

Rights-Based Legal Aid

Rebuilding BC's Broken System



by Alison Brewin and
Kasari Govender

NOVEMBER 2010



CCPA
CANADIAN CENTRE
for POLICY ALTERNATIVES
BC Office

RIGHTS-BASED LEGAL AID: REBUILDING BC'S BROKEN SYSTEM

November 2010

By Alison Brewin and Kasari Govender

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ACKNOWLEDGEMENTS

The authors would like to thank the women and women's advocates who have shared their knowledge and experiences of the family law system over the years with West Coast LEAF. We also want to thank the Coalition of Public Legal Services for their efforts and success at developing a coordinated response to the legal aid crisis on behalf of low-income British Columbians. In addition we would like to thank J.P. Boyd, Brenton Walters, Zara Suleman, Seth Klein, Shannon Daub, Sarah Leavitt and the anonymous peer reviewers, for providing feedback and editorial comment on the paper in its development.

Thanks to BCGEU for their assistance with production costs for this project.

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Copyedit and design: Nadene Rehnby www.handsonpublications.com

ISBN: 978-1-926888-20-0



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SUMMARY

Rights-Based Legal Aid Rebuilding BC's Broken System

BC is now the third lowest province in Canada in per capita spending on legal aid, and our system does not cover many family law issues that other provinces do.

LEGAL AID IS A VITAL, LEGALLY MANDATED SOCIAL SERVICE. We need legal aid in order to have a functioning justice system and promote equality and justice in our society. Drastic cuts have cost Canadian society and taxpayers in unmet legal needs and the resulting expenses of social exclusion. Underfunding legal aid services is no longer a viable option in British Columbia.

This paper updates and expands on *Legal Aid Denied: Women and Cuts to Legal Services in BC*, a study published by the CCPA-BC and West Coast Women's Legal Education and Action Fund (West Coast LEAF) in 2004. We examine the continued cuts and changes to legal aid in the last six years, within the context of a full 15 years of deteriorating legal aid services.

KEY FINDINGS

Reduced access to legal aid

- The number of legal aid cases approved for legal representation declined dramatically between 2001 and 2010: the number of family law cases approved dropped from 15,526 to 6,270 and poverty law referrals went from 40,279 to 0 (legal representation for poverty law—housing, welfare, disability pensions, debt—has been eliminated).
- BC is now the third lowest province in Canada in per capita spending on legal aid, and our system does not cover many family law issues that other provinces do.
- Legal aid representation in civil court has been restricted to high risk family law cases, child apprehension cases, certain prison and mental health related issues, refugee claims, and immigration cases where the client risks deportation.

- Just since 2009, LSS has closed five regional centres (two remain in Terrace and Vancouver) and the family law centre; laid off 96 staff; reduced tariffs for family, immigration and criminal law; imposed stricter screening and eligibility for clients; and reduced services for people who cannot access legal representation through LSS, including the elimination of the LawLINE telephone service and the Community Advocate Support Line (though the latter was picked up by the Community Legal Assistance Society, a Vancouver non-profit).

Costs of an inadequate legal aid system

- There is a great need for legal aid. LSS's own research shows that 83 per cent of BC residents with annual incomes under \$50,000—1.5 million people—are likely to have a civil legal problem in a three-year period, and only 11 per cent retain a lawyer.
- Research from other jurisdictions shows that cuts may save money in the very short term, but they increase costs in the long term:
 - While the government saves by not paying for legal representation, cases in which the parties lack legal representation are more likely to go to trial, which is extremely costly to the public.
 - Unresolved legal issues, particularly family law issues, result in expensive social problems, such as poor health, increased reliance on social assistance and programs, unemployment, domestic violence and relationship breakdown.

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RECOMMENDATIONS

We propose that instead of trying to fix our damaged legal aid system, we build a new, rights-based system that would ensure legal representation for low income people, improve the justice system for all British Columbians, and reduce social and economic costs.

Key recommendations include:

- All citizens should have the right to access the justice system with legal representation in any legal matter where human dignity is at stake. This includes custody and access, spousal and child support, immigration and refugee matters, poverty law issues like debt and access to social assistance, and employment matters. (LSS and the government have fought efforts by BC PIAC, the Canadian Bar Association and others to expand constitutional rights to legal aid.)
- Legal information, advice and representation should all be funded, as opposed to simply focusing on legal information (often known as “pamphlet law”).
- Legal Services Society should regain its independence from the provincial government, which was lost in 2002 when the LSS board was fired and the government legislated control over LSS budgets.

- An effective legal aid system should include a mix of legal aid clinics, private lawyers paid through a tariff system, and staff lawyers in community organizations.

Without access to the means of enforcing one's legal rights, those rights are meaningless. With a rights-based system, justice will be accessible to all British Columbians, not simply those wealthy enough to afford legal representation. By providing representation in addition to advice and information, this system will enable more legal issues to be resolved, improving the overall functioning of our justice system, and decreasing the social and economic costs that result from lack of access to justice.

Introduction

IN 2004, TWO YEARS AFTER THE BC GOVERNMENT cut legal aid funding by almost 40 per cent, the CCPA and West Coast Women’s Legal Education and Action Fund (West Coast LEAF) co-published the report *Legal Aid Denied: Women and the Cuts to Legal Services in BC* (available at www.policyalternatives.ca). Since the publication of that report, the legal aid system in BC has continued to experience restructuring and, more recently, further cuts, leading us to publish this update.

Our 2004 report focused on the impact of those initial deep cuts on women, particularly in the area of family law—which suffered the worst cuts, and is the area in which women are most likely to need legal assistance. Its core findings included:

- While the cuts and service reductions have impacted all British Columbians, they have had the greatest impact on women;
- The provincial government takes in more legal aid revenue from a variety of sources than it spends on legal aid;
- Legislative and administrative changes have eliminated the independence of the Legal Services Society and its capacity to fulfil its mandate; and,
- Constitutional, international and human rights obligations of the BC government require an active change in policy direction to address the equality impacts of our current legal aid system—for women, new immigrants and refugees, and low-income British Columbians.

This update steps back and looks at the current state of civil legal aid overall in BC, the impacts of an inadequate civil legal aid system on women and other marginalized people, and the implications for all British Columbians of failing to meet the legal needs of those who cannot afford to pay for a lawyer’s help. It is women’s experience and a gender lens that makes civil legal aid such an important issue for the authors and West Coast LEAF, and the core findings of the 2004 report outline clearly why civil legal aid is a women’s issue. In this update we outline what has happened since 2004 and propose ideas for a strengthened legal aid system that will ensure meaningful access to justice for all British Columbians.

Since the publication of our 2004 report, the legal aid system in BC has continued to experience restructuring and, more recently, further cuts, leading us to publish this update.

In the past six years, the BC government has not substantially altered the funding or system for providing legal aid in BC. The financial downturn of 2008 led to a decrease in both public and private funding of legal aid, and the impact of inadequate funding continues to undermine the entire justice system. Since the beginning of 2009, the Legal Services Society (LSS) has closed more offices (five of seven regional offices and the Family Law Clinic), laid off more staff (96 in the past year) and implemented a seesaw of cuts to civil legal aid programs, reinstatement of funding, and then cuts again. Even seasoned lawyers had trouble following the changes, much less low-income British Columbians grappling with legal problems.

For the purposes of this paper, let us first clarify the framework of our discussion. Solving a legal problem usually requires access to one or more of the three elements of legal assistance: information about the law, advice on how the law applies in the context of the particular problem, and legal representation for negotiations and court appearances. According to BC's Legal Services Society Act,¹ legal aid is any service provided by LSS, which encompasses all three forms of legal assistance.

