

## **CHALLENGES TO THE BUDGET FOR THE COURT SERVICES BRANCH**

### **Remarks of Chief Justice Bauman** **At the Canadian Bar Association BC Branch Meeting** **19 November 2011 - Las Vegas, Nevada**

Our judicial system is one of the best in the world. But it is threatened, if not in peril.

In nature, the process of erosion takes time- sometimes its pace and impacts are barely perceptible.

Then comes a tipping point when that gradual, insidious process of incremental damage yields its dramatic finish -- the structure is diminished and collapses.

The stability and integrity of our courts and judicial system are being slowly eroded by a lack of funding.

Inadequate funding of courts in British Columbia has been the reality for the last number of years.

We are not at the tipping point yet- but we are steadily edging towards it.

I appreciate that the legislative and executive branches of government have an exceedingly difficult task in balancing the demands on the public purse.

And I respect the fact that there are many competing demands. I also respect the fact that the Court Services Branch, led by the Deputy Attorney General and the Assistant Deputy Minister of Court Services are doing the best they can in our challenging economic environment. But I question whether we have the full attention of the Treasury Board.

As Chief Justice of the Supreme Court, it is my role to protect the institution of the court.

And so today, I want to encourage you to reflect on how critical and integral our courts are to the functioning of our democratic society.

I ask you to think about the harm that flows from diminishing the court's effectiveness through underfunding.

I urge you to consider and speak out to your constituencies concerning the critical importance of this issue, and, as members of the Bar, to take whatever steps you can to defend and protect our judicial system.

## American Bar Association -

### Task Force on Preservation of the Justice System

We have only to look at our judicial counterparts here in America to see the acute consequences that flow from inadequate funding of courts and the judicial system.

American state courts are in crisis and court underfunding is wreaking havoc as state governments draw the purse strings in a struggle to balance tight budgets.

Let's take the example of California. Last month, The Economist reported that in California, \$350 million has been cut from the county trial courts since 2009. Even more cuts are due by the end of the year. According to The Economist, up to 48% (28 out of 58) of California's county trial courts could be rendered insolvent by the state's budget crises.

Katherine Feinstein, presiding judge of the San Francisco Superior Court outlined for The Economist the slow motion process by which California courts are 'going over the cliff' as she describes it (sort of like the erosion metaphor- but actually more dramatic) .

Let me quote from the article:

How does a court go over the cliff? In unphotogenic slow motion, which makes the dire consequences harder to see. Since the budget cuts started in 2009, says Ms. Feinstein, the court has been muddling through. Service has got slower, waiting times longer. An uncontested divorce now takes about half a year, she says. Without [the emergency loan made in September 2011] she would have had to lay off so many people that such a divorce would have taken three times as long. With the loan, it will take merely twice as long. That means lives (not just those of the spouse, but also those of children in custodial limbo) are put on hold.

A typical lawsuit now goes to trial within a couple of years, says Ms. Feinstein, but that could soon stretch to five years.... The California constitution guarantees criminal defendants a right to speedy trial, but it does not technically require courts to administer civil law at all, Ms. Feinstein says. So in theory, civil adjudication could stop altogether, as it already has in one judicial circuit in Georgia. That, she says would bring about the 'unravelling of society'".

The situation in California is not unique. Courts all over the US are in dire straits.

Last year the American Bar Association set up a Task Force to study the issues.

The Task Force reported that over the last few years, the courts of virtually every state have been forced into debilitating combinations of hiring freezes, pay cuts, judicial furloughs, staff layoffs, and early retirements:

- in the past three years, most states have cut court funding by 10-15%- [keep in mind that in the US, 95 % of all cases are filed in the state courts];
- in the past two years, 26 states have stopped filling judicial vacancies;

- 34 states have stopped filling court clerks positions;
- 31 states have frozen the salaries of judges or staff;
- 16 states have furloughed clerical staff, and nine have furloughed judges.
- Courts in 14 states have reduced their opening hours, and are closed on some work days.

The National Centre for State Courts reports that 3,200 courthouses around the country are ‘physically eroded’ or ‘functionally deficient’.

There are some dramatic stories.

One municipal court in Ohio stopped accepting new cases because it could not afford to buy paper.

The state of New Hampshire has suspended all civil cases for a year to deal with overwhelming backlogs exacerbated by inadequate funding.

