THE CASE FOR REPLACING THE 2002 *LEGAL SERVICES SOCIETY ACT*

PART II: A CALL TO ACTION

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This article, which continues on from an article published in the May 2016 issue of the *Advocate* (2016 74 Advocate 355), issues a call to action. Part I tracked the trajectory of, and critically examined, legal aid in British Columbia, ultimately concluding that legislative changes to the *Legal Services Society Act* have left legal aid in B.C. in an impoverished state. As set out in Part I of the article, the *Legal Services Society Act*, RSBC 1979, c 227 created the Legal Services Society (the "Society"), through which government-funded legal aid is provided and administered in British Columbia. In 2002, what was then the *Legal Services Society Act*, R.S.B.C. 1996, c. 256 (the "1996 *Act*") was repealed and replaced by the *Legal Services Society Act*, S.B.C. 2002, c. 30 (the "2002 *Act*"). The Society was continued but the 2002 replacement legislation eliminated the stated objects or purpose of the Society set out in the original statute and failed to stipulate the services that the Society is obligated to provide.

Part II continues the Part I discussion and builds a case for ensuring that everyone has equal access to justice. Among the means to achieve that objective is further legislative change.

THE STRATEGIES THE SOCIETY HAS ADOPTED FOR PROVISION OF SERVICES UNDER THE 2002 *ACT*

The Society appears to be basing its current legal aid strategy on the object of "meeting the needs of low-income clients through the integration of legal services with other social services."[1] For example, the Society has adopted an active partnership role in the planning of the Justice Access Centres and the Vancouver Downtown Community Court project and, in doing so, has made a shift towards an outcomes-based approach to providing legal aid services.[2] The Society is emphasizing a strategy of integrating legal aid services with other social services as part of a holistic approach to meeting clients'

overall needs. This strategy accords with a body of research that posits that the problems faced by low-income or other disadvantaged individuals are not separate and distinct but are profoundly interconnected and co-occurring. The theory behind the strategy may be sound, but the Society's capacity to implement the strategy is problematic.

For the Society to succeed in delivering holistic services would require government ministries—including those responsible for providing health care, child care and social services—also to adopt an integrated and holistic approach to meeting the needs of those unable to access or obtain required legal, health and social services. To date, there has been little indication that the relevant ministries are taking effective steps to adopt an integrated and holistic approach in the provision of services they have a statutory mandate to deliver. In that regard, the frightful consequences of the failure to integrate services across ministries for the protection of children and those with mental health and cognitive deficits have been well publicized.[3]

The provincial government's recent public acknowledgement of that failure was followed by a proposal for a new ministry, the Ministry for Mental Health,[4] but there is no indication that this Ministry will have a mandate to enable those in need of legal services in family law and child protection matters to obtain them through additional legal aid funding. Furthermore, there needs to be a broader recognition of the extent to which various parts of the justice system have to respond to youth in crisis. While the creation of a Ministry of Mental Health—which, in order to be effective, must be separately and adequately funded—would constitute a meaningful step towards service integration by embracing a "one child, one file" approach, this new Ministry does not supplant the need for legal services for family and youth. For example, mere integration of services will not protect women and children from domestic violence; to address those matters, something more is needed. That "something more" includes access to justice. Yet, access to justice is hardly considered in the government's new proposal. There is a limited recognition that maintaining the *status quo* with respect to children and youth mental health services will lead to "increased interactions between youth and law enforcement",[5] but this barely scratches the surface.

In its 2007 submission to the provincial Select Standing Committee on Finance and Government Services, the Society made two key recommendations: (1) "That the government continue to pursue the development of integrated justice, health and social services by ensuring there is a coordinated budgeting process that provides sufficient resources in all ministries to support these innovations" and (2) "That the provincial government

plan for a core funding increase for legal aid by 2010 to sustain successful innovations."[6]

The Society's recommendations accord with the philosophic underpinnings of legal aid—to serve social justice—but without integration of government services as well as adequate funding for legal aid, the Society's goals of integrated justice, health and social services will inevitably be thwarted.