"I don't speak English very well and had no money for lawyer. My ex was rich and had a lawyer and he spoke very good English. I felt scared as I did not know Canadian law."

We centre our discussion here on the availability of legal *representation and advice*—in other words, the help and assistance of a lawyer. While access to legal information is very important, it is access to lawyers that has been most under attack in BC. Access to legal information (what some call "pamphlet law") is readily available to those who are functionally literate and have access to the Internet, and there are even a rich number of multi-language resources and services—especially in the Lower Mainland. However, many British Columbians for whom English is their first language struggle with literacy (40 per cent of British Columbians have literacy rates that affect their capacity to function in the modern world—and the number is predicted to increase in coming years).² Anyone who has dealt with even a relatively straightforward legal problem will understand that the justice system is complex and challenging to navigate for any non-lawyer, let alone someone who faces additional literacy and language barriers.

Key Terms

LEGAL AID:	Public legal services, including legal representation, legal education and legal advice.
CIVIL LAW LEGAL AID:	Legal services for non-criminal matters, such as family law disputes, immigration, or legal problems arising from debt.
CRIMINAL LAW LEGAL AID:	Legal services for those charged with a crime.
LEGAL SERVICES SOCIETY:	A non-profit organization that administers legal aid in BC, its mission is to provide legal aid services "that enable people with low incomes to effectively address their issues within the justice system." LSS is accountable to the public and funded primarily by the province through the Ministry of Attorney General.

1 *Legal Services Society Act*, [SBC 2002], c.30, s.1, www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/00_02030_01#section1.

2 Literacy BC, "Fact Sheet: Literacy in British Columbia," www.literacybc.ca/Info/literacyinbc.pdf, accessed May 25, 2010.

In addition to written materials, non-lawyers can and do provide assistance in BC to help individuals understand legal issues and navigate the justice system, but that assistance can only go so far since non-lawyer advocates do not have extensive legal training, the ability to provide legal advice, or the standing to represent individuals in court. Access to a lawyer means assistance in applying the law to one's own problem, identifying the particular legal remedy most likely to succeed, and representing the individual in pursuing that remedy through the legal system.

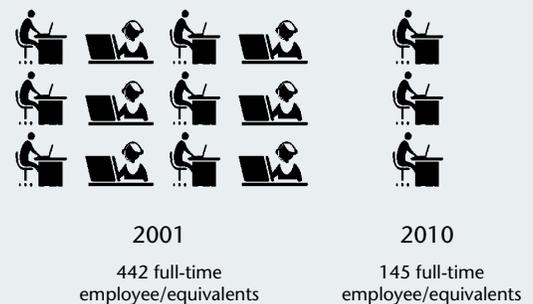
This paper does not address pro bono (donated) legal services, which cannot replace public legal services such as legal aid. The justice system itself often falls back on an assumption that an increase of pro bono legal services offered by lawyers can fill the gap. There is no basis in fact for this expectation. J.P. Boyd, a Vancouver family law lawyer with years of

Snapshot of Legal Aid in BC

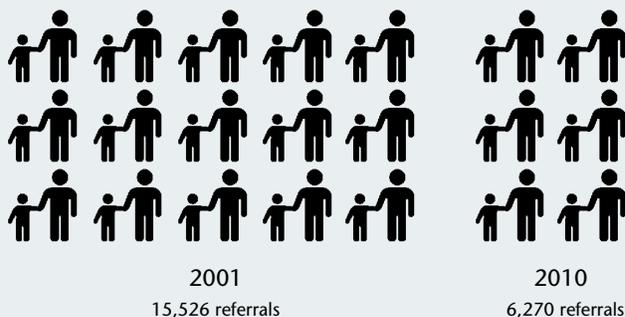
OFFICES



STAFF



FAMILY LAW REFERRALS



POVERTY LAW

Clients served through staff lawyers, paralegals and clinics



CUTS TO SERVICES IN 2009/10: Five regional centres closed (Kelowna, Kamloops, Prince George, Victoria and Surrey, and cuts to LSS staff at the Justice Access Centre in Nanaimo—only the Vancouver and Terrace regional centres remain open); 96 layoffs, including staff lawyers; cuts to tariffs for family, immigration and criminal law; stricter screening and eligibility for clients; closing of the family law clinic; and reductions in services for people who cannot access legal representation through LSS, including elimination of the LawLINE and Community Advocate Support Line.

experience supporting the development of pro bono services in the area of family law, explains the problem this way:

Family law files are particularly difficult for most practitioners to take on as they are rarely confined to a narrow, tightly-defined issue and even the simplest issues can hold unexpected complexities. Many lawyers doing pro bono work feel a responsibility to stick with a file once it's been taken on, and the prospect of an almost unlimited obligation is a powerful deterrent. As well, family law lawyers live by the billable hour, working for clients with finite resources, and pro bono work comes at a double cost—the cost of both the time donated and the cost of the time not billed. Nevertheless, it is important to note that most family law lawyers do pro bono work in one way or another, whether through the formal donation of time to a legal advice program, giving virtually free legal advice through the Lawyer Referral Service, or offering gratuitous assistance to lay litigants in court.³

As one senior criminal lawyer in Vancouver has been heard to exclaim, “What they are doing to criminal legal aid is bad; what they are doing to civil legal aid is criminal.”

In this paper, we limit our discussion to *civil* legal needs, not *criminal*. The need to reform criminal legal aid systems and services is certainly an important discussion, but not one within the scope of this paper. Nor is that need for reform as serious at this moment as the need for reform to meet the unmet civil legal needs of Canadians. As one senior criminal lawyer in Vancouver has been heard to exclaim, “What they are doing to criminal legal aid is bad; what they are doing to civil legal aid is criminal.”

And, finally, this is an equality issue on many levels—some of which were outlined in the 2004 report. Demographic changes in BC in the coming years also necessitate a new approach to accessing justice in the province. Both Aboriginal people and new immigrants will form an increasing percentage of BC’s population in coming years.⁴ If the legal system does not actively plan for these changes by building plain language and translation services, not to mention culturally appropriate services and programs, the current crisis will only deepen. For new immigrant women, who are often sponsored by male family members or employers, dependency, limited or inappropriate ESL training and isolation from public services will result in a steady decrease in their access to justice and legal remedies.

The debate around civil legal aid is situated in the context of severe funding and service cuts to public legal services as a whole. The drastic cuts to the legal aid system in BC since 2002 sometimes result in a limited debate about how to get back what has been lost in the last decade. But it is important to look beyond the recent crisis as well: the blueprint paper that led to the design of BC’s legal aid system is worth dusting off as a roadmap. Produced for the NDP government of the early 1970s, the paper recommends a mixed system of civil legal aid involving grants to the non-profit sector, specialized clinics, and an independent body to administer payments to private lawyers for both criminal and civil matters.⁵ It is this model that was implemented and slowly dismantled ever since. Our task is to step back and focus not only on what the system was before the drastic cuts in 2002 and subsequent changes, but also on what a rights-based system of legal aid in BC could and should look like in the future.

3 To West Coast LEAF, May 7, 2010.

4 From 1996 to 2006 the Aboriginal population in BC jumped by 39 per cent, and over half those identifying as Aboriginal are under 24, meaning the community will continue to grow and represent a much larger portion of BC’s residents. The federal government also predicts a growth in foreign-born Canadians over the next two decades; by 2031 over half of Canadians will be foreign-born. Statistics Canada, “Study: Projections of the diversity of the Canadian population,” March 9, 2010, www.statcan.gc.ca/daily-quotidien/100309/dq100309a-eng.htm, accessed May 20, 2010.

5 The study was written by Peter Leask, commissioned by the Ministry of the Attorney General in 1974, and is available in hard copy at the Courthouse Library, www.courthouselibrary.ca.