### **The Legal Framework-**

#### **Constitutional Responsibility for Funding of Courts**

Let’s come back to Canada and review the fundamental framework within which our courts operate and take stock of where we find ourselves at this juncture.

The judiciary is one of the three branches of government in Canada, together with the legislative and the executive.

In theory the three branches of government are equal.

But in practice, the judiciary is the weakest branch because it depends entirely on the other two branches of government to pay the salaries of judges and to provide the critical infrastructure needed for an effective Superior Court system.

If the executive and the legislative branches do not provide adequate funding to the courts, our whole system of justice is compromised.

In *Bon Hillier v. Milojevic*, 2010 ONSC 435, Mr. Justice Brown of the Ontario Superior Court observed:

The reality of our present system of courts administration is that a constructive working relationship must exist between the judiciary and the other branches of government if the residents of Ontario are to enjoy access to a vibrant system of justice. Courts cannot function without judges; and, judges cannot function without appropriate levels of administrative and infrastructure support from the other branches of government.

## **The Constitutional Obligations of Government**

Section 92 (14) of *The Constitution Act, 1867*, assigns to the provinces, the exclusive power over the administration of justice in the provinces, which includes responsibility for the administration of the Superior Courts.

In British Columbia, the Attorney General's obligation to provide for the administration of Supreme Court is formalized in s. 10 of the *Supreme Court Act*, R.S.B.C. 1996, c. 443 as follows:<sup>1</sup>

### Administration

10 (1) The Attorney General is responsible for the provision, operation and maintenance of court facilities, registries and administrative services.

A similar requirement is imposed by s. 2 of the *Attorney General Act*, R.S.B.C. 1996, c. 22:

### Duties and powers

2 The Attorney General...

- (c) must superintend all matters connected with the administration of justice in British Columbia that are not within the jurisdiction of the government of Canada, ...

## **Content of the Constitutional Obligation - Standard of Service**

Although section 92 (14) of the *Constitution Act, 1867* and the provincial statutes assign responsibilities and duties in relation to the administration of justice, they do not prescribe a standard or level of service.

But by necessary implication, the constitutional responsibility of the Province for the administration of justice must carry with it the obligation to maintain the associated constitutional principles of judicial independence and the rule of law.

In other words, the funding of the courts must be maintained at least at the minimum service level required to protect judicial independence and give effect to the rule of law.

## **Judicial Independence**

Judicial independence has three components: security of tenure, administrative independence and financial security. Judicial independence may have both an individual and an institutional dimension.

Inadequate funding of Court Services impacts the institutional dimension and compromises the court's administrative independence.

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<sup>1</sup> With respect to the Provincial Court, see *Provincial Court Act*, R.S.B.C. 1996, c. 379, s. 41.

In *Newfoundland and Labrador Assn. of Public and Private Employees v. Newfoundland and Labrador (Minister of Justice)*, 2004 NLSCTD 54, 46 C.P.C. (5th) 95 [NAPE], Chief Justice Green concluded that the court cannot function in its adjudicative role unless it has the necessary administrative staff. Anything that impinges on the ability of administrative staff to support the judiciary in the performance of its adjudicative functions amounts to interference with administrative independence.

At issue in *NAPE* was whether registry staff and sheriffs were entitled to strike.

Chief Justice Green concluded against such a right, holding that both groups of employees are fundamental to the functioning of the court as a court, and a withdrawal of services would be fundamentally inconsistent with the ability of the court to continue to operate:

126. Although the administrative functions that are protected under the rubric of administrative independence, as a characteristic of judicial independence, have generally been thought to belong to a narrow category, it must be recognized that a court cannot function and deliver adjudication in an independent fashion without operating as an integrated whole. As Noel, J. noted in *Chafe*, the court "can only function through its officers". In *MacKeigan v. Hickman* [1989] 2 S.C.R. 796, Cory, J., after noting the evolving nature of judicial independence, observed that "the privilege relating to administrative functions is an adjunct to the adjudicative privilege". A court cannot operate to perform its adjudicative functions without appropriate court staff. The staff are the means whereby the judicial function finds real practical expression.

