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Office of the Information and Privacy Commissioner
Province of British Columbia
Order No. 74-1995
December 22, 1995

****** This Order has been subject to Judicial Review ******

INQUIRY RE: A request for the release of records by the Legal Services Society concerning amounts paid for the criminal defense of two possible recipients of legal aid

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1. Introduction

As Information and Privacy Commissioner, I conducted a written inquiry on March 10, 1995 under section 56 of the *Freedom of Information and Protection of Privacy Act* (the Act). This inquiry arose out of a request for review of a decision of the Legal Services Society of British Columbia to withhold the amounts it may have paid to lawyer Charles Lugosi for work on behalf of defendants in two separate trials for murder in the Supreme Court of British Columbia.

Blaine Gaffney (the applicant), a television news reporter in Kelowna, made his original request for information by way of a letter dated September 16, 1994 to the Legal Services Society. On October 21, 1994 it responded by refusing to confirm or deny that payments were made on behalf of the two defendants. It relied on section 11 of the *Legal Services Society Act*, which imposes an obligation on the Legal Services Society to protect all information that might identify a person as a recipient of legal aid. In addition, the Legal Services Society claims it stands as an agent to a solicitor-client relationship and is bound to protect the confidentiality thereof under section 14 of the Act.

The Legal Services Society also believes that release of this information would be an unreasonable invasion of any third party's personal privacy and, therefore, it must be withheld under section 22 of the Act.

2. Documentation of the inquiry process

Under section 56(3) of the Act, the Office invited representations from the parties to this inquiry, the applicant, and the public body. As I completed the written inquiry in February 1995, I decided that a number of questions remained unanswered and a number of seemingly relevant arguments inadequately developed. So, under section 56(4)(a) of the Act, I scheduled an oral inquiry for August 31, 1995 and invited a set of intervenors, including the Law Society of British Columbia (Jeffrey Hoskins); the Canadian Bar Association, B.C. Branch, Civil Liberties Section (Craig P. Dennis and Michael J. Hewitt); the Canadian Bar Association, B.C. Branch, Criminal Justice Section, Victoria (Adrian F. Brooks); the Canadian Bar Association, B.C. Branch, Immigration Section for British Columbia (Douglas Cannon); the Federated Anti-Poverty Groups of B.C., represented by the B.C. Public Interest Advocacy Centre (Katherine Hardie and Wantha Caron); the Radio and Television News Directors Association (Rick Wiertz); the B.C. Press Council (Gerald Porter, Executive Secretary); the Vancouver Sun (Barry Gibson); the B.C. and the Yukon Community Newspaper Association (David F. Sutherland). Harry Stevenson participated in the oral inquiry by telephone, representing the interests of Charles Lugosi as a third party.

As noted below, the oral inquiry also included an *in camera* telephone discussion with one of the defendant third parties in the case. I gave both of them written notice of the inquiry under section 54(b) of the Act.

3. Issues under review at the inquiry

This inquiry examined three basic issues:

1) Does section 11 of the *Legal Services Society Act* activate section 78(1) of the Act? The former reads:

> 11(1) Information disclosed by a client or an applicant for legal services to a director, employee or agent of the society [Legal Services Society] or funded agency is privileged and shall be kept confidential in the same manner and to the same extent as if it had been disclosed to a solicitor pursuant to a solicitor and client relationship.

Section 78 reads as follows:

> ***Interim relationship to other Acts***
>
> 78(1) The head of a public body must refuse to disclose information to an applicant if the disclosure is prohibited or restricted by or under another Act.
>
> (2) If a provision of this Act is inconsistent or in conflict with a provision of another Act, the provision of this Act prevails unless the other Act expressly provides that it, or a provision of it, applies despite this Act.

(3) Subsection (1) is repealed 2 years after section 4 comes into force. [October 4, 1995]

Subsection 1 has now been automatically repealed.

2) Is information about whether the clients of Charles Lugosi were on legal aid privileged under section 14 of the Act? Is the amount that Lugosi may have been paid to defend them privileged under the same section of the Act? Section 14 reads as follows:

Legal advice

14 The head of a public body may refuse to disclose to an applicant information that is subject to solicitor client privilege.

3) Will release of the personal information in dispute about the two clients result in an unreasonable invasion of their personal privacy? On balance, did the head of the Legal Services Society correctly withhold the requested information under section 22 of the Act? It reads in part as follows:

Disclosure harmful to personal privacy [of third parties]

22(1) The head of a public body must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy.

(2) In determining under subsection (1) or (3) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body must consider all the relevant circumstances, including whether

(a) the disclosure is desirable for the purpose of subjecting the activities of the government of British Columbia or a public body to public scrutiny,

...

(e) the third party will be exposed unfairly to financial or other harm,

(f) the personal information has been supplied in confidence,

...

(h) the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant.

....

(3) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if

...

(c) the personal information relates to eligibility for income assistance or social service benefits or to the determination of benefit levels,

...

(f) the personal information describes the third party's finances, income, assets, liabilities, net worth, bank balance, financial history or activities, or creditworthiness

(4) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if

...

(f) the disclosure reveals financial and other details of a contract to supply goods or services to a public body,

...

(i) the disclosure reveals details of a licence, permit or other similar discretionary benefit granted to the third party by a public body, not including personal information supplied in support of the application for the benefit, or

(j) the disclosure reveals details of a discretionary benefit of a financial nature granted to the third party by a public body, not including personal information that is supplied in support of the application for the benefit or is referred to in subsection (3)(c).

....

4. Burden of proof

Section 57 of the Act establishes the burden of proof on the parties in this review. Where access to information in the record has been refused, it is up to the Legal Services Society to prove that the applicant has no right of access to the record or part of the record. If the record or part of the record to which the applicant has been refused access contains personal information of a third party, it is up to the applicant to prove that disclosure of the information would not be an unreasonable invasion of the third party's personal privacy under section 22.

5. The records in dispute

The Legal Services Society refused to produce any "records in dispute" in connection with this inquiry, because they may not in fact exist. Its view is that my decision would not be affected by its admission that relevant records exist or do not exist.
If they do exist, the Society is capable of releasing cumulative amounts only, which is the only issue in this inquiry. My understanding is that any relevant record will be produced, as necessary, from the record of payments that may have been made to counsel for the two defendants.

6. The applicant's initial case

The applicant was not represented by counsel for the written inquiry. He did not think that section 11(1) of the *Legal Services Society Act* applied to the records he is requesting. The applicant argued that the financial information he is requesting has not been disclosed by the clients, because "most legal aid clients have no idea what the lawyer billings for their case add up to."

With respect to the applicability of section 22 of the Act, the applicant argued that disclosure of the information he requested would not be an unreasonable invasion of any third party's personal privacy, since the records are not personal information: "Those figures are information regarding the Legal Services Society itself." The applicant cited sections 22(2)(a) and 22(4)(i) and (j) of the Act in support of his argument for disclosure.

The applicant generally believes that the taxpaying public has a right to know how much it paid to defend a person, for example, who killed his mother or employer. He notes that the public seems to be allowed to know the terms of severance packages paid to public hospital administrators (my Order No. 24-1994, September 27, 1994), the salaries of school teachers, and the annual billings of physicians to the Ministry of Health. In his view, the public has the right to know the amounts paid on behalf of the two criminal defendants from public funds, since public access to information in a democratic society is a right and not a privilege.