Current Status of Civil Legal Aid in BC

THE DRASTIC CUTS TO PUBLIC LEGAL SERVICES implemented between 2002 and 2004 were documented in our 2004 paper, including the elimination of poverty law services and the narrowed scope of family law services. Since then LSS has managed its budget by raising and lowering financial guidelines, closing offices, and contracting out services. As of April 1, 2010, civil legal aid for representation is available for low-income individuals (whose income is below the threshold LSS defines in its financial guidelines)⁶ and whose legal matter falls within one of the following four categories:⁷

- **FAMILY LAW**—Limited emergency services are provided if an individual or their child is at risk of significant harm if matters aren't addressed, or to resolve a serious denial of access to their child. Depending on available funding and the circumstances of the case, some applicants may qualify for extended services for serious high conflict family cases or "when all other efforts to resolve the case have been exhausted and resolving the case will make a significant difference to you or your children"⁸ (known as "exceptional circumstances"). Officially, a lawyer can apply for extended services on behalf of their client for a range of reasons, if their client still qualifies financially. These extended services were cancelled in August 2009, and then reinstated in February 2010,

As of April 1, 2010, civil legal aid is available only for those very low-income British Columbians whose legal matter involves family law (restricted only to extreme circumstances), child apprehension, mental health, prison-related issues covered by the Charter, and immigration.

6 Current LSS guidelines stipulate that a single person's monthly income must be less than \$1,420 to qualify, rising according to family size. Assets are also considered in determining financial eligibility. In a recent case at the BC Supreme Court, *British Columbia (Attorney General) v. T.L.*, (2010 BCSC 105 [T.L.]), the court refused to be bound by LSS guidelines and, according to case law, determined the family was entitled to state-funded legal representation in a child apprehension case. The court relied on common law and constitutional definitions of "indigent" status (a legal concept to excuse an individual from court costs because of lack of financial resources). This case was not appealed. At the time of writing, it is not clear what impact this will have on LSS guidelines.

7 Legal Services Society website, www.lss.bc.ca/legal_aid/legalRepresentation.asp, accessed February 14, 2010.

8 *Ibid.*, www.lss.bc.ca/legal_aid/familyIssues.asp, accessed February 14, 2010.

causing a number of otherwise eligible British Columbians facing a family law trial between August 2009 to January 2010 to do so alone.

- **CHILD APPREHENSION**—There is a constitutional right to state-funded counsel if the state apprehends a child and the parents can't afford a lawyer, depending on the seriousness and complexity of the hearing and the parents' capacity to navigate the legal system.⁹ Because of this constitutional requirement, LSS funds representation for child protection matters where parents can't afford a lawyer to represent them—as long as they fall under the financial guidelines.
- **MENTAL HEALTH AND PRISON-RELATED ISSUES**—There is legal aid coverage for applicants facing a Mental Health Panel in which the outcome could involve institutionalization, and for applicants facing prison-related issues that are covered by the Charter.
- **IMMIGRATION**—There is legal aid coverage for applicants facing an immigration hearing that may result in the applicant being removed from Canada, and for applicants filing a refugee claim. Recent changes in eligibility rules for immigration issues now mean that a non-lawyer intake worker will assess the merits of the case—the chance of success—and approve only those above an undefined merit threshold.¹⁰

"I thought in Canada there is justice even though you are an immigrant. I was proven wrong. My daughter and I did not have justice."

In addition to these services, LSS instituted family law "duty counsel" throughout the province in 2002. Duty counsel is available at some courthouses to represent individuals in that moment, that day. Duty counsel are not a substitute for having a lawyer work with the litigant for the duration of the case, or in preparation for trial. LSS announced in January 2009 that it was reducing this service, but reinstated it before the cut was implemented.¹¹

In sum, having a legal aid funded lawyer represent you in court on a civil law matter in BC is only possible in limited family law and immigration matters, or where the courts have said the state has a constitutional obligation (child apprehension cases, where there is a risk of having physical freedoms taken away by the government, or refugee matters). This severely limited access to public legal services has put the justice system into crisis.

One area in which this crisis is most evident is in family law. While statistics and research show that the number of British Columbians experiencing high conflict family law problems

9 New Brunswick (Minister of Health and Community Services) v. G. (J.), [1999] 3 S.C.R. 46.

10 Legal Services Society website, "Complete Tariff Guide December 2009," www.lss.bc.ca/assets/lawyers/tariffGuide/Dec09/completeTariffGuide_Dec09.pdf, accessed February 16, 2010.

11 While there is no longer any reference to the cutting of family law duty counsel services on LSS's website, the news release announcing its *reinstatement* (couched in the new release as "service enhancements") was accessed May 25, 2010 at www.lss.bc.ca/assets/media/newsReleases/servicesUpdate.pdf.

The recently proposed changes to the Family Relations Act, the statute governing family law in BC, place a broadened focus on non-court dispute resolution, including mediation and arbitration, for families not experiencing family violence, which may reduce the amount of family law litigation in BC over the long run. However, new legislation inevitably brings increased litigation in the short term, as the meaning of the law is shaped, and the broadened definition of violence to include psychological violence will exempt many families from the new focus on non-court dispute resolution. Family law legal aid will remain a vital component of family justice under the proposed legislation. See Ministry of Attorney General, Justice Services Branch, Civil Policy and Legislation Office, "White Paper on Family Relations Act Reform: Proposals for a new Family Law Act," July 2010, www.ag.gov.bc.ca/legislation/pdf/Family-Law-White-Paper.pdf, accessed September 21, 2010.

without legal representation is lower than the number of those who experience other civil legal issues (such as employment, residential tenancy, debt and consumer issues), the profound nature of family law problems means they are related to—and often the cause of—a wide range of social problems and issues, especially for women. Yet the cost of a family law dispute is beyond the means of many British Columbians—estimates put the average legal cost of a contested divorce in Canada at \$12,562, and the average cost of a two-day civil trial at \$29,436.¹²

In addition to the severely limited availability of legal aid and the high cost of responding to a contested case, advocates report mixed experience when individuals apply for family law legal aid. This anecdotal evidence suggests there is a problem for clients trying to understand what information they need to provide to ensure a successful referral to legal representation. Advocates from community organizations and transition houses report that women regularly come back from the LSS offices having been told they were not eligible for legal aid, despite the presence of violence in their lives and their financial eligibility. This means there is a disconnect between what the government and LSS say they are providing, and what people are actually getting.

Notably, since the 2002 cuts, legal representation is no longer available for any civil legal issue relating to housing, welfare, disability pensions, debt (often grouped together as “poverty law” services), employment or consumer-related legal issues. In April 2010, LSS cut more legal advice services, eliminating the LawLINE telephone service and the LSS portion of funding to Povnet,¹³ an on-line network of welfare advocates. Representation for discrimination issues under BC’s Human Rights Act is funded outside of LSS by government and other funders through the Community Legal Assistance Society and the University of Victoria Law Centre.

To fill the gaps in access to legal representation, a number of programs for non-lawyer advocacy have been funded by various organizations, such as the Law Foundation’s funding of poverty law advocates throughout the province.¹⁴ There are free summary advice clinics run by lawyers’ organizations and law schools—few of whom provide family law services¹⁵—throughout the Lower Mainland and Victoria, as well as in some smaller communities. The Law Foundation also provides core funding to a number of public interest law organizations, such as the BC Public Interest Advocacy Centre (BCPIAC) and West Coast LEAF. However, BCPIAC takes on only those cases that will have an impact on many individuals, and West Coast LEAF provides no direct representation, acting as an intervenor¹⁶ or “friend of the Court” in an effort to impact precedent-setting cases. In addition, some

“I am not sure if I have legal custody of both my children because I have never filled out formal custody and access papers...I attempted to get legally divorced. I went to legal aid to ask for help in filling out the paperwork, but they said I did not qualify because I had a full time job [\$22,000/year].”

