

Changes to the Charges Heard Separately Certificate Issuing Process

Background

Under the block fee billing rules, if a client is charged with an additional “block fee eligible” offence after a certificate has been issued, defence counsel, when seeking to resolve the matter, should seek a global resolution of the multiple charges under a single certificate.

LAO provides an exception, however, to allow lawyers to request a new certificate through the portal for an additional block fee eligible charge if the new charge is proceeding separately from a charge or charges authorized on an existing certificate.

Why Are We Making Changes?

Over the past few years, LAO has fine-tuned the charges heard separately exception to provide quick and timely decisions. Counsel may seek, through a portal application, a new certificate for charges heard separately without the client having to apply for a certificate on the new charges. LAO has identified issues with this process, and we are making changes that will resolve our concerns while maintaining the efficiencies and advantages of the current process. The changes are listed below.

What is New?

1. If Original Charges Have Been Resolved: A Separate Certificate Will Not Be Issued

LAO’s analysis of certificates issued through the charges heard separately process reveals that new certificates have been issued when the charges covered by the original certificate have already been resolved but not final billed. This is not how the portal process was intended to be used, and has resulted in new certificates being issued for charges entirely unrelated to the original charges which do not meet LAO’s eligibility criteria. LAO is making changes to the portal which prevent counsel from obtaining a new certificate through the charges heard separately process when the original charges have been resolved but not final billed.

The technical work to change the portal is in progress. Pending completion of that work, counsel are advised not to obtain certificates through the charges heard separately process if the original charge has been resolved.

2. If Defence Lawyer is Unsure How Crown is Proceeding: Separate Certificate Will Not be Issued

Previously, if defence counsel indicated through the portal that they are “unsure” whether the Crown is proceeding separately or jointly on the new charges, a new certificate would be issued. This is inconsistent with Regulation 107 of the *Legal Aid Services Act*, which provides that where a lawyer represents a person charged with two

or more offences and resolves those charges separately, the onus is on the lawyer to satisfy LAO that separate scheduling was appropriate.ⁱ Moreover, since June 2015, lawyers are authorized to bill for a second “s.524” bail hearing on an original certificate where the client is arrested and detained on new charges. As a result, a separate certificate is not required to allow defence counsel to conduct a second bail hearing.

In order to align with our regulations and with LAO’s new bail coverage, we will be making changes to our processes so that if defence counsel is unsure whether the Crown is proceeding separately or jointly, no separate certificate will issue. If however, defence counsel learns subsequently that the charges are proceeding separately, he or she can seek a separate certificate through the portal. This change in process will take effect immediately.

3. If New Charges are Not Legally Eligible: Separate Certificate Unavailable

LAO has also found in its analysis of certificates issued through the charges heard separately process that some certificates were being issued for charges where there was no likelihood of incarceration. This does not conform to our legal eligibility rules. Therefore, when lawyers are seeking a new certificate through the portal, they will be asked to provide some additional information about the facts and circumstances of the new charges to confirm whether a new certificate, if issued, complies with LAO’s legal eligibility rules. For example, lawyers will be asked for information about whether the accused is detained, the nature of any prior record, and the Crown’s position on new charges.

4. If New Charges are already completed: Separate Certificate Unavailable without review by Director General

LAO has also found that certificates were being issued for charges which had already been resolved. The request to add criminal charges proceeding separately may not be used for retroactive authorization. Counsel is reminded to obtain a certificate in advance of performing services, as certificates with retrospective application are only granted in extraordinary circumstances, after review by the Director General. Therefore, when lawyers are seeking a new certificate through the portal, they will be asked to provide some additional information about the facts and circumstances of the new charges to confirm whether a new certificate, if issued, complies with LAO’s rules. For example, lawyers will be asked for information about whether the new charges are ongoing.

Next Steps

The portal changes listed above will likely come into effect late fall/early winter of 2017.

In addition, LAO has learned from different stakeholders, including defence counsel and the judiciary, that the charges heard separately exception has resulted in defence counsel moving to have matters resolved separately not because it is in the client’s best interest (since a global resolution of all charges rather than multiple resolution proceedings is generally the better option) but because it is financially advantageous.

We are certain that this practice, which effectively puts the lawyer's interest before those of the client, is rare, and we expect that that the modifications noted above will curtail this practice. Nevertheless, we would like to meet with the defence bar to discuss this concern, and will be doing so in the coming months.

If you have any questions about these changes, please contact Kathleen Murphy (murphyk@lao.on.ca).

/Reg 107/99 Note G to Schedule 1