

MAKING JUSTICE WORK: THE LEGAL SERVICES SOCIETY'S RECOMMENDATIONS TO THE ATTORNEY GENERAL FOR JUSTICE REFORM

By David Crossin, Q.C.

BACKGROUND

The Legal Services Society ("LSS") is proposing a number of reforms for British Columbia's justice system that are designed to help people find timely, fair and lasting solutions to their legal problems.

The reforms are also intended to reduce justice system costs so that savings can be reallocated to legal aid.

The recommendations are contained in a report, *Making Justice Work: Improving Access and Outcomes for British Columbians*,¹ that LSS submitted to Attorney General Shirley Bond in July in response to her request for advice on justice reform.²

Our proposals include expansion of criminal and family duty counsel, more community-based family law advice services, and greater use of problem-solving courts such as domestic violence courts.

The Attorney General's request for advice was part of a larger justice reform initiative announced on February 8, 2012, that included the appointment of former LSS board chair Geoffrey Cowper, Q.C., to review the criminal justice system, and the appointment of retired Alberta prosecutor Gary McCuaig, Q.C., to assess the criminal charge approval process.³

The Ministry of Justice also released a green paper, *Modernizing British Columbia's Justice System*, that highlights a number of issues affecting justice system performance and outlines key areas that need reform.⁴

LSS AND JUSTICE REFORM

As chair of the LSS board of directors, I welcomed the opportunity for LSS to contribute its expertise to the reform initiative. We see the need for change almost every day because systemic delays and the cost of court appearances make it more expensive for us to deliver the same level of service year over year.

I also believe LSS is uniquely positioned to offer advice on the challenges outlined in the green paper. This is because we are independent of govern-

ment and because we see more facets of our legal institutions than most other organizations. We are involved with criminal defendants, family litigants and new immigrants; we are a legal education provider and an out-of-court problem solver; we are a fee payer, a trial manager and a justice policy adviser; and, while our focus is on providing services for people with low incomes, our broader goal is to improve access to justice for all British Columbians.

In addition, LSS has considerable experience with reform initiatives. Over the years, we have responded to justice system inefficiencies by introducing many innovative services—from family duty counsel to telephone advice lines. The society has also supported many reforms introduced by other stakeholders and has developed a clear vision for what is needed to improve access to justice.

FOCUS ON OUTCOMES

The goal of our proposed reforms is to support a justice system that focuses on outcomes. By “outcomes” I mean timely, fair, and lasting resolution of legal problems. This approach benefits both the broader justice system and society as a whole because it helps people resolve their legal issues and avoid future problems.

In civil matters, an outcomes-focused justice system starts with prevention, has timely resolution as its goal, and views litigation as a last resort. For example, this might include education programs to assist separating couples and mediation services to help them avoid costly and adversarial court proceedings. If necessary, there is quick and inexpensive access to the courts.

In the criminal context, an outcomes-focused justice system recognizes an accused person’s need for and right to representation, but also facilitates resolutions that benefit society as a whole by addressing the underlying problems that led to the criminal behaviour, thereby reducing recidivism.

In preparing our report, LSS consulted with lawyers, community service agencies, police and other legal aid plans, and we reviewed literature and evaluations from around the world. We were struck by the similarity of problems across jurisdictions and by the growing consensus that focusing on outcomes will lead to a better justice system for all stakeholders.

While there have been many attempts to develop more outcomes-focused services in B.C., most reforms have concentrated on court process rather than what people using the justice system want and need. The result is that despite decades of well-intentioned reforms, many British Columbians still regard the justice system as out-of-touch and out-of-reach.

THE CURRENT STATE OF LEGAL AID

Before turning to our recommendations, I want to touch briefly on the current state of legal aid in B.C. Today, “legal aid” means a continuum of ser-

vices ranging from information and advice to full representation by a lawyer in court. These services represent a continuum that aligns with the outcomes-focused approach described above.

LSS currently has two staff offices and 31 contracted offices throughout the province, and provides services at more than 50 locations including law offices, courthouses and community agencies. At each of these locations, individuals can get legal information and referrals to other social service agencies, and apply for legal representation. LSS also works with 24 community partners to bring legal aid information to rural and remote communities.

Legal aid went through a dramatic transformation in 2002 when legislative changes and funding reductions led to a restructuring of LSS and the services provided. The changes eliminated poverty law representation, restricted family law to child protection and emergency services in cases involving domestic violence, and decreased the society's budget by nearly 40 per cent over three years.

In 2009/2010 and 2010/2011, LSS again faced significant budget pressures, this time due to rising case costs and decreased revenue from the Notary Foundation, and was forced to make extensive reductions to its operations and infrastructure. The reductions included the replacement of five staffed offices with contract services at seven locations, closure of the poverty law telephone advice program, and a reduction in the staff complement. LSS used approximately \$7 million of the savings from the reductions to balance its budget and redirected more than \$8 million to client services. The Ministry of Justice also increased core funding for family law and child protection services by \$2.1 million in 2012/2013.