12 Kelly Harris, “The Going Rate” *Canadian Lawyers Magazine*, June 2009, at p. 33, www.canadianlawyer.com/images/stories/pdfs/Surveys/2009/CL-going-rate2.pdf, accessed May 21, 2010.

13 Povnet is a non-profit providing online community information and support to advocates around BC—linking advocates and lawyers in on-line discussions and education, www.povnet.org/.

14 The Law Foundation of BC is a non-profit foundation created by legislation to receive and distribute the interest on clients’ funds held in lawyers’ pooled trust accounts maintained in financial institutions, for the benefit of the public. Its mandate is to fund legal education, legal research, legal aid, law reform and law libraries for the benefit of British Columbians. www.lawfoundationbc.org.

15 For a description of the impact legal aid is having on the future of the Family Law Bar, see “Not with a Ten Foot Pole” published by West Coast LEAF, www.westcoastleaf.org/index.php?pageID=43&parentid=29#Notwitha.

16 As an intervenor, West Coast LEAF does not represent the plaintiff, the defendant or the accused in the legal proceeding, but rather represents the interests of women’s equality generally. West Coast LEAF presents arguments to the court about why and how the particular legal issues or problem in question has broader impacts on women or the equality of marginalized people in BC, beyond the interests of the parties to the individual proceeding.

non-profit organizations provide limited legal representation within their mandated areas, although such organizations are rare. Administrative bodies, such as the Residential Tenancy Board, are designed to be simpler than court proceedings; many lay advocates can and do represent individuals in hearings before these bodies, but that non-lawyer cannot give legal advice or go before a judge to represent someone else. Only the self-represented individual or a practicing lawyer¹⁷ can appear in court as an advocate.¹⁸

Table 1 compares the numbers of applications for legal aid received in any given year by service area and shows the percentage of applications that were granted some legal representation (or “referred”)—whether through a staff lawyer or a private lawyer. The numbers tell us a great deal about management and spending decisions at LSS and illustrate the number of people *not* receiving legal representation compared to the years prior to the 2002 cuts.

“My ex was never involved in child rearing until the separation. Without any legal aid I had to represent myself in court against my ex’s aggressive lawyer. I lost the custody of my son.”

It is important to point out that LSS and the provincial government use the number of applicants to describe the demand for legal help¹⁹—in other words, if only 8,000 people ask for legal aid, LSS and the government need only assess and consider the needs of 8,000 people. This, of course, creates a false impression about the legal needs of British Columbians. The drop in referred cases between 2001/02 and 2002/03 is the clearest reflection of unmet needs, but it is also obvious that many individuals seeking legal help would not get as far as applying for help by simply looking at eligibility rules or being told about them by friends and advocates. Thus, although the number of applicants for family, immigration and poverty law legal aid has dropped substantially since 2001/02, this does not reflect a decline in need for legal aid in these areas, but rather a system that has been made less and less accessible.

Also of note is the number of family law cases referred to legal representation as a result of “exceptional circumstances” applications (see “exception referrals” in Table 1). After 2001/02, individuals eligible for family law legal aid were entitled to only approximately 15 hours of legal representation, and only a very small number, after their lawyer applied to LSS on their behalf, were able to get extra hours.

Finally, the declining percentages of individuals receiving legal representation who did apply reflect more stringent rules about what kind of coverage they are eligible for. In 2007, LSS launched an advertising campaign involving TV ads and ads on buses telling British Columbians that if they need legal aid, the Legal Services Society is there to serve them. In 2008/09 there was a sharp increase in the number of individuals coming forward to apply for legal aid, followed by a public announcement in fall 2008 that LSS could not meet the demand and therefore had to cut services. An LSS news release in January 2009 read:

As many of you know, there has been a significant increase in demand for legal aid... Faced with these challenges, the Legal Services Society board of directors instructed the society to prepare a budget that brings service costs more in line with government funding for criminal, family services... This [change to staff and services] will enable LSS to refocus its resources and finances...”

17 Described as a member of the bar, meaning someone allowed to cross the bar in a courtroom that separates the audience from the judge, permitting them to address the judge.

18 *Legal Profession Act*, [SBC 1998], c.9 at ss.1 and 15.

19 See LSS Annual Reports 2003/04 to present, www.lss.bc.ca/about/annualReports.asp, accessed August 5, 2010.

Table 1: Total referrals to legal aid representation in BC, 2000/01 to 2009/10

Year	Criminal		Family			Child apprehension		Immigration		Poverty	
	Applica-tions	% referred	Applica-tions	Exception referrals	% referred	Applica-tions	% referred	Applica-tions	% referred	Applica-tions	% referred
00/01	35,713	72.4	25,217	-	61.6	not available		3,559	85.6	9,383	63.4
01/02	33,662	72.2	23,168	-	60.4	not available		3,549	87.6	9,107	58.8
02/03	28,837	76.2	8,309	-	48.9	2,720	87.9	2,593	88.7	1,731	46.9
03/04	28,821	75.7	8,754	722	50.4	2,540	86.8	2,061	85.2	0	0
04/05	27,823	76.9	8,267	522	50.5	2,665	86.6	994	74.5	0	0
05/06	28,381	77.7	8,807	452	51.8	2,962	86.5	1,034	81	0	0
06/07	29,024	77.9	8,615	421	52.5	2,884	83.5	1,119	84.4	0	0
07/08	29,314	78	9,067	746	56	2,786	81.6	1,480	80.5	0	0
08/09	30,039	78.7	10,345	770	51.6	2,775	81.2	2,079	70.4	0	0
09/10	26,761	71.4	9,136	282	44.4	2,811	78.7	2,024	61.1	0	0

Source: Legal Services Society Annual Reports 2000/01 to 2009/10

This news release is just one of a number that describe cuts to services and layoff of staff lawyers as a strategy to address the increased demand for legal aid. These cuts, and the declining access to all areas of legal aid shown in Table 1, together explain the current crisis in legal aid.

While the primary problem with the legal aid system in BC is unquestionably the government's refusal to properly resource the need, at the end of the day, the Legal Services Society has made organizational decisions that have contributed to the problem. We argued in the 2004 report that LSS lost its independence in the changes of 2002 and that remains our position today. Over the years it has been a common LSS management tool to balance the budget by manipulating financial eligibility thresholds and that hasn't changed in the past decade. In addition, the relative stability of criminal and child apprehension cases over the years illustrates that the bottom line for LSS and the government is defined by the courts—where there is a clearly defined constitutional obligation to provide state-funded legal representation, LSS is providing it. Absent of that court order, LSS is free to adjust its eligibility requirements to stay within its legislated budget. However, LSS began chipping away at criminal legal aid despite the established constitutional rights. LSS also actively fought efforts by BCPIAC, the Canadian Bar Association and others to establish any other constitutional obligations, and reinstated family law extended services only after BCPIAC launched a court challenge to the lack of family law services.²⁰

Many individuals seeking legal help would not get as far as applying for help by simply looking at eligibility rules or being told about them by friends and advocates. Thus, although the number of applicants has dropped substantially since 2001/02, this does not reflect a decline in need, but rather a system that has been made less and less accessible.

²⁰ This cancellation and reinstatement of family law extended services shows in Table 1 2009/2010 low numbers. The BCPIAC case (P.D. v. British Columbia, 2010 BCSC 290) was a direct effort to invoke Charter and other legal rights to family law representation.

How BC Compares

No matter how one defines these differences, it is clear that British Columbia is falling behind standards set in other parts of Canada and the world.