THE FUNDING OF LEGAL AID THROUGH A TAX IMPOSED ON LEGAL SERVICES: AN UNCONSCIONABLE MISDIRECTION OF FUNDS

The *Social Service Tax Amendment Act (No 2), 1993*,[7] which imposed a seven per cent tax on legal fees, was enacted in 1993. When the tax was introduced, the Finance Minister said that the revenue would be applied to fund legal aid. By way of justification for the imposition of the tax, the Minister characterized the decision as being between making substantial cuts to legal aid, which would have its greatest impact on low-income individuals, and creating a new source of revenue. A tax on lawyer's services was justified on the grounds that: (1) it was introduced expressly and solely for the purpose of offsetting legal aid costs; (2) it was never contemplated as being the only source of revenue for legal aid; and (3) the services of the legal profession were the only professional service in B.C. that attracted the tax.[8]

The fact that the tax was imposed on lawyers' services, but on no other self-governing profession such as accountants, doctors, or engineers, was used to support the rationalization for the imposition of the tax and linked the tax to its stated purpose.

Despite the representations put forward to justify the tax on lawyers' services, the government did not, in fact, put the revenue generated solely towards legal aid services; instead, the tax was put into general revenue and only a portion of the revenue received was used to fund legal aid. In the B.C. legislature, the Opposition of the day vociferously opposed the government's decision to channel the tax revenues into general revenue but, upon a change in government in 2001, the policy was continued and, in addition, deep funding cuts were made.[9]

The failure to use the tax revenue to fund legal aid has continued. In 2009, for example, $144.8 million was received in revenue from the tax on legal services but only about $80 million was spent on legal aid.[10] Despite the substantial revenue received from the tax on legal services, the government has fallen considerably short of providing adequate funds to support legal aid services.[11]

Resources to fund legal aid are not limited to the provincial tax on legal services. Federal funding for civil legal aid matters began in the late 1970s

as part of Canada Assistance Plan ("CAP") funding to the provinces.[12] The funds provided by the federal government were linked to those actually spent. However, federal funding was capped in 1990, which led to serious resource constraints in the provision of legal aid.

In 1994–95, funding from the federal government was lumped into the Canada Health and Social Transfer ("CHST"), resulting in the funds becoming an unconditional transfer payment to the provinces.[13] At that time, approximately $99 million of federal money in total was being provided annually for civil legal aid services.[14] Today, federal support for civil legal aid services is part of the Canada Social Transfer ("CST")—which was implemented in 1996—and legal aid funds are not specifically identified or allocated.[15]

The federal government's reductions in legal aid funding and, in particular, the shift towards a generalized, "no strings attached" transfer of funds instead of a transfer specifically designated for legal aid, marked an unfortunate turning point for legal aid in B.C. and generally in Canada. The "lumping" of legal aid funding in a general transfer of funds evidences the government's conception of legal aid: it is treated as no more than another discretionary spending item. It is impossible to know precisely how much of the transfer is funneled to legal aid, as the provinces are left to allocate portions of the overall sum as they see fit towards education, social assistance, or other purposes.

The federal government has failed to establish minimum national standards and eligibility criteria for criminal and civil legal aid. The current patchwork of eligibility policies adopted by provinces and the territories has resulted in a lack of equal access to legal aid across Canada. A renewal of the federal government's role in funding and establishing policy in the area of legal aid is a crucial step towards establishing a deeper commitment to legal aid in Canada.

As governments have moved away from a commitment to universality espoused in the latter half of the 20th century in favour of "targeted" services and optimum efficiency, budgetary allocations for legal aid have come under considerable scrutiny.[16] At the same time, there is an increasing awareness and recognition that cost efficiency and cost recovery are taken too far when they thwart or eclipse our commitment to access to justice for all.

THE CASE CHALLENGING THE TAX ON LAWYERS' SERVICES

In *British Columbia (Attorney General) v. Christie*[17] a broadly based constitutional challenge to the tax on fees for legal services was unsuccessful.[18] In

Christie the court made this observation about the fiscal implications of the broad right the appellant had proposed:

> It would cover almost all—if not all—cases that come before courts or tribunals where individuals are involved … [T]he fiscal implications of the right sought cannot be denied. What is being sought is not a small, incremental change in the delivery of legal services. It is a huge change that would alter the legal landscape and impose a not inconsiderable burden on taxpayers.[19]

Nonetheless, the decision in *Christie* does not diminish the fact that the provincial government is using revenue from a tax imposed specifically to fund legal aid for purposes other than legal aid. Victoria-based lawyer Michael Mulligan, who obtained documentation through a Freedom of Information request, has stated that in 2014 the Province raised almost $172 million through the legal services tax, in addition to $14 million in payments from Ottawa for legal aid.[20] Despite this, the provincial government spent a mere $75 million on legal aid.[21] This leaves a striking gap: a discrepancy of over $100 million. It is little wonder that the public is so distrustful of government's imposition of special purpose taxes.[22] Without doubt, what is occurring with respect to the use of the tax on legal services is without justification.