7. The applicant's case at the oral inquiry

At the oral inquiry, the applicant was represented by counsel. He again emphasized that the taxpayers are paying the legal bills of the two defendants and have a right to know how much of their money is being spent: "The request is for nothing more than the amount of tax money spent by the public body on two criminal cases." (Applicant's Outline of Oral Argument, paragraph 2)

With respect to the argument that the information in dispute is privileged under section 14 of the Act, counsel for the applicant pointed out in oral argument that only lawyers are opposing disclosure and they are not accustomed to accountability. His further argument was that it is necessary to look at the basic purpose of solicitor-client privilege. For example, would disclosure two or more years after the fact really threaten the solicitor-client relationship?

> The purpose of the law of privilege is to foster the solicitor client relationship, to ensure complete candour between lawyers and their clients, without fear of exposure. Would that principle be threatened by revealing, now that the proceedings are long over, what a government agency ultimately paid the lawyer? Of course not. (Applicant's Outline of Oral Argument, paragraph 5)

I have presented the applicant's section 22 arguments below in connection with my detailed analysis of that section.

8. The Legal Services Society's initial written case

The Legal Services Society indicated that the request for access to its records concerned "the sum total of tariffs and disbursements" paid to a single lawyer for murder trials in Penticton in 1992 and in Kelowna in 1993. There has been no waiver produced from either defendant with respect to the confidentiality the Society owes to its clients and applicants for legal services under section 11 of the *Legal Services Society Act*. (Submissions of the Legal Services Society, February 17, 1995, part I)

The Legal Services Society initially complained that the two third parties in this case were not made participants in the inquiry and given an opportunity to make submissions concerning the production of the information requested. However, it was not prepared to acknowledge that the two defendants were in fact its clients. It argued that if I reject its section 11 argument under the *Legal Services Society Act*, then all possible third parties should be invited to make submissions. (Submissions of the Legal Services Society, February 17, 1995, part II)

Under its interpretation of section 11, the Legal Services Society argued that even the name of a client is confidential. Solicitors in this province have a duty of confidentiality with respect to a client's name.

> It is submitted that if disclosure by a lawyer of the identity of a client is a breach of confidentiality[,] then a disclosure of the retainer terms must necessarily be an even greater breach of confidentiality owed to a client both by the lawyer and by LSS (both under its Act and as agent to the solicitor/client relationship). (Submissions, February 17, 1995, 3.04)

If any person could ask the Legal Services Society about the existence of a legal aid retainer and the amounts paid to a lawyer for fees and disbursements, this might include "both the opposing spouse in a family law case and the opposing parties in a pro bono case." (Submissions, February 17, 1995, 3.06) Such persons have no right of access to the retainers of a non-legal aid client, and this should apply to persons on legal aid as well. (Submission, February 17, 1995, 3.07 and 3.08)

Moreover, disclosure of the personal information requested would be an unreasonable invasion of both the clients' and the lawyer's privacy: "It is submitted that it is simply no one else's business whether or not someone is (or is not) on legal aid." (Submission, February 17, 1995, 3.13) In this connection, the Legal Services Society relied upon section 22(3)(c) of the Act, arguing that "an individual's eligibility or receipt of legal aid is analogous to an individual's eligibility or receipt of income assistance or social service benefits." (Submissions, February 17, 1995, 3.15)

The Legal Services Society fears that if it is required to produce records that may exist to the current applicant, then it might have to do so for all of its clients. It indicates that for each "referral" used in criminal matters, the top part of the relevant form asks for the following information from counsel who are asking for payment: client name, address, and telephone number; lawyer's name, address, and "vendor" number; date of assignment; and referring office. Information collected that is in the public record or readily available to the public includes court location, Legal Services offence code, date of the alleged offence, and information or indictment number. (Affidavit of David S. Duncan, February 17, 1995, Exhibit E)

With respect to the present request for "disbursements," the Society pointed out that this could include all bills from experts, investigators, interpreters, travel expenses to interview witnesses, and telephone, Facsimile, and postage costs. These categories might include sensitive

information that is normally covered by solicitor-client privilege. (Affidavit of David S. Duncan, February 17, 1995, Exhibit E)

The Legal Services Society is aware that the applicant only asked for the total billings of the lawyer on each of the two criminal cases and not for the contents of the actual referrals (billing forms) that have just been described. (Affidavit of David S. Duncan, February 17, 1995, Exhibit E) Disclosure would, however, reveal the legal aid status of these clients.

The Legal Services Society further pointed out that the availability of the Criminal Tariff for what legal aid lawyers are paid means that anyone can calculate the cost of a trial on a legal aid basis by knowing the numbers of days that a trial lasted (which is public information available from court records). Furthermore, "the compensable non-court services are a very small portion of most criminal billings." (Affidavit of David S. Duncan, February 17, 1995, Exhibit E)

The overall position of the Legal Services Society is that "it is in the best interests of all British Columbians to have their consultations with or retainer of a lawyer (whether on legal aid or on a private basis) treated as a matter of personal privacy and a matter of solicitor/client privilege." (Affidavit of David S. Duncan, February 17, 1995, Exhibit E)

In its reply submission of February 23, 1995, the Legal Services Society emphasized that "[m]any of our clients regard their legal aid status as a confidential matter which is covered by solicitor/client privilege and not something which third parties are entitled to know."

9. The Legal Services Society's case at the oral inquiry

The Legal Services Society provided me with its working notes for its presentation at the oral inquiry, and I have used them to present additional arguments not previously noted at the written inquiry. It essentially argued that "information about the basis of a lawyer's retainer" is privileged on the basis of the existence of a solicitor-client relationship under section 14 of the Act and the Descoteaux v. Mierzwinski decision of the Supreme Court of Canada:

> ... the position of the Legal Services Society is that the duty to keep privileged information relating to a legal aid retainer extends to cover information which implicitly would or could reveal the basis of the retainer - such as the information requested here. Legal Services says that if Mr. Gaffney is not entitled to know if someone is on legal aid, he is not entitled to know how much Legal Services paid for that person's case since that would implicitly reveal whether or not that person is on legal aid. (Working Notes, p. 2)

I have presented below, as appropriate, other portions of arguments made by the Legal Services Society.

10. The case of the third parties

I understand that both third parties do not want any information disclosed about their possible relationship with legal aid. During the oral inquiry, I received an *in camera* submission by telephone from one of these parties. He agreed with the position of the Legal Services Society on disclosure and, in particular, does not want the media to get more information about his case that would "stir things up" again in the geographic area in which his trial took place. In his view, disclosure of his legal aid status would unfairly damage his reputation and infringe on his rights in other pending proceedings that involve him.