BECAUSE OTHER PROVINCES AND COMMON LAW SYSTEMS around the world have designed their legal aid systems differently, comparisons are difficult. For example, the definition of what constitutes an administrative cost can differ greatly between jurisdictions. However, no matter how one defines these differences, it is clear that British Columbia is falling behind standards set in other parts of Canada and the world. This is particularly true when BC's system is compared to those in Alberta or Ontario, and even more so when compared to countries such as Finland.

Table 2 outlines legal aid expenditures in 2007/08 by province (not including federal contributions). What it tells us is that only two provinces (New Brunswick and Alberta) spend less per capita on legal aid than BC. In addition, Table 2 tells us how much the legal profession is contributing to the costs in each of the provinces listed. Here in BC, and across the country, there is a huge expectation that lawyers will pick up the demand for legal representation through free services. The BC legal profession is contributing more than in any other province.

Looking at spending by category, BC in 2007/08 was in the mid range when it came to the amount of money it spent on administration rather than actual legal services. The share of spending on administration has likely increased in recent years given that LSS has eliminated the majority of its staff legal positions—there are currently only five lawyers at LSS who provide legal services.

In the area of family law legal aid, BC is falling behind services available in other provinces. In Alberta and most other provinces, legal aid for family law matters covers all child welfare proceedings and all other family law matters if there is merit to the proceeding (in other words, a likelihood of success).²¹ By comparison, BC provides representation only for child protection and very serious family matters, particularly those involving violence; many family law matters that would be funded in other provinces fall outside the legal aid system in BC. Alberta spends less provincial government money per capita on legal aid, but has

21 Legal Aid in Alberta Review Steering Committee 2009, 153–4.

Table 2: Provincial Legal Aid Funding, 2007/2008

Jurisdiction ^a	Provincial government spending (millions)			% of total spending by three main categories ^b			Other funder contributions ^c (millions)		Legal profession contributions (millions)		Client contributions (millions)	
	Total	\$ per capita	% of funding	Criminal	Civil	Admin	\$	%	\$	%	\$	%
Nova Scotia	17.76	17.14	98	54	39	6	.39	2	-	-	.05	0
New Brunswick	66.68	9.11	96	48	41	10	.03	0	.14	2	.11	2
Quebec	116.83	13.03	97	39	51	9	1.60	1	-	-	1.88	2
Ontario	256.22	18.43	78	36	39	16	53.73	16	-	-	17.36	5
Manitoba	18.71	13.44	81	53	25	20	.09	0	2.97	13	1.24	5
Saskatchewan	16.57	14.44	99	69	24	7	.22	1	-	-	.34	0
Alberta	38.46	9.96	70	50	33	16	12.54	23	-	-	3.77	7
BC	52.06	11.88	88	51	26	14	5.15	7	3.24	5	0	0

Note: ^a Newfoundland and PEI are excluded as only very limited statistics are available.

^b This illustrates the three main categories of expenditures, including comparisons of administrative costs. Where they do not equal 100%, remainder is in smaller categories of costs described by Statistics Canada as "other expenditures." www.statcan.gc.ca/pub/85f0015x/2008000/t006-eng.htm.

^c Other funders include provincial Law Foundations and other legal foundations.

Source: Statistics Canada website "Legal Aid in Canada: Resource and Caseload Statistics 2007/2008: Tables" www.statcan.gc.ca/pub/85f0015x/2008000/tablesectlist-listetableauxsect-eng.htm, accessed May 25, 2010.

designed a system that shares costs with the client when possible. While this model may be at odds with a rights based approach, on the flip side it may provide more access to more people—a shared system of client costs, at a minimum, deserves more consideration in the BC context, with the caution that it is not appropriate for applicants who cannot afford to maintain an adequate standard of living while paying even a small portion of their legal fees.²²

Many other provinces also offer extensive coverage for other types of civil claims.²³ For example, Legal Aid Ontario funds 80 specialized and community legal clinics, many of which deal with poverty law issues, tenancy and housing issues, employment and workplace rights, immigration matters, human rights complaints and more.²⁴ BC's LSS does not operate any such clinics, having closed the last—a family law clinic—in April 2009, and five of the seven remaining regional offices in April 2010. In contrast, the government of Ontario announced in 2009 that it would invest an additional \$150 million into Legal Aid Ontario over the next four years.²⁵

Many other provinces offer extensive coverage for non-family civil claims. For example, Legal Aid Ontario funds 80 specialized and community legal clinics, many of which deal with poverty law issues, tenancy and housing issues, employment and workplace rights, immigration matters, human rights complaints and more.

22 A further point is that LSS has a practice of having clients sign a commitment that may require them to pay back legal aid funding if they have a change in financial circumstances, including funds from a family law dispute above \$10,000. It is not clear how this is administered or how often funds are paid back. Given that family law legal aid is available only in very high conflict, emergency cases and isn't available for property divisions issues (unless secondary to receipt of extended services), it is a practice that has raised concern among women's advocates.

23 Legal Aid in Alberta Review Steering Committee 2009, 153–4.

24 Legal Aid Ontario website, www.legalaid.on.ca/en/getting/typesofhelp.asp, accessed February 11, 2010.

25 Ontario Ministry of Attorney General, "Press Release: Legal Aid Investment Supports Ontario's Vulnerable," September 8, 2009, www.attorneygeneral.jus.gov.on.ca/english/news/2009/20090908-lao-nr.asp, accessed February 12, 2010.

LSS argues it has replaced the regional offices with local agents, which are “private lawyers who contract with LSS to administer legal aid and provide community legal outreach in the area.”²⁶ In fact, the argument goes, there are now more local agents than there were regional offices. However, advocates have difficulty accessing these new agents because office hours are often reduced for legal aid intake, agents are inadequately trained on intake procedures and have less investment in ensuring accessibility of public legal services, and clients find the private law practice environment more intimidating than public legal aid offices.

Looking outside Canada, Finland is arguably the only jurisdiction in the world that attempts to provide near-universal legal aid coverage.²⁷ Approximately 75 per cent of households in Finland are eligible for some degree of legal aid coverage (although they may be required to cover a portion of the costs depending on income), compared to the less than 30 per cent of households covered in most English-speaking common law countries.²⁸ While the United Kingdom does not aim at such extensive coverage, it spends over \$62 (Cdn) per person on legal aid, compared to approximately \$15 per person in Australia²⁹ and \$13 (on average) in Canada.³⁰

LSS argues it has replaced the regional offices with local agents, but advocates report difficulties with access and clients find the environment more intimidating than public legal aid offices.

“After being denied legal aid, I represented myself twice in court. Volunteers from a transition house came with me, but I had to stand up alone. I did not know what I was doing and it felt like nobody listened to me. My ex-partner’s lawyer was brutal towards me. No one in the courtroom recognized that I was representing myself or that English is not my first language. I was standing there alone trying to protect the boys. This new judge...disregarded the other judge’s decision. She said that my children could go back to overnight visits. The judge said my ex-partner’s actions were ‘just different parenting.’ I had practiced going to court and representing myself, but this did not matter because I cannot argue with a lawyer. I am not a lawyer. I am just a mother.”

26 Legal Services Society, “LSS services update: New local agents in seven communities” in Electronic Legal Aid Newsletter for community workers, March 26, 2010, www.lss.bc.ca/elan/Feb_March_10/newLocalAgentsSevenCommunities.htm, accessed September 21, 2010.

27 Hutchison 2008.

28 Ibid. See also Finland Ministry of Justice website, www.om.fi/en/Etusivu/Julkaisut/Esitteet/Oikeusapu/pagename/esite/Tulosta, accessed January 19, 2010.

