificate whenever an Applicant has an interest in property registered in the Land Titles Office.

6.4.3 LAM does not cause a property owner to sell their property to recover the cost of representation and generally postpones LAM's interest where an owner has to refinance their mortgage, unless the client is refinancing to pay creditors, in which case LAM expects the lien to be paid out rather than postponed.

6.4.4 A Charge on Land shall be registered immediately although the AD may delay the registration of the lien where there is a reasonable fear for the safety of the client.

6.4.5 A Charge on Land, once filed, can secure the cost of representation on any subsequent certificates, but the Applicant must be notified of this intention as each new certificate is issued.

6.5 RECOVERY FROM COURT AWARDS

6.5.1 When an award is made to a client, LAM is entitled to recover the cost of representation as a charge against the award. LAM generally excludes from this recovery all child maintenance awards, ongoing awards of spousal maintenance and awards of modest arrears for spousal maintenance.

6.5.2 Where a lump sum spousal benefit is awarded, the AD, taking into account the basis for the award and the circumstances and needs of the family, may recover some or all LAM's costs from the award.

6.5.3 Where costs are ordered in the client's favour, LAM is entitled to the costs and will make reasonable efforts to collect those costs.

6.6 UNPAID CLIENT ACCOUNTS

6.6.1 When an Applicant has previously defaulted on an Agreement to Pay - Partial or Agreement to Pay - Full, and there are outstanding arrears, the Applicant,

except in the circumstances set out in 6.6.2 and 6.6.3, is required to make arrangements to satisfy the outstanding amount before they will be considered for coverage.

6.6.2 Where an Applicant has an explanation for defaulting that would have resulted in the obligation to pay being deleted, the default will not prevent ongoing financial eligibility.

6.6.3 If the Applicant would, but for the default, be fully eligible now, then the AD shall consider the Applicant financially eligible for legal aid. In issuing any such certificate, the AD shall affirm the continuing requirement to repay the amount owing and take such steps as are prudent to ensure the client is reviewed for financial eligibility and a repayment scheme is initiated as soon as repayment can reasonably be commenced.

PRACTICE NOTES: CLIENT CONTRIBUTIONS

CLIENT CONTRIBUTIONS

There are currently three types of client contribution programs at LAM. For Applicants with income above the full eligibility guidelines, but who are still in the “low-income” range, LAM has established Agreement to Pay - Full guidelines. This means low-income persons and families can be given legal assistance at rates substantially below market rates by paying part or all of the cost of the legal services provided.

The client contributions come in three forms:

1. **Agreement to Pay - Partial Applicants** just over the full eligibility guidelines may be assessed a flat fee, less than the full cost of the matter, which shall be paid in monthly installments until paid in full.

2. **Agreement to Pay - Full Program Applicants** who are deemed to be able to pay full fees pay a monthly installment until the cost of providing legal services is paid in full. Payments for these applicants are to be structured in such a way as permits full recovery of the anticipated cost prior to the conclusion of the matter/closing of the file.

3. **Clients with property interests** (usually real estate) may have a lien filed against the real estate to secure fees. The client must acknowledge that a lien may be filed on the application or during the application process. This can be used either by itself or as security for the payments in the Agreement to Pay – Full Program. When the property is sold or refinanced, LAM generally requires the outstanding cost of legal services to be repaid from the proceeds.

CHAPTER 7: RECIPROCAL AGREEMENTS

Revisions Approved by Management Council on May 24, 2016

There is a reciprocal agreement between Canadian provincial and territorial Legal Aid plans. When a person resident in one province is eligible for coverage for a matter that requires legal services in another province, the reciprocal agreement allows for the application and referral between provinces. It does not apply to criminal matters.

7. RECIPROCAL AGREEMENTS

7.1 A non-resident requiring legal services for a family or civil matter in Manitoba applies through the Legal Aid plan in their province or territory. An incoming referral from another province is received by the Legal Director (LD), assessed for merit only, and counsel is appointed where appropriate.

7.2 Where counsel is appointed on an incoming referral, the matter is dealt with thereafter in the same manner, using the same criteria as for a Manitoba resident.

7.3 Information respecting the ongoing provision of legal aid, including the name, address and phone number of the person with conduct of the matter, and any information that might affect disbursement costs and ongoing eligibility, is promptly forwarded to the province or territory of residence.

7.4 A resident of Manitoba who requires legal representation on a civil or family matter in another province or territory (outgoing referral) applies through Legal Aid Manitoba (LAM). The Area Director (AD) makes an initial assessment of financial eligibility and merit and, where appropriate, collects the information in support of the Reciprocal Application.