11. The submission of the Vancouver Sun

The Vancouver Sun takes the position that "there should be full disclosure of any expenditure of public funds. All levels of government are currently under pressure to reduce spending. The public therefore deserves as much information as possible concerning the costs and benefits of each government program." (Submission of the Vancouver Sun, p. 1) Without more detailed information than the Legal Services Society is currently willing to provide, "the public cannot assess whether the expenditure on any particular case was justified or whether the bills rendered by a particular lawyer seem reasonable." (Submission of the Vancouver Sun, p. 2)

The newspaper argues that the public are concerned about the costs of legal aid and about the best way of delivering it in a cost effective manner. Indeed, "there is a public perception that lawyers are overpaid and may be taking advantage of the legal aid system." (Submission of the Vancouver Sun, p. 2)

The Vancouver Sun's position is that the information requested is not subject to solicitor-client privilege. All the applicant wants to know is how much "public money" a defense lawyer received for defending two persons. (Submission of the Vancouver Sun, p. 2)

With respect to the prospect of embarrassing the two defendants by revealing that they were recipients of legal aid, the Sun submitted nine stories from the Canadian press about these individuals (which I will discuss below): "In light of the contents of these stories, it seems difficult to believe that either [of the two defendants] would be embarrassed by disclosure of the fact that they qualified for legal aid." (Submission of the Vancouver Sun, p. 3 and appendices)

With respect to the suggestion that the applicant is asking for "personal information" under the Act, the Sun takes the position that what is being sought is in fact information about the spending practices of the Legal Services Society. (Submission of the Vancouver Sun, p. 3)

The newspaper basically believes that "there is a strong public interest in the type of information sought" by the applicant, and "no serious invasion of personal privacy that would justify withholding such information from the public." (Submission of the Vancouver Sun, p. 4)

12. The submission of the B.C. and Yukon Community Newspaper Association (BCYCNA)

The BCYCNA represents approximately 100 mostly-weekly newspapers, the vast majority of which are in this province. They "are a major means by which British Columbians are informed about the administration of criminal justice, the course of individual criminal cases, governmental activity in general, and governmental activity in particular instances." (Submission by the BCYCNA, p. 1)

The BCYCNA pointed out that the Legal Services Society (LSS) is a public body:

> LSS, as a public body, has different objects and duties than does a member of the private bar, and has therefore a different relationship with its client than does a private solicitor. LSS is, undoubtedly (and should be) governed by the best interest of its client to a significant degree, but it is also influenced by the public interest and the policy-makers who are its masters/mistresses ....
>
> We submit ... that the public interest in scrutinizing the operation of the tariffs and disbursements paid by LSS must prevail in both cases presently under consideration ....

If the Legislature had intended that LSS keep confidential, for all time, the identity of any of its clients, it could have, and would have, conferred such a duty in explicit terms. (Submission by the BCYCNA, pp. 4, 5)

The BCYCNA argues that the Legal Services Society is shirking its public accountability for its expenditures by arguing in the present case for a "blanket exception, arguing no specific factual rationale applicable to the instance. This is a classic case for the weighing and the balancing of access and privacy interests." (Submission of the BCYCNA, pp. 7, 8)

Finally, the BCYCNA emphasized the public interest in accountability for the expenditure of public funds:

> There is a strong public policy argument in favour of public scrutiny of the expenditure of public funds. It has a salutary effect on the potential for abuse. It has a quieting effect on the taxpayers, where expenditures are appropriate and justified. Where they are not appropriate and justified, disclosure of the information permits the democratic process to effect changes, in the mysterious manner that is characteristic of a representative democracy. It is submitted that secrecy not only invites abuse, but it will, also, over time, cause abuse. (Submission of the BCYCNA, p. 9)

13. The submission of the Radio and Television News Directors Association of Canada (RTNDA)

The RTNDA consciously chose to appear at this inquiry without legal representation, noting, however, that "there is no group with a greater self-interest in preventing the release of this information, than the legal profession."

> Essentially, what is sought by Mr. Gaffney, is information about how our tax dollars are provided to lawyers for specific services in specific cases in which these lawyers may have been, and were, self-policing in the determination of the time they spent on these cases, and the amount of personal income they received as a result .... I can understand why some lawyers may wish to keep that kind of information from the public. Even if there is absolutely no manipulation of the system whatsoever, we have the right to be able to assure ourselves of that ... [The applicant] is seeking information that will identify for any interested party, how many tax dollars were provided to lawyers arguing specific cases, in which they had some independent measure of control over how many of those dollars they were able to access. (Submission of the RTNDA, p. 1)

The applicant wants to examine the expenditure of public funds, not the payment of a private retainer. The RTNDA asked:

> What are the motives of the media in cases like this one?
>
> The purpose in seeking out this kind of information is to serve our constituents, the public, while satisfying our customers in what is also a business relationship. Those customers too are the public ... [In] providing the information to the public, the media offers an opportunity for citizens to be informed and aware--aware of issues they may not otherwise confront, and informed about how those issues affect them. (Submission of the RTNDA, p. 2)

With respect to the release of personal information about the defendants, the RTNDA asserted that:

> It is already public knowledge, and known by the applicant, that both clients were represented by lawyers who were paid through Legal Aid. To argue that release the specific amounts of payments would somehow violate these persons' rights to confidentiality and identify personal financial information is incorrect. I might argue in practical terms that almost any one of us may have to apply for Legal Aid assistance no matter what our personal status, if faced with a lengthy criminal trial, considering the cost of a good defense lawyer these days. (Submission of the RTNDA, p. 2)

The RTNDA regards reliance on section 14 of the Act in this case as "a perversion of the principle of solicitor-client privilege."

Finally, the RTNDA "is concerned that the attempts to keep the information about the specific payments by the Legal Services Society from the public, may be, and may be perceived to be, a manipulation of FOIPPA [the Act] for the benefit of a specific group within our society, to the detriment of our society as a whole."

14. The submission of the British Columbia Press Council

The Press Council represents 17 daily newspapers and 100-plus community newspapers of the BCYCNA. The Press Council fully supports the disclosure of information in the present inquiry, since public monies are being spent and the attempt to invoke solicitor-client privilege "is neither warranted, nor in the public interest." It argued that:

> If the provincial government and its many agencies are routinely allowed to hide financial information under the rug of solicitor-client privilege, or whatever, then the news media cannot do their job properly and the public interest will suffer. Surely that is not what the Freedom of Information & Privacy Act wants to see happen.

15. The submission of the Law Society of British Columbia

The Law Society focused on the privacy concerns of a lawyer's clients in this particular inquiry. It argued that disclosure of monetary information about the clients would reveal their eligibility for legal aid, which information is privileged in statute and common law: "If the information to establish eligibility is privileged and private, the fact of that eligibility must also [be] privileged and private." (Submission of the Law Society, pp. 2, 9) Its emphasis is on the protection of the basic fact that someone has qualified for and received legal aid. It argues that section 14 of the Act and the Descoteaux decision of the Supreme Court of Canada protect this information from disclosure.

The Law Society further argued that it was not the intention of the Legislature to "interfere with the right of non-public body clients to confidentiality of communications with lawyers." (Submission of the Law Society, p. 5) It referred in this connection to recent amendments to the *Legal Profession Act* that have not yet been proclaimed.

With respect to the privacy issues raised under section 22, it is the position of the Law Society that "for the Legal Services Society to disclose the amount it has paid to a lawyer with respect to a specific case discloses by necessary implication that the client in that case met the financial qualifications for legal representation and did receive legal aid." To disclose such information, in its view, would be an unreasonable invasion of the clients' privacy rights. (Submission of the Law Society, p. 6) As necessary, I discuss below the Society's position on particular parts of section 22.

16. The submission of the Poverty Law Section of the Canadian Bar Association

The Poverty Law Section relied upon the concept of solicitor-client privilege as developed in statute and case law and section 22(2)(f) of the Act to argue against disclosure of the information requested. I discuss elsewhere its position on aspects of these issues.