29 United Kingdom Ministry of Justice, “News Release: Review into delivery of legal aid,” October 13, 2009, www.justice.gov.uk/news/newsrelease131009a.htm, accessed January 19, 2010.

30 See Table 2 on page 17 for provincial spending on legal aid across Canada.

The Public Cost of Under-funding Legal Aid

CUTS TO LEGAL AID HAVE FAR-REACHING IMPLICATIONS, both for the immediate unmet legal needs of individuals and families, and for the many other services required to fill the needs and gaps that arise as a result—for example, social assistance costs for families unable to access financial support through the legal system. While there has not been a comprehensive Canadian study of the social costs of inadequate legal representation, several important research studies allow us to estimate the scope of the problem in British Columbia and set a framework for future research.

LSS research shows that 83 per cent of BC residents with annual incomes under \$50,000 —1.5 million people—are likely to have a civil legal problem in a three year period.³¹ When we break down those numbers we find that 44 per cent of low income British Columbians (or 660,000 people) dealt with the problem on their own (i.e. by fixing a leaky roof themselves rather than taking legal action against a landlord) or left the problem unresolved. The next largest group of individuals who reported a civil legal problem (22 per cent or over 300,000 people) sought and utilized *non-legal* assistance. Interestingly, the institution most commonly utilized when Canadians seek non-legal help with a civil legal problem is their union (if they belong to one).³² A further 11 per cent (150,000 people) sought and received legal assistance—meaning a lawyer. Almost 6 per cent (85,000 people) did not address the legal issue at all because they did not think it was worth the trouble.

An underfunded legal aid system results in more litigants representing themselves in court, and self-represented litigants cost the justice system more than litigants with counsel. Unpublished data from the BC Supreme Court tells us that where one or both parties are unrepresented in civil law matters, 17 per cent go to full trial, compared to only 8 per cent

While there has not been a comprehensive Canadian study of the social costs of inadequate legal representation, several important research studies allow us to estimate the scope of the problem in British Columbia and set a framework for future research.

31 Legal Services Society, “Legal Problems facing Everyday people in BC,” www.lss.bc.ca, accessed February 14, 2009. For the best summary of the existing data, see McEwon 2009.

32 McEwon, p. 59.

where both parties are represented.³³ Similarly, only 17 per cent of cases where one or more parties is unrepresented settle before going to trial, compared to 35 per cent of cases where both parties are represented. Given the costs of civil trials (including courtroom infrastructure and the salaries of judges, law clerks, court clerks, registry staff and sheriffs, to name a few), ensuring that individuals are represented and therefore more likely to settle before reaching court represents significant cost savings for the justice system (and thus the public purse). In other words, investment in legal aid results in significant financial savings in other areas of the justice system.

According to a key report commissioned by the Law Foundation, among the portion of British Columbians who reported a civil legal problem in the three year period and did not seek any assistance at all, a significant number (almost 250,000 people) did nothing in response to a legal problem as a result of a barrier of some kind rather than a conscious decision to let it go.³⁴ This group is important to the development and design of an effective legal aid system that is strategic in its financial and human resource allocation. These are individuals who lack the capacity to seek a legal remedy as a result of language barriers, income, freedom of time, physical or mental health abilities, unfamiliarity with the Canadian justice system, or because the complexities of the issues they face simply make it impossible to manage without legal training.

“Failure to get legal aid has led me to go into a serious debt and severe depression. I have lost my job as a result of the stress of representing myself in court.”

A Canadian study analyzing extensive data on the impact of legal problems reported that family law issues were the most likely to have a negative impact in one’s life, followed closely by legal issues relating to disability pensions, personal injury and issues with the health care system.³⁵

Outside of Canada, there is thorough evidence from many common law nations that unmet legal problems create a financial burden on society, including health problems and increased reliance on social assistance and programs.³⁶ A UK study shows that legal conflicts are more likely to afflict vulnerable people and to “reinforce characteristics of vulnerability (such as unemployment, relationship breakdown and illness)”³⁷—meaning unresolved legal problems perpetuate social problems and therefore social costs. For example, 27.7 per cent of respondents to that study had a stress-related illness as a consequence of their civil legal problem, mostly resulting from domestic violence, mental health problems, homelessness and problems relating to their children (custody and other legal issues).³⁸ In addition, 14.2 per cent of respondents reported a physical illness, with the vast majority visiting a health care professional about their illness.³⁹ These health problems represent a significant cost to the individual, society and the economy, with the problem extended and compounded the longer the legal problem remains unsolved. The UK study also detailed other social problems and costs that result from or “cluster” with civil legal problems, including domestic violence,

33 According to statistics shared with the authors by the BC Supreme Court in May 2010.

34 McEwon 2009.

35 Currie 2007.

36 See Pascoe Pleasence, Nigel J. Balmer and Alexy Buck, “The Health Cost of Civil-Law Problems: Further Evidence of Links Between Civil-Law Problems and Morbidity, and the Consequential Use of Health Services,” *Journal of Empirical Legal Studies* 5:2, 351–373.

37 Pascoe Pleasence et al., “Civil Justice in England and Wales: Report of the 2007 English and Welsh Civil and Social Justice Survey,” London: Legal Services Commission, 2008 at 32, www.lsrc.org.uk/publications/2007CSJS.pdf, accessed May 21, 2010.

38 *Ibid.* at 36-37.

39 *Ibid.* at 36-37.

relationship breakdown and job loss. These findings suggest that increased legal aid services will reduce these other social problems and associated costs.

A study on legal aid in Texas showed that investment in legal aid services led to economic growth in the community by increasing jobs, reducing work days missed due to legal problems, creating more stable housing, resolving debt issues and stimulating business activity. In fact, “For every direct dollar expended in the state for indigent civil legal services [legal services for low-income people], the overall annual gains to the economy are found to be \$7.42 in total spending, \$3.56 in output (gross product), and \$2.20 in personal income.”⁴⁰ Reductions in legal aid spending, therefore, have a negative impact on spending and create an economic burden on the community.⁴¹

These findings can be logically extended to legal aid services in BC. An investment in legal aid is an investment in our communities—and legal aid cuts are a shortsighted hazard to our health, our relationships, our social fabric, and our economy.

“I tried the Law Clinic, the UBC Law Student Advice Program, but they told me they don’t do family law. I talked to three or four lawyers at the Salvation Army Law Clinic. One of the lawyers advised me that I did not need to do a financial statement because I was not the payer. I also went to the courthouse to get advice. In March the court clerk told me I didn’t need to do a financial statement. The next time I went in they told me my affidavits looked fine. I was trying hard to do everything properly...It all seemed to go by very fast. My mind seemed hazy, but I remember he (the judge) said to me ‘I can’t believe you didn’t do the financial statement. Why didn’t you?’ I replied ‘I was told I didn’t need one.’ The judge cut me off and told me he didn’t believe that a court clerk would tell me not to do a financial statement.” [In this case, the woman was applying to increase support payments as she had lost her job. The judge lowered the maintenance her ex was required to pay from \$455/month to \$171/month.]

40 The Perryman Group, “The Impact of Legal Aid Services on Economic Activity in Texas: An Analysis of Current Efforts and Expansion Potential,” February 2009, at 1–3, 24–25.

41 See also PricewaterhouseCoopers, “Economic value of legal aid: Analysis in relation to Commonwealth funded matters with a focus on family law,” prepared for Legal Aid Queensland, 2009, www.nla.aust.net.au/res/File/Economic%20Value%20of%20Legal%20Aid%20-%20Final%20report%20-%206%20Nov%202009.pdf, accessed August 16, 2010.

What Legal Aid in BC Should Look Like

To re-shift focus from patching the leaks to reframing the system to provide access to justice to low income British Columbians, we need to start at the beginning.