One critical issue facing LSS is lawyer supply. Fewer than 1,000 of B.C.'s 10,000 practising lawyers take legal aid referrals. That number has been declining steadily for the past 15 years—from a high of nearly 1,800 in 1997/98 to a low of 976 in 2009/10. In some rural locations, LSS is unable to place cases with local lawyers and must bring in lawyers in from other communities at added expense. Surveys conducted by LSS show that low tariffs are the primary reason lawyers refuse to take legal aid referrals. Although LSS, not government, sets tariffs, the rates are subject to available funding and to the society's mandate to provide services that, with the exception of family law, are often constitutionally mandated and cannot be eliminated to free up money for increased tariffs.

Despite all this, LSS still provides much-needed services to a significant number of people. In 2011/2012, our telephone and duty counsel advice services provided more than 138,000 client assists; we provided representation to more than 27,000 people; and we distributed almost 140,000 legal information publications and self-help manuals.

RECOMMENDATIONS

Below are the highlights of our recommendations for ways in which legal aid can be used to support an outcomes-focused justice system. Out of necessity, what follows is brief, and I encourage you to look at the full report for more details about the anticipated benefits of these proposals.

Criminal Law Initiatives

Our recommendations for criminal law reforms are expanded duty counsel, early resolution referrals, disposition court and increased use of video bail.

In an expanded duty counsel model, specific lawyers are assigned to the same court on a continuing basis, rather than on an ad hoc basis, and retain conduct of non-complex files that can be resolved within a short time frame (e.g., 30 days). Where volumes warrant, duty counsel is supported by a non-lawyer who provides administrative and client support.

The Public Commission on Legal Aid in British Columbia, without endorsing a specific delivery model, recommended enhanced duty counsel services as “the most effective and cost-efficient mode of delivering legal assistance”. The Canadian Bar Association (B.C. Branch) also supported this approach in its submissions to LSS for our report and in its submissions to Geoffrey Cowper, Q.C.

Expanded criminal duty counsel, which is used in Alberta, Manitoba and Nova Scotia, can help achieve more early resolutions generally and can help manage the growing volume of administrative cases such as breach of probation and failure to appear. It will also address the concern raised in the green paper that duty counsel and defence counsel are often retained on the same matter at different stages.

Early resolution referrals are designed for locations where client volumes do not warrant the expanded duty counsel model. These are short-term referrals that would allow ad hoc duty counsel to retain conduct of non-complex matters that can be resolved fairly quickly. LSS is also asking the government to consider developing a distinct procedure or court devoted to early disposition of appropriate cases.

Our video bail recommendations build on a 2008/2009 pilot project sponsored by the Provincial Court and the Ministry of Justice in the Peace region. An independent evaluation found reductions in the number of appearances, the time to resolution, and the use of sheriff resources, including a reduction in “escort kilometres.”

Family Law and Child Protection Initiatives

Because representation for family matters is so restricted, duty counsel play a crucial role in assisting people who cannot afford a lawyer. There is also a

significant unmet demand for legal services to assist clients with related issues that have an impact on, or are the root cause of, the family law problem. Social science research, as well as LSS's own experience, shows that family clients often present with more than one family law issue along with additional related legal or non-legal issues. For example, a child custody problem may also involve financial support and may have, as its root cause, housing issues. Resolving the presenting issue (child custody) often requires resolving the related issues.

For these reasons, LSS is recommending a multi-pronged approach to improving family law services. One element is increasing the availability of existing services by providing more duty counsel and more community-based advice services. Another is to make these services more outcomes-focused by providing assistance for related problems (usually poverty law problems), perhaps through a telephone advice program and paralegals.

Providing more duty counsel services and community-based advice clinics can increase the number of early resolutions, divert cases from court, and help people be better prepared for hearings, all of which can translate into time and cost savings for the justice system. In addition, providing more family duty counsel services can support the new *Family Law Act* and government mediation initiatives.

Establishing advice clinics in community-based locations such as social service agencies can increase access to justice for vulnerable and marginalized clients who are reluctant or unable to use services in courthouses due to cultural barriers or lack of availability. This type of service is of particular benefit for aboriginal peoples, who are overrepresented in child protection matters and who often live in remote locations without access to legal advice prior to and between court appearances.

An independent evaluation of LSS's family law services conducted in 2011 supports the effectiveness of legal aid advice services in helping clients reach resolution. The evaluation found that 75 per cent of clients who received duty counsel services resolved their legal issues, while the resolution rates for telephone advice clients and advice lawyer clients were 71 per cent and 70 per cent respectively.