17. The submission of the Civil Liberties Section of the Canadian Bar Association

The Civil Liberties Section supported the basic privacy position of the Legal Services Society. Like other intervenors on that side, it also argued on the basis of section 11 of the *Legal Services Society Act*. It concluded that section 14 simply "affords a public body the discretion to disclose privileged information *provided that and only where* the client previously has waived the privilege." (Submission of the Civil Liberties Section, p. 3)

At the oral inquiry, the Civil Liberties Section emphasized that the key fact to be kept confidential is the existence of a legal aid retainer. In its view, disclosure of that information could inhibit the retention of counsel.

18. The submission of the Criminal Justice Section (Victoria) of the Canadian Bar Association

The Criminal Justice Section essentially supports the position of the Legal Services Society, going so far as to state that it "must be left to the Legal Services Society to determine for itself the existence of the solicitor/client privilege given its peculiar knowledge of the relationship with its applicants." (Submission of the Criminal Justice Section, pp. 4, 5) I have discussed relevant portions of its submission elsewhere.

19. The submission of the Federated Anti-Poverty Groups of B.C. (FAPG)

The Federated Anti-Poverty Groups urged me not to disclose the information requested because of section 14 (solicitor-client privilege) and section 22 (privacy considerations). In its view, revealing "personal information" under the Act about low-income is "a basis of discrimination against individuals and groups in our society." (Submission of the FAPG, paragraph 9) It argues that the presumption in this case is that disclosure would be an unreasonable violation of personal privacy. (Submission of the FAPG, paragraphs 16, 23) I have presented its more detailed arguments below.

The Federated Anti-Poverty Groups emphasized that "media coverage of services provided to persons who are poor tends to characterize poor persons as dishonest and lazy individuals who are taking advantage of the system at the expense of the rest of the population." (Submission of the FAPG, paragraph 33)

20. The affidavit of the Immigration Section, Canadian Bar Association, British Columbia Branch

This Section sought to address issues not raised by the other parties, especially those who seek legal aid for immigration matters. The main thrust of its affidavit concerned the degree of

confidentiality customarily extended to such hearings before administrative tribunals, as governed by the *Immigration Act*. A number of such proceedings (e.g., refugee claimants) in fact occur *in camera*. (Exhibit 4)

21. Discussion

The choices to be made in this case were well represented at the oral inquiry. The media were enthusiastic promoters of the public's right to know in the public interest in this case, while some groups of lawyers and those representing the disadvantaged were strong proponents of the confidentiality and privacy rights of those receiving legal aid.

Section 11 of the Legal Services Society Act

Section 11 of the *Legal Services Society Act*, which I have quoted above, establishes what personal information the Legislature determined the Legal Services Society should keep confidential about legal aid clients. It covers only "[i]nformation disclosed by a client or an applicant for legal services to a director, employee or agent of the society or funded agency ...." This is not the kind of information that this applicant is seeking. In addition, section 11 is now subordinate to the disclosure rules established under the *Freedom of Information and Protection of Privacy Act*.

What the Legal Services Society has disclosed

More than a year ago, the Legal Services Society disclosed to the applicant that the total amount billed by Charles Lugosi for the 1993/94 fiscal year was $356,428, inclusive of disbursements and GST. It added that "Mr. Lugosi travels extensively and his disbursements are considerable. Unfortunately, our system does not allow for us to distinguish between fees and disbursements." (Affidavit of Blaine Gaffney, Exhibit A) In 1992/93 Lugosi's billings were the fourth highest in the province at $325,378. (Exhibit 6, Barbara Yaffe, "The Public Eye. Legal aid? Sounds like lawyers' aid to me," Vancouver Sun, August 23, 1994) The Legal Services Society publishes such global figures on an annual basis under section 2(f) of the *Financial Information Act*. But it does not disclose how many cases it paid for, nor how many cases a particular lawyer handled for the global amount, which might assist the interested public in evaluating the costs of legal aid.

The Legal Services Society acknowledges the public interest in learning about how tax monies are spent on legal aid and believes that it meets that need by annual publications and the availability of the Criminal Tariff. (Working Notes, pp. 3, 4; and Exhibit 5)

The public's right to know

The applicant emphasizes that as a television reporter it is his job to gather and report information of public interest, including information about how tax dollars are spent. He states that there is a current debate about the size of legal aid tariffs and whether the existing system should be replaced by a public defender system. (Affidavit of Blaine Gaffney, paragraphs 2, 3) In this connection, he covered the trials of the two defendant third parties in this case. His argument is that the release of global figures by the Legal Services Society "does not provide any

real sense of whether the taxpayers are getting value for their money .... Taxpayers have no way to compare the efficiency of different legal aid lawyers or an alternate legal aid system." (Affidavit, paragraph 5) The applicant originally only wanted to know how these two defendants could afford such a prominent lawyer.

The Legal Services Society spent approximately $74 million in fiscal year 1993/94 in paying tariffs to lawyers for legal aid work in criminal and family cases (approximately 75 percent of its budget). Ninety-five percent of its budget comes from the province. (Exhibit 6) The tariff expenditures on criminal and family matters were about $34 million each.

Counsel for the third party lawyer, Mr. Lugosi, argued that the accountability of lawyers is solely to the Law Society of British Columbia and the courts. However, the Act has created a new form of accountability for the legal profession, that is to the public, when public funds, derived from a public body like the Legal Services Society, are being disbursed for particular purposes. It is my duty to take this broad goal of greater openness into account in making my decisions.

There is indeed a public right to learn about the general costs of defending criminal defendants. The public should know more about how its tax money is being spent on legal aid. The goal of public scrutiny is to exercise some control of the costs of lawyers in a publicly-funded scheme. One issue is how much detailed information needs to be released to satisfy this public desire to know. In fact, the applicant is not seeking details, but only global figures for expenditures on each case. However, I must balance this in interpreting the applicability of sections 14 and 22 in this case.

Section 14: Solicitor-client privilege

This case features quite divergent views on the meaning of section 14 with lawyers arguing on all sides with respect to the application of solicitor-client privilege in the unique circumstances here. The most common position was that the name of a lawyer's client and the nature of a retainer (whether legal aid or private) are protected by the scope of solicitor-client privilege. See, for example, the Submission of the Poverty Law Section, Canadian Bar Association, pp. 1-5.

The Legal Services Society relied on Ronald D. Manes and Michael P. Silver, Solicitor-Client Privilege in Canada Law (Butterworths, 1993) for the proposition that the terms of such a relationship are privileged, "including but not limited to the financial arrangements between the solicitor and client." But I note that the first phrase in this proposition, and the one preceding it, establish, at least in the minds of the two authors, that solicitor-client privilege does not extend to "communications showing only the existence of the solicitor and client relationship," that is, that "the existence of a solicitor-client privilege is not privileged ...." (p. 82) If the existence of any such relationship between Charles Lugosi and either of the two defendants is in fact not privileged, then I question how the Legal Services Society can successfully claim privilege for the fact that it may have had a legal aid relationship with such defendants, and that it paid specified amounts for their defense.