127. To the extent, therefore, that the functions of court staff are necessary to enable the judiciary to perform their functions, the right to direct and control the administrative support provided by court staff of necessity falls under the protective umbrella of judicial independence. Anything that impinges on the ability of administrative staff to support the judiciary in the performance of those functions in itself will amount to interference with administrative independence. The role of the judiciary in scheduling sittings of the court and allocating courtrooms, for example, necessarily requires administrative support. As noted in *Valente*, "the direction of administrative staff" engaged in carrying out such functions is recognized as part of administrative independence.

Where insufficient funding of administrative support renders a court unable to perform its adjudicative role, judicial independence is threatened.

Let me repeat Chief Justice Green's statement: "A court cannot operate to perform its adjudicative functions without appropriate court staff. The staff are the means whereby the judicial function finds real practical expression."

The funding of the courts must be maintained at least at the minimum service level required to protect judicial independence and ensure that the court is able to carry out its core adjudicative function.

Similarly, the court must have the resourcing necessary to allow it to give effect to the rule of law.

## **Rule of Law**

In *British Columbia (Attorney General) v. Christie*, 2007 SCC 21 at paras. 19-20, the Supreme Court of Canada said:

The rule of law is a foundational principle. This court has described it as “a fundamental postulate of our constitutional structure” (*Roncarelli v. Duplessis*, [1959] S.C.R. 121, at p. 142) that “lie[s] at the root of our system of government” (*Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, at para. 70).

The court must give effect to the rule of law.

In turn, it is incumbent on the Executive to ensure that the court has the resources to do so.

This requires that the court be able to exercise its inherent jurisdiction to administer justice in a regular, orderly and effective manner.

The court must be able to ensure that its orders are enforced and its process is respected; it must have the necessary complement of staff and sheriffs to do so.

Funding of court services must be sufficient to prevent systemic delays in the day to day operation of the courts.

## **Taking Stock of Where We Are Now**

Let me now turn to give you some sense of the picture from my vantage point.

Between 2008 and fiscal 2012/2013, the Court Services’ budget will be reduced by over 10%.

That translates directly to a reduction in staffing levels. In 2008, Court Services staffing level was 1,430 FTEs. Today, there are 213 fewer FTEs. (I should point out that the numbers I have been given do fluctuate from source to source so let us use these numbers as close to being totally accurate.)

The cuts to the Court Services’ budget for the Supreme Court that are in the offing are cuts to the bone. We have no fat left in our infrastructure. What impacts flow from reduced Court Services staffing levels have?

There are some direct impacts of reduced staffing levels:

- **We have fewer court clerks available**

We have had courtrooms that can’t proceed because no clerk is available. We have difficulty scheduling matters outside 10:00 am to 4:00 pm court hours.

The court clerk maintains the operation of the courtroom on behalf of the judge and the court cannot function without the clerk. The clerk calls matters at the direction of

the judge, operates telephone and video attendances, administers oaths to witnesses and jury members, records appearances, operates the digital audio recording system which is the official court record, records the terms of the court's orders, maintains custody and continuity of exhibits in proceedings.

If there is no clerk available, court cannot proceed and matters that are scheduled to go forward must be adjourned.

- **We have fewer registry staff available:**

Registry staff manage the court registry which is where the judicial process starts and ends. At the outset of a matter, registry staff accept initiating documents for filing; at the conclusion of the proceedings, registry staff process the orders made by the court.

In the last few years, the staffing shortages in our registries have meant we have experienced considerable delay in the processing of court orders.

In some registries, the impact of inadequate registry staffing has been delays of up to six months and longer in the processing of court orders.

Without adequate staffing of our registries, access to justice for litigants is impeded. Shortages in court clerk staffing lead to this unfortunate result: registry staff are seconded to serve as court clerks and the result is further delays in processing all manner of documents in the court registry. Let me interject here to note, as well, that matters today appear better than they are in reality because of the juggling done by Court Services Branch managers around the Province. That juggling includes, as necessary, taking staff out of the registry and placing them in the courtrooms as clerks.

- **Sheriffs**

In June of last year, the reduction of sheriffs services resulted in several criminal matters not proceeding at their scheduled times. The presence of a sheriff in the courtroom in a criminal trial is important for security - to maintain order, to protect witnesses, the accused, the public and the court officers. The presence of sheriffs maintains the decorum and just plain "calm" that is required in a criminal trial to ensure a fair trial.