CIVIL LEGAL AID IN BC, as discussed, has been slowly deteriorating for 15 years, with severe cuts made in 2002. The structure and public policy behind the system of public legal services—that is, the goal of providing access to justice for BC’s most vulnerable—is not being fully realized. And the ripple effects and costs are being felt by the entire legal system in the province, as well as in the as yet undocumented social and financial costs to British Columbians. To re-shift focus from patching the leaks to reframing the system to provide access to justice to low income British Columbians, we need to start at the beginning.

There are a number of aspects to consider in the design and administration of a legal aid system. Roger Smith, director of the Scottish law reform organization JUSTICE, has developed a series of questions to help governments determine the most effective model of legal aid delivery.⁴² Some of these questions, adapted for the Canadian context, are particularly apt for BC. For example, governments are asked which legal duties they accept in relation to publicly funded legal services. In BC, the answer should include the Charter of Rights and Freedoms, the rule of law, and both domestic and international human rights law. Another question concerns the role of legal aid in funding public interest litigation; that is, the role of legal aid in funding cases that have the potential to change the law, such as challenges to the constitutionality of legislation.⁴³ Smith’s questions also focus on the identities and vulnerability of those most in need of legal services, and highlight that legal services must be tailored to the needs of marginalized people. Smith concludes by suggesting partnerships with the bar, the non-profit sector, unions and government. He also suggests that the cost of running a clinic staffed by lawyers (higher than the cost of paying private lawyers a

42 Smith 2002.

43 This is particularly significant in Canada since the 2006 cancellation of the Court Challenges Program, a national federally funded non-profit organization set up in 1985 to provide financial assistance for important court cases that advanced language and equality rights guaranteed under Canada’s Constitution.

legal aid tariff) is outweighed by the value of developing multi-disciplinary clinical services specializing in particular legal issues.

The answers to these questions in the BC context suggest a mixed model of service delivery firmly rooted in the community and a rights based approach. A mixed model of delivery includes public legal services delivered through legal aid clinics, private lawyers paid through the tariff system, and staff lawyers in community organizations. A mixed model of delivery can meet the diverse needs of a diverse population, foster co-operation with a range of professionals both in and outside the justice system, create accessible public legal services through storefront clinics and interdisciplinary community organizations, and free up resources for test case litigation. As stated in a recent report for the Canadian Bar Association, “the most effective approach to legal aid service delivery is one that is *comprehensive* or *holistic* in meeting the needs of clients (legal and non-legal) and is well *integrated* with other relevant social service delivery agencies” [emphasis in original].⁴⁴

“I had to write my own affidavit, in the evening hours when my babies were asleep while I lived in a shelter.”

At this stage in the dismantling of legal aid in BC, we need to think outside the current legal service paradigm and envision what a functional, efficient and rights-based system of legal aid would look like—one in which costs can be controlled, budgets can be planned and people can be served. Each of the key elements of a legal aid system—information, advice and representation—is part of this puzzle and how they are delivered must be firmly rooted in the context of marginalized persons in BC who are most in need of gaining access to our courts.

Ultimately, legal aid in BC should be a rights-based system. Our legal aid system today has been stripped down to almost exclusively cover only those services that have been proven in court to be constitutionally required. A rights-based system would recognize that there is a human right to access justice and courts with adequate representation in *all matters where human dignity is at stake*. Human dignity is at stake in legal matters such as custody and access issues, property division in family law, spousal and child support, major and minor criminal offences, immigration and refugee matters, poverty law problems such as debt and access to social assistance, and employment matters, among others. The government has a responsibility to provide access to legal representation in these circumstances when a person cannot afford to pay a lawyer themselves while maintaining an adequate standard of living. The right to equality (enshrined in Section 15 of the Canadian Charter of Rights and Freedoms), the right to security of the person (Section 7) and the fundamental principle of rule of law require such access, not only as a matter of sound policy in a constitutional democracy, but also as a matter of law.

Access to legal aid in these circumstances is required by law because without access to the means of enforcing one’s legal rights, those rights are meaningless. Law in words alone makes a mockery of the justice system, and is contrary to the very basis of the rule of law. An equal and fair society depends on equal access to the justice system. For example, the UN Committee on Economic, Social and Cultural Rights has set out that state parties have a duty to fulfil the economic, social and cultural rights of men and women equally, which includes establishing “appropriate venues for redress such as courts and tribunals or administrative mechanisms that are *accessible to all on the basis of equality, including the poorest and most*

44 Buckley 2010, 126.

disadvantaged and marginalized men and women” [emphasis added].⁴⁵ Courts cannot be for the benefit of only those who can afford to be represented; justice cannot be limited to the wealthy. This is the foundation of a rights-based system of legal aid.

BC’s legal aid system should also recognize the value of well-placed grants in which the public receives the most value for its money. A mixed model of delivery includes grant making to community organizations so they can hire a lawyer to serve their specific client community. For example, Vancouver Lower Mainland Multicultural Family Support Services has a mandate to provide support to families, and particularly to women, facing marriage breakdown. Since the cuts in 2002, the organization’s advocates have had to shift focus from providing counselling and support, to translating affidavits and providing legal information on custody and access.⁴⁶ One or two family law lawyers on staff would transform that organization’s advocates back into the family support workers they are meant to be. This model would also address the growing demographic changes by training lawyers who are grounded in specific cultural communities.

A key ingredient in a healthy legal aid system is independence from government. That ingredient was lost in BC in 2003 when the government fired the board of LSS (the majority are now appointed by government), rewrote the Legal Services Society Act, and legislated control over LSS budgets.

It is important to point out that a key ingredient in a healthy legal aid system is independence from government. That ingredient was lost in BC in 2003 when the government fired the board of LSS, rewrote the Legal Services Society Act, and legislated control over LSS budgets. Currently, the majority of the LSS board is appointed by the government, LSS is not legally allowed to run a deficit despite the unpredictability of the number and nature of legal cases, and the Memorandum of Understanding between LSS and the Ministry of Attorney General includes the AG’s approval of annual budgets, not simply reporting on financials.

Ultimately, the future of legal aid in BC demands a central organization with public accountability through a board of directors to manage private lawyers working on a tariff system (paid per client, per file) where appropriate, clinics specializing in subject areas with capacity to identify public interest cases, and support for non-profits and charitable organizations to hire and maintain practicing lawyers on staff. This organization needs independence from government (which the current LSS does not have) to ensure government does not influence the administration of justice represented by legal aid.

The government’s response to challenges and critiques in this area is, first and foremost, that it has not cut funding to LSS substantially since 2002. However, an examination of the March 2010 BC Budget shows that the grant to LSS was cut by \$2 million in 2009/2010, and will be cut another \$1 million in 2010/2011.⁴⁷ Furthermore, it is a governmental responsibility to provide public legal services⁴⁸—such services should not be dependent on the whims of private funders, and any shortfalls in non-governmental funding should be compensated by government dollars.

45 UN CESCR, “Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights: General Comment No. 16, 34th Sess., Annex, Agenda Item 5, UN Doc. E/C.12/2005/4, 2005, at para. 21.

46 The public would be surprised to discover how many Law Foundation poverty law advocates actually have law degrees, but have chosen the lower income attached to lay advocacy because those are the positions available for serving communities.

47 According to BCGEU (*A brief history of legal aid funding in BC*, www.bcgeu.ca/sites/default/files/LSS_funding_history.pdf, accessed March 9th, 2010).

48 At a question and answer panel on Law Day 2010, BC Attorney General Mike de Jong agreed that the government had a responsibility to provide public access to the justice system.