The Descoteaux decision of the Supreme Court of Canada

The application of this decision is central to my finding on the meaning of solicitor-client privilege in this particular inquiry. The applicant made the following argument:

> Descoteaux and similar cases hold that financial information given by a client when forming a solicitor client relationship is privileged. The answer is that the information sought [in this inquiry] is not the detailed financial information provided by the accused. In fact it is not information which ever passed between the solicitor and the client at all. (Applicant's Outline of Oral Argument, paragraph 4)

The Legal Services Society concludes that Descoteaux represents "a strong statement" from the Supreme Court of Canada that "the relationship of a legal aid society stands in a position of agency to the solicitor-client relationship even before that relationship is established and that the duty of confidentiality applies to that relationship." It further submitted that "the details of a retainer of a lawyer (whether privately or through legal aid) are also covered by that [obligation] of confidentiality" including "details concerning the client's ability to pay the lawyer etc. - in other words the nature and the terms of the legal retainer." (Working Notes, p. 1; and Submission of the Law Society of B.C., pp. 3, 4)

The Descoteaux decision involved facts considerably different from the matter before me. After it was alleged that an applicant had falsely claimed a low income in order to qualify for legal aid from a provincial legal aid bureau in Montreal, police tried to seize the application form. The Supreme Court of Canada concluded that solicitor-client privilege does protect the information on a legal aid application form, but not if it was communicated for the purpose protect of facilitating the commission of a crime. (70 C.C.C. (2d) 385 at 404) No information supplied on a legal aid application form is at issue in this case except, possibly, the name of one or both of the defendant third parties.

The Legal Services Society and other intervenors relied on the following statement from the judgment of the court by Mr. Justice Lamer (as he then was):

> With all due respect for the opposite view, I am of the opinion, however, that in principle information concerning one's financial means, the basis of the claim, and any other information required by the corporation or the regulations ... which a person applying for legal aid must provide in order to obtain the services of a lawyer is, except in the exceptional cases I shall deal with later, privileged. (70 C.C.C. (2d), 385, at 395)

I take this finding as applying to information which a person must supply in order to qualify for legal aid, which is not the issue before me in this inquiry. There is also no question in this inquiry of disclosing information from the Legal Services Society that may have been provided by the third parties to their counsel. Compare 70 C.C.C. (2d) 385, at 398.

Mr. Justice Lamer proceeded to formulate a substantive rule with respect to confidentiality of communications between solicitor and client. The third point of the rule is that:

> When the law gives someone the authority to do something which, in the circumstances of the case, might interfere with that confidentiality [between solicitor and client], the decision to do so and the choice of means of exercising that authority should be determined with a view to not interfering with it except to the extent absolutely necessary in order to achieve the ends sought by the enabling legislation.

The court added that "such enabling legislation ... must be interpreted restrictively." (70 C.C.C. (2d) 385, at 400) I interpret this statement as meaning that my application of the *Freedom of Information and Protection of Privacy Act* to the present case should be done with such rules in mind. I note further that Mr. Justice Lamer was ruling specifically about legal aid information of a different type than the very simple information at stake in the present matter.

The Supreme Court of Canada further stated that solicitor-client privilege normally covers "information concerning the client's ability to pay the lawyer ...." (70 C.C.C. (2d) 385, at 401) In the context of the present inquiry, it is my view that this description would apply to the detailed personal and financial information supplied by an applicant to the Legal Services Society; again, that is not the information at issue in this inquiry.

The thrust of the Descoteaux decision is to keep confidential all communications between a lawyer and his client "with a view to obtaining legal advice ...." Such communications include "matters of an administrative nature such as financial means ...." Thus "all information which a person must provide in order to obtain legal advice and which is given in confidence for that purpose enjoys the privileges attached to confidentiality. This confidentiality attaches to all communications made within the framework of the solicitor-client relationship ...." (70 C.C.C. 92(d) 385, at 413)

I wish to emphasize the extent to which "communications" between client and solicitor are not the essence of what is at stake in this inquiry. The applicant wants to know how much the Legal Services Society paid defense counsel to represent a particular defendant. It is my view that I need to determine the meaning and application of section 14 of the Act in the present case. I think that the Legal Services Society and the Law Society took a very strict view of the application of solicitor-client privilege in this inquiry that is not supported under existing case law. I believe that I can decide in this case without, in fact, challenging the fundamental integrity of solicitor-client privilege, which I support, and have supported, in a number of my Orders to date.

Other jurisprudence on solicitor-client privilege

The Poverty Law Section of the Canadian Bar Association discussed the case of Regina v. Littlechild (1979), 51 C.C.C. 92d), 406 as a bar to disclosure of legal aid information. Despite its claims, I find that what was at stake in that case is not directly relevant to the current inquiry. The Crown was trying to use evidence in a criminal proceeding that came from a conversation

between the accused and an interviewer of the Alberta Legal Aid Society during the legal aid application process. The Alberta Court of Appeal found that all communication between an applicant for legal aid and an official of the Legal Aid Society was privileged. (Submission of the Poverty Law Section, Canadian Bar Association, pp. 2, 3) The only information that might be implicitly disclosed in the present request for access to information is the fact that the defendant(s) applied for and received legal aid.

The Civil Liberties Section of the Canadian Bar Association cited a recent decision of the Ontario Court (General Division), Divisional Court for the proposition "that no court--and by extension, it is submitted, no other body--has jurisdiction to order disclosure of privileged information." Geo. Cluthe Mfg. Co. v. ZTW Properties Inc. (1995), 23 O.R. (3d) 370. (Submission of the Civil Liberties Section, p. 3) This case in fact involved a motions court judge attempting to free a solicitor to discuss in pending litigation a matter that was the subject of privileged communications between him and his clients. The court said:

> It is fundamental that the privilege attaching to confidential communications between solicitor and client is the privilege of the client. That privilege can be waived only by the client, not by the solicitor. No authority was cited for the proposition that the court may authorize a solicitor to disregard the privilege, absent waiver by the client. (23 OR (3d) 370, at 381, 82)

I have no intention of ordering the disclosure of privileged information in this case.

Counsel for the applicant drew to my attention the decision of the Saskatchewan Court of Queen's Bench in Rieger et al. v. Burgess et al. (34 C.P.C. 92d) 154. (Exhibit 3)) In that case, defendants wanted information about any contingency fee arrangements between plaintiffs and their counsel. Mr. Justice Malone determined that this disclosure "of financial arrangements between the plaintiffs and their solicitors" would not offend the principle of solicitor-client privilege in the circumstances of that case:

> The professional relationship between the parties would not be compromised or the essential element of confidentiality upon which it is based infringed upon. The defendants are not seeking disclosure of any communications between the plaintiffs and their solicitors that deal with the prosecution of the action or the advice given with respect thereto. They are seeking to determine if any moneys are owed to the plaintiffs by their solicitors, which they are entitled to do on an examination in aid of execution. ((34 C.P.C. 92d) 154, at 157, 58)

Legal aid and the private retention of counsel

A number of those appearing at this inquiry equated the rights of individuals to retain a lawyer privately with the rights of individuals to keep private the fact that their particular lawyer is funded by legal aid. Thus the Poverty Law Section of the Canadian Bar Association concluded that:

> It is vital to the integrity of the legal aid system that clients who are financially disadvantaged are able to access legal services, so far as possible, on the same terms as any other client. A 'paying client' could never be expected, or required, to disclose the terms of a solicitor-client retainer. (Submission of the Poverty Law Section, Canadian Bar Association, p. 7)

I find this a dubious (even if substantively meritorious) proposition for the following reasons. Legal aid lawyers, for example, normally expect and accept lower hourly rates and more bureaucratic control over disbursements by the Legal Services Society than a privately-paid legal practitioner. The following argument of the Criminal Justice Branch is not realistic:

> ... Legal Aid applicants should be treated the same as any individual who has the resources to pay for a lawyer. It would be contrary to any sense of equality and dignity that poor people be treated differently from the rich in obtaining Legal Counsel. (Submission of the Criminal Justice Section, p. 5)

I agree with this formulation, but even in our relatively democratic society, persons are in fact treated differently, depending on whether they are paying personally for a service or receiving a comparable benefit from the state.