Other Recommendations

Other recommendations include the use of non-lawyer service providers to assist duty counsel, poverty law services, increased services for aboriginal peoples and greater use of specialized, problem-solving courts such as drug courts or domestic violence courts.

LSS currently issues criminal legal aid referrals for about 3,000 domestic violence cases per year. Many of these cases could be better resolved by the

use of a specialized domestic violence court with a designated Crown and specialized duty counsel. It is anticipated that processing cases through a specialized domestic violence court can result in fewer breach charges, fewer collapsed trials, and better overall outcomes. Currently, six provinces and the Yukon Territory have specialized courts for domestic violence cases.

Another example of problem-solving courts are First Nations Courts that provide opportunities to address the unique circumstances and needs of aboriginal accused and the overrepresentation of aboriginal peoples in the justice system. Aboriginal courts take a restorative justice approach that involves balancing the needs of victims, offenders and communities, while using the most appropriate form of intervention at the most appropriate time.

THE ECONOMICS OF REFORM

There has been a significant investment in the justice system over the past 15 years, primarily for prosecutorial and judicial services. As pressures within the system mount, it is important to identify where any future investments will have the greatest impact.

New legal aid initiatives are not possible at this time without additional funding, as the society's current budget is required to provide present services (many of which are constitutionally mandated and cannot be eliminated) and necessary operations. Nor are significant internal savings available. LSS has for many years focused on ensuring internal efficiency through evaluation of our services and refining our work to ensure we do the most for our clients with every dollar we spend. In addition, as noted above, LSS has reduced its operating budget significantly over the past four years so that more money could be put into client services. As a result, there are only limited opportunities for additional internal savings that could be used for new initiatives.

Our experience has, however, taught us that a small investment in legal aid can result in savings in other areas of the justice system. For six of our recommendations, we have developed a detailed economic analysis of the potential savings to the broader justice system. Savings generated by any enhancements to legal aid can be measured and redirected to LSS to offset some of the costs of these enhancements. As most savings will be in avoided future costs, tracking the inputs, outputs, and outcomes of piloted services or system changes will be critical to quantifying results to ensure any dollars saved can be reallocated to the most effective projects.

Proposals that initiate a shift to an outcomes-focused justice system can also generate a range of savings that are real, significant and system-wide, but difficult to quantify. For example, our proposals can create ancillary benefits

through incremental improvements in working relationships, breaking down of silos, systems thinking and process improvements that may vary location by location. Further, because the proposed initiatives focus on outcomes, they will create benefits for clients. For example, when clients achieve early and more stable resolution of their legal issues, they are less likely to experience legal problems in the future, and their related issues—such as health or debt—are less likely to escalate. While these benefits avoid future costs to the justice system and to government, they also generate a positive impact on clients, their families and their communities that is both profound and immeasurable.

NEXT STEPS

The key to our proposals is that they are incremental, are scalable, and can be piloted. This ensures that any new program will be properly tested and evaluated before full implementation.

The first step will be to review Ministry of Justice data, operating assumptions and justice reform priorities, along with our own data. With that information, LSS will be in a position to develop the requisite project charters, budgets and work plans to support effective implementation of the pilot projects. The timelines for these initiatives would be determined by the availability of resources to support them.

Given the scarcity of resources in the family justice system, it will be especially important to collaborate with agencies such as the Family Justice Services Division of the Ministry of Justice to plan and implement new or expanded service options. As well, to ensure the right resources are aligned with the most appropriate activities, training and skill development will be important considerations.

Collaboration with a number of justice system stakeholders will also be needed regarding space allocation in courthouses as a number of our initiatives will not be successful—criminal and family duty counsel in particular—without a permanent location in the courthouse.

LSS has been committed to an outcomes-focused justice system for several years, and that commitment remains unchanged. To be successful, reform requires the active commitment of all justice system partners to shared goals and measurable targets, and a collaborative approach to meeting them. Implementing an outcomes-focused justice system will also require strong leadership. LSS is prepared to take an active role in ongoing justice reform discussions and to make justice work for all British Columbians.

ENDNOTES

1. See Legal Services Society website, <www.lss.bc.ca>.

2. The Honourable Shirley Bond to E. David Crossin, Q.C., no date, and E.

- David Crossin, Q.C., to the Honourable Shirley Bond, February 10, 2012, online: <www.legalaid.bc.ca/assets/media/news-Releases/letterFromAGFeb2012.pdf>.
3. See "Justice Reform" online: <www.ag.gov.bc.ca/justice-reform/index.htm>.
4. Minister of Justice and Attorney General, *Modernizing British Columbia's Justice System: Green Paper* (Victoria: B.C. Ministry of Justice, 2012), online: <www.ag.gov.bc.ca/public/JusticeSystemReviewGreenPaper.pdf>.



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