

# THE VANCOUVER SUN

## **Supreme Court slams Liberal cuts to legal aid: Ruling declares B.C.'s tax on legal services unconstitutional for low-income earners**

*Ian Mulgrew, February 10, 2005*

The B.C. Supreme Court has declared unconstitutional the provincial tax on legal services as it applies to poor clients, in a ruling that slams Victoria's failure to properly fund legal aid.

Had the Liberals used the money collected via the controversial levy to expand legal aid, the court said it would have upheld the much-maligned law.

The Canadian Bar Association's B.C. branch hailed the ruling and said it's time for the government to completely repeal the seven-per-cent tax, which was recently reduced from 7.5 per cent, on most legal bills.

"It's quite a brilliant judgment," said president Michael Woodward.

"It's a bad tax, it's unfair and it's discriminatory, yet it remains. It leaves the government in the situation where it has lost part of the tax but it could still make a meaningful improvement in access to justice by going the rest of the way rather than trying to keep this leaky dike together."

Attorney-General Geoff Plant told reporters Wednesday he had not yet read the decision and it would take some time for the administration to respond.

The tax raises about \$100 million a year -- but the government only provides about \$55 million to fund legal aid.

In the 47-page ruling released Tuesday, B.C. Supreme Court Justice M. Marvyn Koenigsberg said the 1992 law introduced by the New Democratic Party government is flawed, but it could have sustained the constitutional challenge. However, she said successive regimes failed to use the tax for the ostensible reason it was imposed.

"The stated objective of the act when it was introduced was to raise revenue from the collection of taxes on all lawyers' fees in the province in order to fund legal aid in the province," Koenigsberg said. "As noted elsewhere in these reasons, such a purpose has not been fulfilled."

Dugald Christie, a 30-year veteran of the bar who works with the poor, petitioned the court in 1999 to strike down the tax because it was hurting the most vulnerable in society and crippling his low-cost law practice.

He earned only about \$30,000 a year and the cost of trying to collect the tax and deal with its repercussions he claimed forced him to temporarily quit practising law.

When the province twice seized money from him for failing to file the tax, Christie was unable to pay his mandatory Law Society fees.

The judge, however, said Christie's professional financial straits did not bear on the constitutionality of the tax.

But Christie's argument was broader -- that the tax was a hindrance, impediment and denial of access to justice to a certain segment of society even though such a right was guaranteed by the constitution. The judge agreed.

Christie was thrilled.

"The ramifications are immense," he said. "It's going to be very difficult to make this work now because the tax is still supposed to be paid by those who are not low-income [those earning more than \$28,000]."

Lawyers, Christie pointed out, are going to have difficulty deciding which clients don't have to pay.

"When it comes down to actually interpreting how that is to be done will be difficult," he said. "Do I need to ask my clients what their income is? Some might not be keen on telling me that. Am I supposed to pay tax for those I suspect are not low income? I think there are too many difficulties with that and this tax should not be payable by anyone."

He said it would probably be a few weeks before he decides whether to appeal to have the whole law struck down.

The tax -- the only surcharge on professional services the province imposes -- has been controversial since its inception.

Prefiguring the judge here, the then-Liberal Opposition savaged the NDP for imposing it and not dedicating the money collected for legal aid as promised.

Once they gained government, however, Plant and the Liberals didn't live up to their own standards. Not only did they continue the previous government's practice of using the money for general revenue, but they also slashed legal aid by 40 per cent.

Lawyers, judges, women's groups, poverty activists and others have all attacked those cuts as leaving too many poor people without legal resources.

In an earlier challenge of the tax, the B.C. Court of Appeal split on these thorny issues and in a majority decision upheld the act because it failed to find evidence of harm.

This time, Judge Koenigsberg decided there was plenty of proof this law and the Liberal cutbacks have caused widespread hardship.

"[There] is, in this case, clear uncontradicted proof not only of impediment, hindrance and discouragement by the imposition of this tax to access to justice, but also evidence of a denial of access to justice," she wrote.

"In addition, I infer from the evidence adduced in this case, buttressed by common knowledge in the courts, that legal aid is no longer widely available, if it ever was, to all litigants except those charged with criminal offences. . . . The issue of the tax is not whether the government must provide and pay for legal counsel in any matter requiring legal services, but whether the state can impose an additional financial burden on those seeking to obtain legal services."

Koenigsberg said the tax "does in fact deny access to justice in some cases of low-income persons . . . and this court is prepared to declare that the constitutional rights of low-income people who cannot afford legal representation have been breached."

The judge said the act is not wholly offensive and could be imposed on those with sufficient income.

But the CBA's Woodward urged Victoria to eliminate it completely and use the expected tax surplus to fund expanded legal-aid services.

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