The B.C. and Yukon Community Newspaper Association also pointed out, in this connection, that legal aid, as opposed to direct employment of a private lawyer, features a "'mixed model' of service provision - harnessing the efforts of staff lawyers, paralegals, and other non-professionals, as well as members of the private bar ..." (Submission of the BCYCNA, p. 4) In fact, the Legal Services Society has recently announced changes moving in this very direction.

Various intervenors argued that lawyers have a professional responsibility not to disclose information about who their clients are. See Submission of the Canadian Bar Association, Poverty Law Section, p. 2. The request in this case does not ask or require a lawyer to disclose any information about his clients. The applicant's request for information is to the Legal Services Society.

Accordingly, I find that the Legal Services has not proved that the information requested is subject to solicitor-client privilege. Neither section 14 of the Act, nor section 11 of the *Legal Services Act*, apply in this case.

Section 22: The privacy rights of criminal defendants

The applicant argues that possibly revealing that the two defendants were on legal aid is such "an unspecific piece of information" that disclosing it would not "constitute unreasonable violation of privacy when balanced against the public's right to know how their tax dollars are being spent:"

> ... the past histories and lifestyle led by [the two defendants], which were canvassed in some detail in open court at their trials, clearly indicated to me that

> these were people who could not afford to hire their own lawyers. As an aside, I must say that the information revealed in open court was far more pointed and embarrassing personal information than whether or not the two accused were able to convince a legal aid officer to exercise his or her discretion to fund their case. (Affidavit of Blaine Gaffney, paragraphs 7, 8)

It is important, from a privacy perspective, that the applicant only wants global amounts of expenditures concerning the two cases and not the details of referrals and itemized billings. In my view, this request is indeed reasonable and not excessive in scope.

I need to consider the privacy rights of criminal defendants with respect to the fact of their being on legal aid. The B.C. and Yukon Community Newspaper Association submits that there is no stigma attached to disclosure that one is a client of legal aid and, even if such disclosure constitutes a violation of a client's privacy rights, it is not an unreasonable one. In its view, the stigma associated with receipt of welfare does not attach to relying on legal aid for a lawyer, since legal fees "are notoriously expensive. In most people's eyes, the cost of engaging a lawyer to conduct a court case is an outrageously expensive prospect." (Submission of the BCYCNA, pp. 5, 8, 9) In the BCYCNA's view:

> A GAIN stigma arises from post-war idealism of the 50's and an associated work-ethic. There is an important distinction between legal aid recipients and GAIN recipients. Legal aid recipients are often employed and, it is submitted, no conclusion can be, or is, drawn by the public in respect of the character of a legal aid recipient as such.

One relevant consideration is that a very high proportion of defendants in serious criminal cases, such as murder, are recipients of legal aid. Although no one could provide me with firm information on this point, it is probable that at least eighty percent of criminal defendants in serious crimes are in this category. Between 1984 and 1993, inclusive, at most 100 persons annually have been charged with homicide in this province. (See Police Services Division, Ministry of Attorney General, Summary Statistics: Police Crime [1994], p.79. These data cover mostly first and second degree murder and also manslaughter and infanticide.) The strong likelihood is that each such person was defended by a legal aid lawyer.

Thus revealing the fact of receipt of legal aid is not, in my view, a serious invasion of personal privacy for a criminal defendant charged with a serious crime. It would be as unwise for me to ignore the realities of those charged with serious crimes, as it would be for me to suggest that such a defendant really concerned about his privacy should forego legal aid; it is a matter of balancing competing interests.

It is also argued on behalf of the applicant that the approximate amount paid to a legal aid defense lawyer can already be estimated on the basis of the known number of days for trial and the fee schedule for other forms of work according to the legal aid criminal tariff. This argument cuts both ways, since the public may not really need to know specific amounts if such rough approximations are reasonably accurate (a proposition that could be tested empirically). The problem is that it is almost impossible for the public to learn the cost of work that a lawyer and

his or her associates did on a case outside the courtroom and the context of a trial. Only the Legal Services Society can compile and release such information.

The Legal Services Society points out that if a criminal trial lasts fifteen days, then its cost at the current tariff rate of $700 for each half day, would be $21,000. In its view, the applicant can readily calculate this amount for the two trials he is interested in, "if they were run on a legal aid basis." (Working Notes, p. 4)

The applicant responded to the argument that disclosure of the records being requested in this case "would treat those requiring legal aid differently than people with greater financial resources. The answer is that the public should have access to the amount paid by the taxpayers any time tax dollars pay for someone's lawyer." Counsel used the example of the leader of the Reform Party being able to obtain from the government, under the Act, the amount spent in the spring of 1995 for a lawyer to represent the then Minister of Government Services when he faced allegations of harassment. (Applicant's Outline of Oral Argument, paragraph 4)

The applicant described the argument that disclosure would reveal the recipients as having "sufficiently limited financial means to obtain legal aid" as "an ingenious but erroneous characterization of the information sought. It might equally have been said in the Shaugnessy Hospital case (Order No. 24-1994, September 27, 1994) that the request for the severance packages might have revealed by inference that certain individuals had their jobs terminated." (Applicant's Outline of Oral Argument, paragraphs 8, 9) In Order No. 24-1994, September 27, 1994, I determined that it was not an unreasonable invasion of privacy to order disclosure of the names and specific amounts paid to individuals terminated from their hospital jobs. The goal was accountability to the public for the expenditure of public funds.

Disclosures in related legal aid cases: a slippery slope?

With respect to the disclosure of the information at issue in this inquiry, the Legal Services Society pointed out that it also funds family, immigration, and some civil *pro bono* matters. (Reply Submission) The risk is that a requirement for disclosure in this inquiry would be the thin edge of the wedge for further disclosures in other kinds of legal aid cases. According to the Civil Liberties Section of the Canadian Bar Association:

> ... legal aid clients enjoy a high expectation of privacy concerning the subject for which the Applicant seeks disclosure. Disclosure of the fact that a person depends upon legal aid for legal representation could work immediate harm to a legal aid client, e.g. an impecunious spouse engaged in matrimonial litigation with a more affluent adversary or a refugee claimant in respect of whom proceedings may not otherwise be made public. (Submission of the Civil Liberties Section, p. 4)

This argument is an overstatement; I am deciding the case currently before me, which involves particular criminal defendants. Other types of cases would have to be decided on their own merits, especially the application of section 22. (See Applicant's Outline of Oral Argument, paragraph 4) For example, there are several exceptions in the Act that would readily deal with

the safety issues raised in the affidavit submitted by the Legal Services Society on behalf of the Immigration section of the Canadian Bar Association. (Exhibit 4) Contrary to the concerns raised by the Legal Services Society at the oral inquiry, my decision in this case does not directly concern the delivery of legal aid in immigration and family law cases. Thus I obviously have no intention of creating a precedent "which in effect could empower an abusive spouse in domestic litigation." (Working Notes, pp. 5, 6) I also find it hard to imagine a successful public scrutiny argument for disclosure of the legal aid costs of a particular family law or refugee matter, unless it had become notorious in some way, as is arguably the case with the murder trials at issue in this inquiry.