THE CONSTITUTIONAL CHALLENGE TO BRITISH COLUMBIA'S CIVIL HEARING FEE SCHEDULE

In the 2014 decision in *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*[23] the Supreme Court of Canada affirmed the order of McEwan J. in *Vilardell v. Dunham*[24] setting aside as unconstitutional the hearing fee schedule for civil actions brought in the British Columbia Supreme Court. After reference to the development of Canada's legal history, McEwan J. concluded that civil justice ought not properly be treated as if it were a business. In that regard, he observed that the hearing fee schedule had been instituted as part of a government strategy to make civil courts economically self-sufficient, if not a profit centre. He observed that the philosophical underpinning for this strategy was first cultivated in Britain in the early 1990s and several years later it was advanced in British Columbia. Justice McEwan criticized that development and observed: "The move to full cost recovery in England and British Columbia has been accompanied by declines in staffing levels [in the courts] and in the commitment to legal aid".[25] Justice McEwan went on to note that "[t]he government's preoccupation with reducing the cost of civil justice and of the court system in general has extended to other attempts to reshape the work and the role of the courts more directly."[26] In British Columbia, he observed, "the legal aid budget is

said to be less in unadjusted dollars today than it was 20 years ago", and this was "despite the intervening imposition of the [seven per cent tax on legal services] … which was specifically introduced to finance legal aid."[27]

On appeal to the Supreme Court of Canada, Chief Justice McLachlin, giving the judgment for the majority, struck down as unconstitutional the hearing fee schedule. The Chief Justice concluded that the indigent exemptions in the court rules did not provide sufficiently wide discretion to trial judges to exempt litigants from having to pay the hearing fees. As a result, the schedule worked undue hardship on ordinary people and impeded their right to bring legitimate cases to court. The Chief Justice noted that such levies are permissible only insofar as they do not impinge on the constitutional jurisdiction of the courts by denying some people access. Chief Justice McLachlin C.J. added: "If people cannot challenge government actions in court, individuals cannot hold the state to account—the government will be, or be seen to be, above the law."[28] Unsurprisingly, the decision in *Trial Lawyers* has been celebrated as a triumph for access to justice.

THE COST OF FAILING TO FUND LEGAL AID: AN OUNCE OF PREVENTION

The argument that sustainability of the justice system justifies decreases in legal aid funding is unsupportable. Many ailments—in the social sense and the biological sense—are the product of poverty. Focusing on identifying and treating the causes rather than the disparate symptoms of poverty makes economic sense. Legal aid can play an important role by serving as *preventive* law; as is often said, "an ounce of prevention is worth a pound of cure". Robert F. Kennedy aptly summarized this sentiment:

> We have secured the acquittal of an indigent person—but only to abandon him to eviction notices, wage attachments, repossessing of goods and termination of welfare benefits … [We] have to begin asserting rights which the poor have always had in theory—but which they have never been able to assert on their own behalf … [we] need to practice preventive law on behalf of the poor.[29]

Legal aid can reduce or eliminate costs that are precipitated when those on the margins of society are left without assistance in the justice system. Self-represented litigants invariably cause delays and increased costs in the courts. In the Provincial Court the rate of unrepresented litigants has reached 90–95 per cent in family matters, 90 per cent in other civil matters and 40 per cent in criminal matters.[30] In the superior courts, there has been a steady increase in unrepresented litigants in both the trial and appeal courts. Unrepresented litigants increase trial time thereby limiting the efficient use of court facilities and judicial time. Data published by several jurisdictions indicates that for every $1 spent on legal aid, the savings range

from $1.60 to $30.[31] Thus, increasing funding for legal aid is not only a just *legal* policy, but also sound *economic* policy.