7.5 The information collected for an outgoing referral includes copies of any pleading received or made by the Applicant, names and addresses of opposing parties and/or counsel, and an agreement to attend the other jurisdiction at their own expense as required for court purposes. The AD forwards the above information and completed application to the LD for determination of eligibility and outgoing referral where appropriate.

7.6 Criminal matters are not covered by the Reciprocal Agreement. Generally these applications are assessed by, and the representation paid for, in the jurisdiction where the matter will be heard.

7.7 Where an inmate has been transferred to an institution in another province while serving a sentence, most matters respecting the sentence including appeals and parole hearings will be heard in the jurisdiction where sentence was imposed. In these cases, Legal Aid can often assist in taking the appropriate application and gathering supporting materials to be sent to the originating province. The AD makes referrals to the institutional Duty Counsel as necessary for this purpose.

7.8 Applications to have criminal matters waived into Manitoba for guilty plea will be assessed by the AD and dealt with in the ordinary course. Applications by persons in custody to waive in charges from another province for guilty plea will generally have merit, since unresolved matters usually result in denial of parole.

PRACTICE NOTES: RECIPROCAL AGREEMENTS

CHAPTER 8: REJECTIONS

Revisions Approved by Management Council on May 24, 2016

This chapter defines what constitutes a Rejection and mandates the form of Rejection notices.

8. REJECTIONS

8.1 All applications that do not meet the criteria for eligibility, or exceed the time lines and other requirements of eligibility in this manual, result in a Notice of Rejection. The Notice of Rejection is prepared and sent to the Applicant, and any counsel indicated on the application, immediately upon the decision being made to reject the application.

8.2 A Notice of Rejection is in the form provided in these guidelines and includes:

a) a concise statement of all the matters/charges for which eligibility was considered;
b) the exact wording of all rejection codes that apply;
c) notice of the right of appeal in the exact wording provided; and
d) a copy of the form “Notice of Appeal”.

PRACTICE NOTES: REJECTIONS

CHAPTER 9: CERTIFICATE ISSUANCE

Revisions Approved by Management Council on November 27, 2018

Most legal services are provided pursuant to a Legal Aid Certificate. It is the formal retainer document for the lawyer providing and/or overseeing the legal services. This chapter mandates the form and content of the certificate.

9. CERTIFICATE ISSUANCE

9.1 A certificate is a formal contract to pay the legal fees and disbursements in a legal matter or matters. It contains:

a) the name of the counsel who has been appointed;
b) a concise, complete, and accurate description of all matters for which representation, and billing, is authorized;
c) the tariff category or number of authorized hours that apply to each matter;
d) any conditions placed upon the representation provided; and
e) any disbursements specifically authorized, including limitations on those disbursements.

9.2 All criminal matters on the same Information/Indictment or that arise out of the same transaction, and all family or civil remedies that will be pursued in the same court procedure, are listed in a single paragraph under the heading “Legal Matter”. Criminal matters on a second Information/Indictment and that arise out of a separate transaction, or family and civil remedies that have been authorized for a second and separate court procedure, are set out in a separate paragraph under another heading “Legal Matter”.

9.3 Each Legal Matter on a certificate has a distinct number associated with it, and this number appears on the certificate following the heading “Legal Matter”.

9.4 Criminal Informations assessed as not having merit unless combined with a “Legal Matter” are set out in a paragraph separated by the word “Also”, but without the heading “Legal Matter” and without a distinct number.

9.5 Where a certificate needs to be amended after issuance, the AD may place the words "AMENDED CERTIFICATE" above the Legal Matter. The original purpose is then replaced on the certificate with the new purpose. The "new" certificate is then generated.

9.6 Where additional authorization is required prior to taking a step, such as setting a trial date, the authorization for that matter is preceded by the phrase “prior authorization from the AD required prior to _____”, filling in the contingent step.

9.7 Where a law firm or the same lawyer represents more than one accused in a criminal matter the paragraph granting coverage shall be followed by the phrase “No fees or disbursements payable if conflict arises as counsel has been advised the same lawyer or firm represents a co-accused”.

9.8 Where a certificate is issued for a limited purpose, including providing limited services to a financially ineligible person, the AD assesses the number of hours anticipated to conclude the matter and authorizes representation for a limited number of hours, and may authorize disbursements and expenses pursuant to sections 9.12, 9.13, and 9.14.

9.9 Where corollary relief sought is by way of varying an existing order, tariff 2 will only be authorized where there has been a demonstrable change in circumstances and substantial preparation is required to address the issues raised.

9.10 Where the same counsel has provided partial representation on a matter (a warrant has issued, or some applicable relief is being sought that could have been included in previous representation), the certificate indicates a reduced tariff will be paid. The paragraph setting out the applicable matters will be followed by the phrase “to be reduced by fees previously paid for Legal Matter # _____”.