In the spring of this year, government made the decision to cut some 30 sheriffs' positions. The immediate impact was that sheriffs were unavailable in the courtroom for a number of criminal trials. The judges scheduled to preside in these case refused to proceed in the absence of a sheriff.

This was a glaring example of the court being unable to perform its adjudicative role because of the lack of necessary staff.

Fortunately, these cuts were reconsidered, and in fairly short order, the level of sheriff staffing was restored. We are appreciative of that action but observe that it never should have come to that.

- **Provincial Court**

Let me pause to say just a brief word about the Provincial Court which finds itself in even more dire straits than does the Supreme Court. Appointments to the Provincial Court have not kept pace with retirements and departures from the bench, and between 2005 and 2010, the court suffered a loss of 17.35 judicial full-time equivalents in its judicial complement. As of 31 October 2011, the Provincial Court was still down 16.65 judicial full-time equivalents. The backlog of cases that has developed has been the subject of media reports with which you are no doubt familiar.

In *R. v. Archibald*, 2010 BCPC 273, Judge D.J. O'Bryne spoke of the considerable challenges the Provincial Court has faced as a result of a declining complement, and an increasing workload. He gave a picture of the court as at that moment in time, and observed that the criminal backlog in Surrey was so large that it would require three Provincial Court judges sitting criminal law, full-time, two years to restore wait times to appropriate levels.

In a series of cases<sup>2</sup> Provincial Court judges have cited the lack of judicial resources as a key reason for cases being dismissed for unreasonable delay.

In *R. v. Hammer*, 2011 BCPC 0234, Associate Chief Judge Brecknell granted a stay of proceedings to a defendant found guilty of possession of cocaine for the purpose of trafficking where there was a 42 month delay, 21.5 months of which was attributed to limitations in institutional resources.

Judge Brecknell cited the shortages to the judicial complement and observed that as at March 31, 2011, 59% of the adult criminal cases pending in the court were over the 180 day completion guideline the Court has mandated for itself based on the case law of the Supreme Court of Canada. Of that 59%, 15% of the adult criminal cases pending have been pending for more than 18 months or 540 days.

In granting the judicial stay of proceedings, Associate Chief Judge Brecknell said this:

[101] The fact that an unrepentant drug dealer who has been convicted of possession of cocaine for the purpose of trafficking; and while involved in the trial of this matter has been charged with further like offences; should now be able to be free of the consequences of this very serious offence because the judicial system could not accommodate his trial, within a reasonable time should alarm and concern the community. However, all citizens, even drug dealers, are entitled to the full protection of their rights under the *Charter*.

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<sup>2</sup> See for example, *R. v. Williams*, unreported, Cranbrook, 25926, May 6, 2010, *R. v. Ollenberger*, 2010 BCPC 93, Cariboo Northeast,; *R. v. Hammer*, 2011 BCPC 0234

Chief Judge Brecknell quoted paragraph 59 of the Supreme Court of Canada's decision in *R. v. Askov* [1990] 2 S.C.R.1199:

[59] Where inordinate delays do occur, it is those who are responsible for the lack of facilities who should bear the public criticism that is bound to arise as a result of the staying of proceedings which must be the inevitable consequence of unreasonable delays. Members of the community will not and should not condone or accept a situation where those alleged to have committed serious offences are never brought to trial solely as a result of unduly long delays. It is a serious consequence with potentially dangerous overtones for the community. It is right and proper that there be criticism of the situation when it occurs.

Judge Brecknell concluded his reasons in *R. v. Hammer* with this statement:

[103] The court does not control the availability of facilities, nor the providing of adequate staff resources such as sheriffs and clerks nor the appointment of a sufficient number of judges to hear cases of all types within a reasonable time. That is the duty and responsibility of the Provincial Government to the citizens of British Columbia.

A judicial stay of proceedings in a criminal matter is the most obvious example of the system unacceptably breaking down. But I suggest the other more benign symptoms of the breakdown - delays in processing of documents/effects on scheduling flexibility for example, are just as serious and should be regarded with the same critical eye.

### **Inadequate Funding of Programs Supporting the Justice System**

The challenge which the courts face in dealing with reductions to Court Services funding, is compounded by a concurrent decline in support for programs that directly or indirectly support our justice system.