Another aspect of the failure to provide legal aid services is the additional cost in the criminal courts resulting from Crown counsel's concern about discussions with unrepresented accused. Generally, it is less likely that Crown counsel will enter into plea discussions with unrepresented litigants, whose lack of understanding of the law and trial process is taken as axiomatic. This reluctance is significant considering that, in British Columbia, 80 per cent of criminal cases are resolved by negotiation when accused are represented by counsel.[32]

The failure to provide adequate funding for legal aid services has its greatest impact on society's most vulnerable, including persons with mental health or cognitive disabilities, the impoverished, women and children who are victims of violence, those who have physical impairments or are functionally illiterate, immigrants and refugees, and those who are victims of discrimination. The legal problems the vulnerable encounter are often persistent, multi-dimensional, and systemic. Addressing these problems requires a robust and multi-faceted legal aid system. The alternative is limiting services, a course of action that results in greater overall costs.

The risk of arbitrary, inconsistent, or erroneous results in cases of self-represented litigants is of increasing concern in the criminal justice system. To the extent that individuals are wrongfully convicted, the overall costs can be very substantial, particularly when the result is lengthy incarceration.

Funding legal aid is not restricted to funding representation in court. A number of entities including the Society have worked to enhance public legal education through use of websites and electronic data links. However, there is a danger in relying on electronic access to legal information as a solution to the needs of many who are most in need of legal services. Examples include those who have mental health problems, cognitive difficulties, and functional illiteracy. And, of course, without access, electronic databases are of no assistance at all.

Self-help sites on the Internet have been advanced as a solution to shortcomings in accessing the justice system, but this resource needs to be questioned. A new study[33] carried out in the U.K. raises doubts about the extent to which self-help resources on the Internet truly serve public needs. The study explores how young people use Internet resources to solve housing and employment law problems. With data obtained from 208 young people aged 15–26, the study found that the efficacy of online services is seriously in doubt. One in five participants visited a website with irrelevant content,

more than half of the high school students visited foreign websites for information about a U.K. legal problem, and nearly a third of law students did the same.[34] In addition, many students could not craft searches to get the correct results, and the study indicated that sites are likely to be ignored if they are not first on the search results list. Even when participants did discover useful information, most still wanted help from someone else to solve the problem.

The U.K. study concludes that Internet resources continue to be "constrained by the quality of information provided online and the public's capacity to use it and apply it in a meaningful way".[35] Moreover, the study suggests that the challenges will be even greater for those with reading problems, mental challenges, or weak Internet literacy. These considerations are especially important in light of reports showing that 40 per cent of British Columbians have literacy rates that affect their capacity to function in the modern world.[36]

Information is only useful to the extent that the user is capable of effectively utilizing that information to solve a legal problem. Electronic access to information can be useful but it cannot be used as justification for the underfunding of legal services that has occurred in this province.

CONCLUSION

The integrity of the justice system requires that all have equal access to justice. Access to justice is a hollow phrase without a system for the provision of legal aid services. In the absence of a robust and adequately funded legal aid system, our commitment to democratic values and the rule of law suffers. When the legal aid system fails, justice fails.

The legal profession and the public at large need to bring the importance of legal aid services and legal aid funding to the attention of MLAs and the responsible ministers at every possible opportunity. There is no doubt about the public sentiment: the Society published a poll in 2015 which found that 94 per cent of British Columbians said that they support legal aid, with 61 per cent saying they strongly support it.[37]

The 2002 *Act* is in serious need of re-examination and amendment. The failure to use the revenue from the tax on legal services to fund legal aid is indefensible. Legal aid services and legal aid funding must become part of the agenda for change among members of the British Columbia legislature. As it has in the past, the legal profession in British Columbia can contribute to a positive dialogue with legislators on how to improve the legal aid legislation. The recommendations in the Doust Report ("Foundation for Change: Report of the Public Commission on Legal Aid in British Columbia", and dis-

cussed at length in Part I of this article) would be an excellent place to begin the dialogue:

(i) amend the *Legal Services Society Act* to clearly recognize legal aid as an essential service and the entitlement to legal aid where an individual has a legal problem that puts into jeopardy their or their family's security; and

(ii) develop a new approach to define core public legal services and priorities.