In my view, it should be possible to draw a bright line between requests for access about highly-publicized criminal trials and information about uncharged persons, those acquitted, and persons involved in family law, immigration, and civil and human rights cases. The need to protect the privacy interests of individuals and family members would weigh heavily in these kinds of cases.

The Legal Services Society informed the Public Interest Advocacy Centre on July 11, 1995 that of 305 complaints received about eligibility and/or coverage since October 1, 1994, "[v]irtually all of the complaints made about clients have been about our family clients." (Submission of the FAPG, Affidavit of G. Guay, paragraph 6 and Exhibit D) The estimate is that eighty percent of such complainants try to get information about someone they believe is receiving legal aid. Now that section 78(1) of the Act has been repealed, it is possible that such individuals may try to use the Act to obtain access to information previously refused by the Legal Services Society. As noted earlier, the exceptions in the Act can regulate such matters.

The Criminal Justice section raised another potential problem by arguing that a decision to disclose the information requested:

> would apply to all the information provided to the Legal Services Society by an individual .... Either, in principle, <u>all</u> the information in the Legal Services file, as well as the existence of that file, must be produced or <u>none</u> should be produced .... If [this request] is successful, then every referral in every Legal Services case is automatically subject to complete scrutiny by anyone. (Submission of the Civil Liberties Section, pp. 2, 6)

This case is not about disclosure of information provided to the Legal Services Society by an individual, nor is it about disclosure of any referral information or the detailed billings of a legal aid lawyer. Those charged with implementation of the Act in public bodies are quite capable of making the distinctions necessary to apply my Orders with appropriate refinement. Anyone wishing to test the boundaries of a previous Order can bring a request for review before me.

Section 22: The privacy rights of a defense lawyer

One of the points that Charles Lugosi's lawyer made on his behalf is that gross billings do not distinguish the actual disbursements that a defense counsel has to make in the course of

preparing for and conducting a trial from the billings for time spent on a case. The Society's position is that both types of data are supplied to it in confidence. The applicant stated that he will be satisfied with gross billing information about the specific cases he is interested in. The third party lawyer's response that the media can abuse such information has no probative force, since rights of access to information under the Act do not include anyone's policing of how released data are in fact used. The privacy rights of the third party defendants are what is at issue in this inquiry.

The Law Society pointed out that while section 22(3)(f) of the Act "may indicate that it would not be an unreasonable invasion of the lawyer's privacy to release information as to what, if anything, he may have been paid by the Legal Services Society on certain matters, that is of no relevance to the question of whether it is an unreasonable invasion of the privacy of his clients." (Submission of the Law Society, pp. 8, 9) I find the submission of the Law Society helpful. I agree that disclosure of the information requested would not constitute an unreasonable invasion of the privacy of the defense lawyer in this case.

Section 22(2)(a): Disclosure is desirable for the purpose of subjecting the activities of the government of British Columbia or a public body to public scrutiny

The Legal Services Society sought to refute the applicant's argument on section 22(2)(a), because disclosure of billings in one or two cases does not in fact subject the Legal Services Society to public scrutiny. (Reply Submission, February 23, 1995) The Law Society also does not think that the information requested is "necessary or desirable for a public scrutiny" of the activities of the Legal Services Society in providing legal aid services. (Submission of the Law Society, p. 7) I do not find either Society persuasive on this point. I am equally unconvinced by the argument of the Poverty Law Section of the Canadian Bar Association that the availability to the public of the legal aid tariffs, the records of the Provincial and Supreme Courts, and the annual report of the Legal Services Society are adequate for purposes of public scrutiny. A segment of the public wants to learn more specific information as part of the ongoing debate over the costs of legal aid. (Submission of the Poverty Law Section, Canadian Bar Association, p. 6; see also the Submission of the Civil Liberties Section, p. 4; and the Federated Anti-Poverty Groups, paragraph 25)

I also disagree with the argument of the Federated Anti-Poverty Groups that "[d]isclosure of the information requested would add nothing of relevance to the public's scrutiny of LSS's activities. The only information disclosure would add to this list [of material already published by LSS] is confirmation that a particular individual received legal aid for a particular matter. Such information would not subject the activities of LSS to greater scrutiny but would merely invade the privacy of that individual." (Submission of the FAPG, paragraphs 26, 45, 49) Disclosure would in fact inform the public, in a way not currently possible, what it actually costs to defend persons charged with serious crimes who receive legal aid.

The applicant urged me to take serious account of the balancing considerations that underlie section 22, and I intend to do so. The purpose of the request is to subject the Legal Services Society to public scrutiny:

> The current information given out by the LSS ... fails to allow an appraisal of whether the public is getting value for money. The tariff fails to satisfy that need because the tariff items might be abused and because several of them permit overbilling. The tariff for a half-day in court, for example, applies in many circumstances where the lawyer spends as little as a few minutes in court. (Applicant's Outline of Oral Argument, paragraph 13)

I am of the view that the proposed disclosure is desirable for the purpose of subjecting the activities of the Legal Services Society to public scrutiny. Thus I consider the facts in section 22 (2)(a) to be highly relevant to my determination that disclosure in these circumstances would not constitute an unreasonable invasion of the third party defendants' privacy.

Section 22(2)(e): The third party will be exposed unfairly to financial or other harm

The Federated Anti-Poverty Groups argue that disclosure of the information requested will in fact expose the third parties unfairly to financial harm: "disclosure of this information would subject them without their consent to the media attention regarding this fact and, as a result, would subject them to the real possibility of discrimination based on their level of income." (Submission of the FAPG, paragraphs 27, 52) From an empirical perspective, I do not find this argument persuasive, especially with respect to financial harm. Many serious criminal defendants, especially those charged with murder, receive legal aid. Based on the size of his annual billings, Charles Lugosi does a substantial amount of legal aid work. Any media attention to this matter would likely concern the cost of defending those charged with serious crimes rather than the specifics of the persons involved in this case. Such publicity would, in any event, be minimal compared to the coverage of their trials. (See the Submission of the Vancouver Sun with its exhibits) I am of the view that disclosure of the information in dispute, assuming it exists, will not unfairly expose either defendant third party to financial or other harm in this particular case.

Section 22(2)(f): Personal information has been supplied in confidence

The Law Society argues that this section "is the key to the privacy aspect of this matter .... [F]inancial information supplied to the Legal Services Society to support an application for legal aid is clearly supplied in confidence." (Submission of the Law Society, p. 7) Neither the Legal Services Society nor the Law Society provided me with evidence to substantiate this point. Moreover, this request for information is not for "financial information" supplied to support an application for legal aid.

The Poverty Law Section of the Canadian Bar Association and the Federated Anti-Poverty Groups did inform me that the Eligibility Assessment Form used for legal aid applications in this province is endorsed with the following "declaration and consent," including the phrase that "Information on this form is confidential ...." (Submission of the Poverty Law Section, Canadian Bar Association, p. 6; Submission of the FAPG, paragraph 37) In their view, it is not possible for the Legal Services Society to provide the information requested in this case without breaching that confidence.