For example, at a time when the number of self represented litigants in our courts hovers at 15-20% of civil and family cases, funding for legal aid has declined to almost nil in civil and family cases.

In addition, many government programs which support the justice system are simply not funded at the level where they can provide meaningful assistance.

Let me give you just one example which was brought to me recently by the court's Family Law Committee.

One of the things that the court is frequently required to do in family disputes is make orders for the custody of children. Often, the court needs assistance on this and a social worker, family counsellor or other expert is asked to complete a report under s. 15 of the *Family Relations Act*.

These reports can be done by an expert who is privately retained, but when the litigants can't afford that route, the court can request that a government agency, The Provincial Custody and Access Assessment Service, prepare the report (at no cost to the parties).

This sounds like a wonderful service for litigants and the court, and it can be. But here is the problem: there are 7.5 FTEs who do this work, for the whole of the province, and for both the Provincial Court and the Supreme Court. The waiting time is generally nine months- and can extend to 14 months. For children, nine to 14 months can effectively be a lifetime.

### **The Impact in Slow Motion**

I have mentioned some of the impacts of court underfunding that are felt directly and immediately, as when persons accused of crimes go free without trial because the process has taken too long, or when the court cannot function because there is no clerk or no sheriff.

But another impact of inadequate resourcing of the courts is taking place, insidiously and in slow motion.

Without adequate resourcing, the court's traditional and essential role in maintaining societal order is being eroded and degraded.

And here the stakes become simply too great. So what can we do?

### **What Can the Court Do?**

What can the court do in the face of funding cutbacks?

We can endeavour to operate in a more efficient manner, and we strive to do that.

We have in place a new set of Court Rules intended to make court processes more streamlined and efficient. We work within the parameters of proportionality, striving to ensure that the private resources of the parties and the public resources of the court are engaged in an effective way.

We continue to implement technological improvements to improve administrative processes, and on that front, we are a leader amongst Canadian courts.

But, fundamentally, the court has a limited ability to cope with underfunding.

### **What Can the Bar Do?**

Lawyers must educate and urge the community to recognize that courts are not just another line item in the budget - like education or hospitals.

That may sound sacrilegious - more important than education and health care? Yes - from this perspective while education and health care are essential public services, the

judicial system, as a branch of government, is a foundational institution in our democracy.

The legislative branch no matter the constraints of budgets can never close. Its committees must have the resources to carry out their work come “hell or high water”. The same is true for the judiciary - the third branch of government.

Lawyers must defend and protect the justice system by encouraging the community and government to understand the importance of adequate court funding.

### **ABA Task Force Resolutions**

In the US, the President of the ABA struck a Task Force on Preservation of the Justice System. The Resolutions of the Task Force are instructive and can perhaps serve as a useful template for a call to action.

They are as follows:

- RESOLVED, That the American Bar Association urges state, territorial, and local bar associations to document the impact of funding cutbacks to the justice systems in their jurisdictions, to publicize the effects of those cutbacks, and to create coalitions to address and respond to the ramifications of funding shortages to their justice systems.
- FURTHER RESOLVED, That the ABA urges state, territorial, and local governments to recognize their constitutional responsibilities to fund their justice systems adequately, provide that funding is a governmental priority, and develop principles that would provide for stable and predictable levels of funding of those justice systems.
- FURTHER RESOLVED, That the ABA urges federal, state, territorial, and local courts to identify and engage in best practices to insure the protection of the citizens within their jurisdictions, efficient use of court resources, and financial accountability.
- FURTHER RESOLVED, That the ABA urges state, territorial and local courts and bar associations to develop sustainable strategies to communicate the value of adequately funding the justice system utilizing advisory groups, enhanced civic and public education, and direct engagement with public officials at all levels.

### **Closing**

In closing, I encourage you to do three things:

1. Reflect on how critical and integral our courts are to the functioning of our democratic society;

2. Think about the harm that flows from diminishing the court's effectiveness and traditional role through underfunding; think about "going over the cliff in slow motion" - once our institution is critically wounded it will never be the same again.
3. Bring this issue to the attention of our fellow citizens and take whatever steps you can to defend and protect our judicial system.

Thank you.

Chief Justice Robert J. Bauman  
Supreme Court of British Columbia