9.11 Where there is no Duty Counsel in a rural court, Duty Counsel is in conflict on a matter, or a special trial sitting has been set, and there is no local private bar available/willing to provide representation, the AD will provide travel time and mileage for non-local private bar to attend court. Such travel time and mileage will be proportionate to the needs of the case but generally will not exceed three trips.

9.12 A certificate issued by an AD clearly states on its face authorization for such disbursements as are apparently necessary at the time of issuance. Where a disbursement benefits more than one party in a matter, and the cost of a disbursement can be shared between the Applicant and another party to the action without identifiable prejudice to the Applicant, the expectation is that the cost of the disbursement will be shared. In this case the AD will initially authorize only the applicant's *pro rata* share of the disbursement.

9.13 The AD assesses requests to authorize disbursements or additional steps/motions in light of the potential benefit to the case, with particular value given to those that are likely to be dispositive of matters in issue. The guiding principle here, as elsewhere, is whether a reasonable person of modest means would bear the cost in light of the potential benefit it might afford to their case.

9.14 When authorizing expenditures, the certificate or letter of authorization states that travel time and/or mileage are authorized according to the Legal Aid schedules, and that all other expenditures are authorized according to prevailing government of Manitoba rates.

9.15 The AD may exercise discretion and grant a LAM 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 Big Case Management (BCM) program or a Discretionary Increase.

9.17 Counsel moving from firm to firm or leaving practice (Certificate Issuance).

9.17.1 Counsel moving from LAM (staff) to private practice:

a) Where files remain with counsel:

i) Counsel will bill all matters half tariff or as appropriate in LAMAS and close all files;

ii) certificates will then be reissued to counsel (as private counsel) subject to a deduction of amount already paid in LAMAS.

b) Where files to remain at CLC or be dispersed to other counsel:

i) Counsel will bill all matters at half tariff or as appropriate in LAMAS and close all files.
ii) certificates will then be reissued to counsel at full tariff.

9.17.2 Counsel moving from private practice to LAM (staff) or moving from one private firm to another.

a) Where files remain with counsel:

i) counsel will bill all matters half tariff or as appropriate and close all files;

ii) new certificates will then be issued to counsel (as staff) subject to a deduction of amount already paid in LAMAS.

b) Where files to be issued to new counsel at the same firm or elsewhere:

i) Counsel will bill all matters half tariff or as appropriate and close all files;

ii) new certificates will then be issued to new counsel at full tariff.

9.18 Counsel on a Category A case, or other appropriately complex matter, shall be appointed by the appropriate AD and the task of appointing counsel in these cases shall not be delegated.

9.19 Where the AD is concerned that counsel of choice or counsel available in the Area Office district may not have the knowledge and skill required to have primary conduct of the case, they may, in their discretion:

a) approach counsel and ask if they would consider acting as junior counsel on the case;

b) require the provision of a letter from senior counsel undertaking to provide appropriate supervision and resources to appointed counsel;

c) request a letter from counsel certifying that they consider themselves capable of fulfilling their obligations pursuant to 2.01 (2) of the *Code of Professional Conduct* with respect to the case;

d) consult with the Applicant to determine if they have any further choice of counsel; and/or

e) not honour choice of counsel.

9.20 Where the AD has abiding concerns that the counsel of choice, or available counsel in the Area Office district, is able to appropriately act on the case, and does not appoint counsel of choice, they shall appoint counsel they consider to have appropriate knowledge and skill, and may appoint counsel from outside the Area Office district for that purpose where necessary. The AD is required to report any appointments under this section in writing to the Senior AD immediately.

9.21 Where a certificate is issued as a BCM certificate in a rural Area Office, a notice shall be sent to the attention of the BCM clerk at the Administration Office.

PRACTICE NOTES: CERTIFICATE ISSUANCE

WHERE COUNSEL HAVING CONDUCT OF A FILE IS NOT THE COUNSEL ON THE CERTIFICATE

Sometimes a certificate will issue to counsel “A” but counsel “B”, who is in the same firm, will assume conduct of the matter. Counsel “B” will then decide to leave the firm and the firm will seek to have new certificates issued at full tariff to counsel within the firm.

LAM will not issue new certificates in the above circumstances. When counsel go outside the certificate, they do so at their own peril.

FINANCIAL REVIEWS

Where a financial review has been started or is scheduled to be started within one month of request to change counsel, the financial review shall take priority and shall be completed prior to the re-issuance of the certificate.

