

Speaking notes for Oct 1 panel on “Legal Aid: A Right or a Privilege?”

The Honourable Anne Rowles,
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I am going to use my allotted time to talk about the legislation that governs the provision of legal aid in this province. In my view the legislation is seriously flawed. I will explain why by referring to the provisions in the legislation prior to 2002 and the legislation as it now stands.

1. The Legal Services Society Act

The Legal Services Society is the vehicle for providing legal information and legal aid services in British Columbia. The Society was created by statute, the *Legal Services Society Act*.

The legislation provides for a Board of Directors. Broadly stated, the Directors are responsible for ensuring that the provision of legal aid and legal information complies with the provisions in the *Act* and does so within the confines of the money allocated to it by government and by grants from the Law Foundation.

It is common for legislation to include a statement of a statute’s purpose or objective. When the legislation does so, it provides guidance to those who must work within its legislative framework.

The legal services legislation in place prior to 2002 stated, without qualification, the two objects of the Society. Section 3(1) of the *Act* in the 1996 revised statutes provided:

- 3 (1) the objects of the society are to ensure that
 - (a) services ordinarily provided by a lawyer are afforded to individuals who would not otherwise receive them because of financial or other reasons, and
 - (b) education, advice and information about law are provided for the people of British Columbia.

The objects of the pre-2002 legislation are generally in accord with the international standards discussed earlier.

The next subsection specified the services the Society was obligated to ensure were made available:

- 3(2) The society must ensure, for the purposes of subsection (1) (a), that legal services are available for a qualifying individual who meets one or more of the following conditions:

- (a) is a defendant in criminal proceedings that could lead to the individual's imprisonment;
- (b) may be imprisoned or confined through civil proceedings;
- (c) is or may be a party to a proceeding respecting a domestic dispute that affects the individual's physical or mental safety or health or that of the individual's children;
- (d) has a legal problem that threatens
 - (i) the individual's family's physical or mental safety or health,
 - (ii) the individual's ability to feed, clothe and provide shelter for himself or herself and the individual's dependents, or
 - (iii) the individual's livelihood.

For the legislation to specify what legal services the Society had to provide gave clear and certain guidance to its Board of Directors. Under the pre-2002 *Act*, the Board was to make decisions largely independent of government.

To be sure, there were problems from time to time when the Board was trying to resolve how funds were to be allocated or at what level lawyers were to be compensated for their services. How to keep within the funding envelope did generate conflict with both government and the legal profession.

In 2002, the *Act* was substantially amended. I'm going to move ahead for a moment and refer to how legal aid has fared since the 2002 amendments.

In 2010, the legal profession had become so concerned about the impoverished state of legal aid services in this province that, collectively, the bar decided to pay for a public commission to report on the matter. When I say "collectively", I am referring to the entities within the Bar that commissioned the Report: the Law Society of British Columbia, the governing body of the Bar in this province, the BC Law Foundation, the BC Crown Counsel Association, the BC Branch of the Canadian Bar Association, and both the Vancouver and the Victoria Bar Associations.

2. The Doust Commission

Mr. Leonard Doust Q.C., an experienced and highly regarded lawyer, was asked to act as the Commissioner. His report, released in 2011, is referred to at page 3 of the Lawyers Rights Watch paper: "The Right to Legal Aid: How British Columbia's Legal Aid System Fails to Meet International Human Rights Obligations". Here are the first two of the Doust Commission recommendations:

1. 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;
2. develop a new approach to define core public legal services and priorities;

As far as I am aware, the report of the Doust Commission has not prompted any action on the part of government to amend the *Act*.

It should also be noted that the Legal Services Society is also well aware of the problems. In a 2012 report, the Society summarized the legislative changes and the funding reductions that have significantly altered legal aid in B.C. The report catalogues the extent to which legal services have been decimated.

West Coast LEAF has documented the implications of the massive funding cuts in the area of family law.

Summaries of the reports of the Legal Services Society and West Coast LEAF are also on page 2 of Lawyers Rights Watch paper. Anyone concerned about the state of funding for legal services in family law would do well to read LEAF's summary.

3. Issues with the Act

I'm nearly out of time but I want to refer briefly to parts of the legal services legislation that has been in force since the 2002 amendments. Bluntly put, the legislation is crafted in such a way that it invites uncertainty as to its purpose and obfuscation as to the services the Society must provide. Reference to the legislation itself will explain why.

Section 9(1) provides:

- 9** (1) The objects of the society are,
- (a) subject to section 10 (3), to assist individuals to resolve their legal problems and facilitate their access to justice,
 - (b) subject to section 10 (3), to establish and administer an effective and efficient system for providing legal aid to individuals in British Columbia, and
 - (c) to provide advice to the Attorney General respecting legal aid and access to justice for individuals in British Columbia.

What does s. 10(3), the "subject to" subsection, say?

- 10(3) The society must not engage in an activity unless
- (a) it does so without using any of the funding provided to it by the government, or

- (b) it does so in accordance with this Act, the regulations and the memorandum of understanding referred to in section 21 and money for that activity is available within the budget approved by the Attorney General under section 18.

Section 9(2) provides:

- (2) The society is to be guided by the following principles:
 - (a) the society is to give priority to identifying and assessing the legal needs of low-income individuals in British Columbia;
 - (b) the society is to consider the perspectives of both justice system service providers and the general public;
 - (c) the society is to coordinate legal aid with other aspects of the justice system and with community services;
 - (d) the society is to be flexible and innovative in the manner in which it carries out its objects.

It is well nigh impossible for the Society, as required by s. 9(1), “to establish and administer an effective and efficient system for providing legal aid”, while the legislation continues to take its present form.

I am out of time and so I will not refer to sections 10 though 12 or the remarkable inclusion of a memorandum of understanding in s. 21. I urge you to read *Act* which is readily available on-line under BC Statutes.

4. Conclusion

Anyone familiar with the history of the common law knows that one of its strengths lies in the prominence it gives to effective remedies. Unless we ensure access to the courts and a fair trial or hearing for all, the effective remedies afforded by the common law and by our *Charter of Rights and Freedoms* will inevitably be denied to those who are unable to afford to pay for legal services. The fact that our society is changing and that the laws and procedures will change as a result should enhance, not lessen, the need for clarity in the objects of the legal services legislation and in the services the Society is expected to provide.

I conclude by saying that I hope the Bar, collectively, will continue to urge the government to amend the legislation and for others concerned with the adequacy of legal services in this province to do so as well.

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