ENDNOTES

1. See Melina Buckley, *Moving Forward on Legal Aid: Research on Needs and Innovative Approaches* (Ottawa, Ont: Canadian Bar Association, 2010) at 56, online: <www.cba.org>.
2. *Ibid.*
3. Calls for greater integration of services across government agencies are found throughout a recent report by the Select Standing Committee on Children and Youth of the BC Legislature: "Another prominent request was for resources to be targeted to increase coordination and integration of services across government agencies. Integrated models of care, it was noted, are best suited to meeting the needs of youth and individual communities, while reducing overall duplication of services. Furthermore, integrated services have been proven effective in other jurisdictions in producing better mental health outcomes." See British Columbia, Legislative Assembly, Standing Committee on Children and Youth, *Interim Report: Mental Health in British Columbia* (November 2014) (Chair: Jane Thornthwaite) at 24. The Committee concluded that "[e]vidence to the Committee pointed to an urgent need for greater integration of services." See *ibid* at 31.
4. British Columbia, Legislative Assembly, Select Standing Committee on Children and Youth, *Final Report: Youth Mental Health in British Columbia* (26 January 2016) (Chair: Jane Thornthwaite).
5. *Ibid* at 24.
6. Legal Services Society (LSS) Submission to the Select Standing Committee on Finance and Government Services (11 October 2007) at 1, online: <www.lss.bc.ca/assets/aboutUs/reports/submissions/submissionBudgetConsultations2007.pdf>.
7. SBC 1993, c 24.
8. See Penny Bain & Marina Morrow, *Access to Justice Denied: Women and Legal Aid in BC* (Women's Access to Legal Aid Coalition, 2000).
9. See *ibid.*
10. See *ibid.*
11. See Ian Mulgrew, "Lawyers Still Rankled over Legal Service Tax" *Vancouver Sun* (27 June 2014), online: <www.vancouversun.com>.
12. See Canadian Bar Association, *A Short History of Federal Funding for Legal Aid*, online: <www.cba.org/cba/advocacy/legalaid/history.aspx>.
13. See *ibid.*
14. See *ibid.*
15. See *ibid.*
16. See Mary Jane Mossman, Karen Schucher & Claudia Schmeing, "Comparing and Understanding Legal Aid Priorities: A Paper Prepared for Legal Aid Ontario" (2010) 29 Windsor Review of Legal and Social Issues 149.
17. 2007 SCC 21, [2007] 1 SCR 873 [*Christie*].
18. *Ibid* at para 17.
19. *Ibid* at paras 13–14.
20. See "Legal Aid Funding Short-Changed by BC Government, Claims Victoria Lawyer" *CBC News* (13 June 2015), online: <www.cbc.ca>.
21. *Ibid.* In response to this story, the Ministry of Justice stated that there has never been any structure link between the tax on legal services and legal aid funding: *ibid.*
22. As Mulligan aptly puts it, "The morally right thing to do is when you collect money from people that's supposed to help the needy and disadvantaged that money should be put to that purpose and it's simply not appropriate that it be diverted to other things": *ibid.*
23. 2014 SCC 59 (CanLII) [*Trial Lawyers*].
24. 2012 BCSC 748, 260 CRR (2d) 1 [*Vilardell*].
25. *Ibid* at para 308.
26. *Ibid* at para 309.
27. *Ibid* at para 308.
28. *Ibid* at para 40.
29. Dieter Hoehne, *Legal Aid in Canada* (Queenston, Ont: Edwin Mellen, 1989) at 63, n 114.
30. Sharon Matthews, Briefing Note, "Making the Case for the Economic Value of Legal Aid", *Canadian Bar Association British Columbia Branch* at 3, online: Legal Services Society <www.lss.bc.ca>. Matthews' briefing note provides a compelling argument, based on economic considerations, for increased legal aid funding.
31. *Ibid* at 6.
32. *Ibid* at 2.
33. Catrina Denvir, "What is the Net Worth? Young People, Civil Justice and the Internet" (PhD thesis, University College London, 2014) [unpublished], online: <discovery.ucl.ac.uk/1437397/1/PhDThesis-CDenvir.pdf>.
34. See Ian Mulgrew, "Online Self-Help Legal Resources No Panacea for Justice System" *Vancouver Sun* (26

September 2014), online: <www.vancouversun.com>.

35. Denvir, *supra* note 33 at 3.
36. Leonard T Doust, QC, "Foundation for Change: Report of the Public Commission on Legal Aid in British Columbia" (Vancouver, BC: 2011) at 23, online: <www.publiccommission.org/media/pdf/pcla_report_03_08_11.pdf> [Doust Report].
37. Sentis Market Research, *2015 Public Opinion Poll* (22 April 2015), online: <www.legalaid.bc.ca/assets/aboutUs/reports/legalAid/lssPublicOpinionPoll04_15.pdf>.
38. Doust Report, *supra* note 36 at 9.