LIMITED PURPOSE CERTIFICATES

When an application is received and a detailed factual review is required to determine eligibility, pursuant to section 9.8, the AD may issue a limited purpose certificate to counsel. The certificate shall issue with no more than four hours authorized. This shall be clearly indicated on the face of the certificate

When more than four hours are required for a factual review, or an application is received that involves a new or novel area of the law or facts which may result in a novel interpretation of the law the matter shall be referred to the ED/ED designate for determination.

CHAPTER 10: CANCELLATIONS

Revisions Approved by Management Council on May 24, 2016

When legal services provided pursuant to a Legal Aid Certificate are terminated prior to the conclusion of the legal matter in issue, the certificate is cancelled. This section defines cancellation and mandates the process and notice to be given when a certificate is cancelled and when it may be reactivated without a new application.

10. CANCELLATIONS

10.1 Legal Aid Manitoba (LAM) certificates remain active for a period of six years after which they are automatically cancelled absent a decision by an Area Director (AD), recorded in writing on the file, to allow the certificate to remain active. In determining whether a certificate should remain active the AD considers:

a) if the case is still active and beneficial to the client;
b) if a resolution is likely at a determinable point within the next two years; and
c) if the client is still financially eligible for legal aid.

10.2 All legal matters shall be billed within 60 days of providing the services authorized. Payment of any accounts submitted more than 60 days following completion of such authorized services may be requested in writing to the Executive Director (ED). A letter indicating the reason for the request is required and payment of such accounts shall be permitted at the discretion of the ED.

Each certificate shall have wording on its face as follows:

"It is a condition of this certificate that all completed legal matters authorized pursuant to it be billed within 60 days of provision of the services authorized. Payment of accounts submitted after that time require authorization by the Executive Director and may be rejected at the Executive Director's discretion."

10.3 All certificates are subject to investigation and financial review. They are cancelled when the AD determines the client:

a) no longer has reasonable grounds for the proceedings as authorized;
b) is no longer financially eligible for legal aid;
c) refuses to cooperate with the process of financial review;
d) the client lies or conceals information from LAM respecting pertinent financial matters; or
e) is no longer cooperating with their counsel to reasonably conclude the matter.

10.4 Both the client and counsel are advised of any pending review. Where a client does not respond to a request for information on a financial review within 21 days, a second notice is sent to the client and counsel. Where no response is received within the further 14 days, the certificate is cancelled unless counsel has advised they cannot withdraw or a hearing date is set within the next 60 days whereupon the certificate is cancelled with the proviso "...to take effect immediately upon conclusion of the scheduled hearing".

10.5 A certificate cancelled pursuant to 10.3 may be reactivated within 30 days upon satisfactory compliance with the financial review and proof of ongoing eligibility. After 30 days, a new application and application fee are required and the application is processed as a new application.

10.6 A certificate is cancelled when LAM is advised that the client has retained other counsel or determined to retain current counsel on a fee paying basis. Where new counsel requests that coverage be provided by LAM following a change in counsel, a new application and application fee are required unless the original application was signed within the preceding six months.

10.7 No fees are allowed for steps taken following cancellation of a certificate other than steps necessary to withdraw from the record which shall be paid as the tariff allows.

PRACTICE NOTES: CANCELLATIONS

CHANGES IN COUNSEL

Requests for a change in counsel are made for a variety of reasons. In deciding whether to grant a change in counsel, the reasons must justify any change requested. This involves assessing the reason why the client's present counsel cannot continue.

Changes in counsel are costly to LAM and cause delays in the court process. LAM must allow for a change when needed, manage the costs and delays caused by such a change, and prevent the practice of changing counsel just because another lawyer is considered “better” than the client's first choice.

Except in extraordinary circumstances, where a change in counsel is requested, LAM will appoint a Legal Aid staff lawyer in order to meet the objectives above.

It has been the ED’s practice to allow one change of counsel. This practice is set out on LAM’s website. Exceptions are made to this practice.

In Notice to the Profession 3 - 2009, LAM indicated that as resources permit, all requests for change of counsel in criminal matters will result in the appointment of a staff lawyer.

*see comments made by the Appeal Committee in Appeal Decision 74, and Appeal Decision 75.

EXTENDING EFFECTIVE DATE OF CANCELLATION

This issue has effectively been dealt with in Notice to the Profession 16 – 2012.

NON-CRIMINAL FILES

Where counsel indicate that a matter which has been cancelled by LAM is effectively complete and where the cost of the case will not change significantly, the AD may extend the effective date of cancellation to allow counsel to complete the matter.

CRIMINAL FILES AND NON-CRIMINAL FILES WHERE A TRIAL HAS BEEN SET:

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 LAM certificate to the point where the hearing is concluded or counsel is permitted to withdraw. The AD shall extend the effective date of cancellation to the day after the last day of the scheduled hearing.