Another common government response is to argue that it spends a great deal on the legal system and in particular on programs to support families when marriages break down—citing the Family Maintenance Enforcement Program (FMEP) as an example. However, the FMEP requires an individual (usually a woman) to have a court order for child or spousal maintenance before the program will assist in collecting funds owed. How can someone obtain such an order if they cannot afford a lawyer's help?

The bottom line is that many legal problems require the involvement of lawyers to be resolved in a just and equitable manner, and for low-income individuals this means access to a comprehensive legal aid system. A comprehensive legal aid system requires access to legal *representation*—funding the justice system and legal *information* services are not the same thing. Moreover, a decision to underfund legal aid creates a false economy because it is simply a decision to increase costs in other areas of the justice system, and other areas of society.

"I was told that I would not qualify for legal aid unless my children were in jeopardy. I attended the court hearing without representation and my case was dismissed [her application to have her daughter's primary residence changed to her home from her ex-husband who was not the biological father of the child]. The judge said he had two reasons for dismissing my case—the first that he did not feel there was just cause to change the residence of my daughter, and in addition he said that I did not complete the correct paperwork—the judge said I did not fill out a writ of summons with my application and so the proceedings could not continue. I did not know about this procedure because I am not a lawyer. I felt like sinking into the floor and I did not want to be in court when the judge told me this. I did not feel like I was heard. I had spent a lot of time preparing affidavits, but the judge would not read them and only wanted oral arguments. I did not have anything oral prepared. I kind of froze and did not know what to do."

Conclusion

The long term solution requires strategic planning, public commitment and a willingness to take a rights-based approach to legal aid for British Columbians.

LEGAL AID IS A VITAL SOCIAL SERVICE. It is legally mandated and necessary for a functioning justice system, and is necessary to promote equality and justice in our society. Drastic cuts have cost Canadian society and tax payers in unmet legal needs and the resulting expenses of social exclusion. Underfunding legal aid services is no longer a viable option in British Columbia.

In June 2010, a People’s Commission on Legal Aid began its work to assess the need and develop strategies for BC, including public hearings across BC in September and October 2010.⁴⁹ The commission has invited the provincial government to participate. Meanwhile, test cases and creative constitutional arguments are occurring in a variety of courtrooms around the province in an effort to push the LSS and government into meeting their obligations—costing both the government and LSS money in hiring lawyers to fight those cases. Lawyers in Kamloops withdrew services, refusing to take LSS contracts, to oppose the closure of their regional LSS office.

Meanwhile, hundreds of thousands of BC residents struggling with a range of legal problems do so without the benefit of a lawyer. They face hearings, trials, judges, lawyers and legal documents alone, putting their children, their mental and physical health, their economic independence and their personal safety at risk. The short-term solution of building non-profit and community services’ capacity to provide legal representation would ensure those most in need receive the help they need, guided by the people who are best placed to support and understand those needs. The long term solution requires strategic planning, public commitment and a willingness to take a rights-based approach to legal aid for British Columbians.

⁴⁹ The Public Commission on Legal Aid was established in 2010 by six funding partners who recognized the need to engage the public of BC regarding legal aid in the province to determine their priorities for the future. Partners include the Canadian Bar Association (BC), the Law Society of BC, the Crown Counsel Association of BC, the Law Foundation of BC, the Vancouver Bar Association and the Victoria Bar Association. The commission officially commenced its work in June of 2010 when Leonard Doust, QC was appointed as Commissioner. www.publiccommission.org.

SELECTED REFERENCES

- Brewin, Alison and Lindsay Stephens. 2004. *Legal Aid Denied: Women and Cuts to Legal Services in BC*. Vancouver: CCPA-BC and West Coast LEAF.
- Buckley, Melina. 2010. *Moving Forward on Legal Aid: Research on Needs and Innovative Approaches*. Report for the Canadian Bar Association. June. www.cba.org/CBA/Advocacy/PDF/CBA%20Legal%20Aid%20Renewal%20Paper.pdf.
- Currie, Ab. 2007. *The Legal Problems of Everyday Life: The Nature, Extent and Consequences of Justiciable Problems Experienced by Canadians*. Department of Justice. www.justice.gc.ca/eng/pi/rs/rep-rap/2007/rr07_la1-rr07_aj1/toc-tdm.html.
- Hutchison, Alex. 2008. "Access to justice: Foreign countries offer lessons to Canada." Toronto: *The Lawyers Weekly*. October 24.
- Legal Aid in Alberta Review Steering Committee. 2009. *Legal Aid Alberta Review 2009*. www.legalaid.ab.ca/News/Pages/NewsItem.aspx?iid=17&lid={20D56B49-60FF-48C1-A00C-DFA7A2953926}, accessed February 11, 2010
- McEwon, Carol. 2009. *Civil Legal Needs Research Report*. Law Foundation of British Columbia. www.lawfoundationbc.org/itoolkit.asp?pg=CIVIL_LEGAL_NEEDS.
- McMahon, Kristin. 2008. "The Going Rate 2008." *Canadian Lawyer Magazine*, July. www.canadianlawyermag.com/images/stories/pdfs/Surveys/2008/03CL_legal%20fees%20survey.pdf.
- Ontario Ministry of Attorney General. 1996. *Ontario Legal Aid Review: A Blueprint for Publicly Funded Legal Services*. www.attorneygeneral.jus.gov.on.ca/english/about/pubs/olar/.
- Smith, Roger. 2004. "Legal Aid Management and Delivery: Lessons." Prepared for the conference on *Legal Aid Reform in Lithuania*. http://snap.archivum.ws/dspace/bitstream/10039/6564/3/Legal_aid_management+and+Delivery.pdf.
- Smith, Roger. 2002. "Legal Aid: Models of Organisation." Prepared for a conference of the European Forum on Access to Justice, Budapest. www.justice.org.uk/images/pdfs/legalaid.pdf.
- Suleman, Zara. 2009. *Not with a Ten Foot Pole*. Vancouver: West Coast LEAF, 2009. www.westcoastleaf.org/index.php?pageID=43&parentid=29#Notwitha.



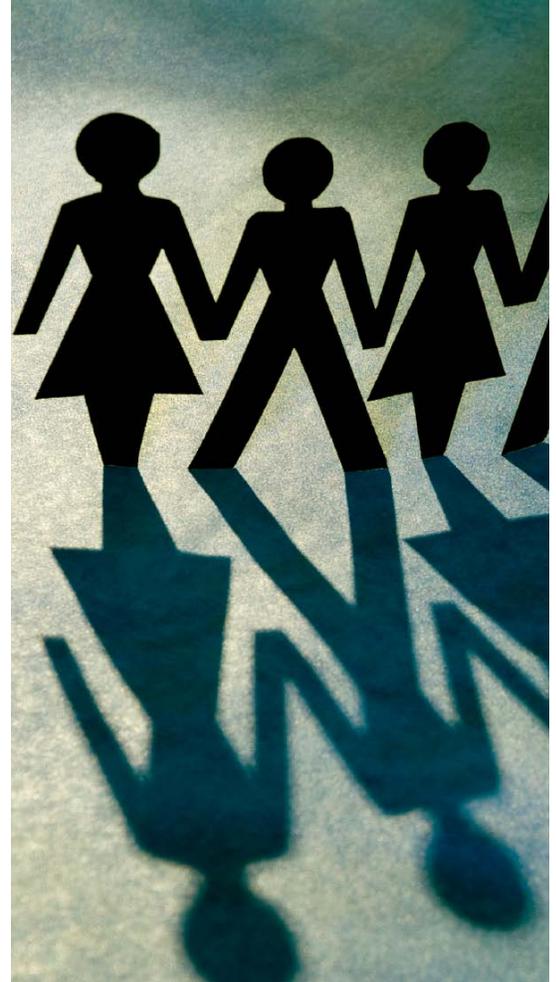
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