I note that the Eligibility Assessment form requests an enormous amount of personal information about the applicant, none of which the applicant is requesting. The data requested includes period of residency in this province and Canada, present marital status, education, ages of children, employment, occupation, family support, monthly household income (nine categories), monthly household expenses (twelve categories), full amount owing on debts (five categories), and assets (nine categories). (Affidavit of G. Guay, Exhibit B)

With respect to the Legal Services Society's evident concern for the confidentiality of the two third parties' possible legal aid status in this case, the Eligibility Assessment Form further requires an applicant to agree to the following rather expansive conditions (among others):

> 3. Information on this form is confidential, however I agree that any organization which may provide legal services to me on the basis of information on this form can check my financial situation to see if I am eligible for those services.
>
> ...
>
> 5. I have read 'Permission for lawyer to provide information and documents' on the back of this form and I agree that any lawyer Legal Services appoints for me has my permission to provide information and documents about my case to the Legal Services Society. (Affidavit of G. Guay, Exhibit B)

One usually associates such all-expansive "consent" forms with the private sector.

In all of the circumstances, I agree that the names of applicants for legal aid in serious criminal cases are personal information supplied in confidence under the Act, but this is only one consideration governing the overall application of section 22.

Section 22(2)(h): The disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant

The Legal Services Society raised one context in which disclosure of the records at stake in this inquiry would clearly involve an invasion of the personal privacy of a third party. Retainers are sometimes given to a lawyer before a charge is laid with the result that no charge is laid. The Legal Services Society correctly argues that disclosure of this particular information would "unfairly damage the reputation of any person referred to in the record" under section 22(2)(h) of the Act. (Affidavit of David S. Duncan, February 17, 1995, Exhibit E) I agree that costs and total billings of criminal defense work should not be available to an applicant before a matter is concluded in the courts.

Several points made by the applicant weaken the potential impact of this factor on the application of section 22. As a reporter, he states that he has often asked those on trial whether they were funded by legal aid, "and I have never had someone take offense or show embarrassment at either the question or the answer. It may be that the nature of public trials is so revealing of personal information that the issue of whether or not the defense is being funded by legal aid seems insignificant." (Affidavit of B. Gaffney, paragraph 9) In the case of one of these

defendants, a senior RCMP officer told the applicant that the defense was being funded by legal aid, a fact not denied by Charles Lugosi during a conversation with the reporter during the trial. (Affidavit of B. Gaffney, paragraph 10) I find this anecdote quite useful in measuring the potential impact of such a disclosure upon the reputation of the defendants concerned. With respect to the balancing considerations required by section 22, I am of the view that the impact of disclosure on the reputation of the third parties would be minimal in the circumstances of this case.

Section 22(3)(c): Personal information relates to eligibility for income assistance or social service benefits or to the determination of benefit levels

The applicant argued that this section, which creates a presumption about what is an unreasonable invasion of privacy, has no relevance to the amounts paid by the Legal Services Society to defense counsel for the two defendants. (Applicant's Outline of Oral Argument, paragraph 11) The Law Society and the Federated Anti-Poverty Groups are of the view that the presumption of an unreasonable invasion of privacy arises under this particular subsection. (Submission of the Law Society, p. 6; Submission of FAPG, paragraph 18)

I find that legal aid payments as such are not covered by the terms "income assistance or social service benefits" in this particular section. I am supported in this interpretation by the definitions used in the Information and Privacy Branch's *Freedom of Information and Protection of Privacy Act* Policy and Procedures Manual, section C.4.13, p. 27. Such benefits are intended to provide for, or augment, an individual's income. The Legislature specifically determined that personal information about those eligible for income assistance or social service benefits should not be revealed. It was free to add legal aid benefits to this list but clearly did not do so.

Section 22(3)(f): The personal information describes the third party's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness

The applicant argues that the fact of qualifying for legal aid does not describe a client's finances within the meaning of this section: "It is a general kind of information, which was reasonably (and in the case of [one defendant], certainly) known in advance in any event." (Applicant's Outline of Oral Argument, paragraph 10)

The Federated Anti-Poverty Groups argued that an "individual's financial eligibility for legal aid clearly falls within this subsection." (Submission of the FAPG, paragraph 17) Again, this is not the information that the applicant is directly seeking in this case. Eligibility for legal aid is only implicitly disclosed in a context where it is almost certain that every such defendant in a murder trial will be a recipient of same. I find that the information in dispute does not describe financial information of a third party within the language of this section.

Section 22(4)(f): The disclosure reveals financial and other details of a contract to supply goods or services to a public body

The Radio and Television News Directors Association argues that this section "speaks directly to the heart of the issue. Mr. Gaffney is seeking financial details of the contracts under

which the lawyer supplied a service to the public body, the Legal Services Society." The information about the defense costs of the two criminal defendants was created as a direct result of their lawyer's contract with the Legal Services Society to provide legal services to them. I am not persuaded that the lawyer supplied a service to the client and is simply being paid by the Legal Services Society. Thus I find that this section supports disclosure of the information in dispute.

Section 22(4)(i): The disclosure reveals details of a licence, permit or other similar discretionary benefit granted to the third party by a public body, not including personal information supplied in support of the application for the benefit, or,

Section 22(4)(j): the disclosure reveals details of a discretionary benefit of a financial nature granted to the third party by a public body, not including personal information that is supplied in support of the application for the benefit or is referred to in subsection (3)(c).

The Legal Services Society rejects the applicant's efforts to use section 22(4)(i) and (j) of the Act to cover disclosure of a "discretionary benefit paid from public funds," because payments to counsel on a given matter are not "details of a licence, permit or other similar discretionary benefit." (Reply Submission, Feb. 23, 1995; Applicant's Outline of Oral Argument, paragraph 12)

The Law Society argues that legal aid is not a "discretionary benefit" under either of these sections of the Act, because under section 3(2) of the *Legal Services Society Act* the Legal Services Society must provide legal aid to individuals charged in criminal proceedings that could lead to their imprisonment. The B.C. Court of Appeal in Mountain v. Legal Services Society [1984] 2 Western Weekly Reports, 438, upheld this lack of discretion. (Submission of the Law Society, pp. 7, 8; see also Submission of the FAPG, paragraph 20)

The applicant argues that I have set forth the broad terms of these sections in Order No. 24-1994 and that "similar broad and purposive reasoning should be applied here, with the result that the presumption of access applies."

In light of the non-discretionary aspect of the provision of legal aid to criminal defendants, I find that the payment of legal aid does not disclose details of a discretionary benefit within the meaning of sections 22(4)(i) and 22(4)(j) of the Act.

What is publicly known about the defendants?

While my decisions need to reflect a careful application of the Act, I also want them to be founded upon as much empirical reality as possible. I am not inclined to make Jesuitical distinctions that would bring credit to a medieval theologian but lack credibility among the taxpayers and residents of this province.

In terms of the privacy claims of the defendants then, it is worthwhile noting briefly that a significant amount of information was reported about them individually in the 1992-94 period. My discussion is based on submissions to me from the Vancouver Sun and reflects stories in the

Sun and the Province, based on their own reporting, News Services, and the Canadian Press. These reports state that one of the adult defendants killed his mother by strangulation and multiple stabbing. He was sentenced to life in prison for manslaughter. The second defendant allegedly stabbed and then strangled a woman to death.. Although the Criminal Justice Branch of the Canadian Bar Association encouraged me to ignore an approach that verged on "no privacy for murderers," I have to weigh the potential impact of what will be disclosed (legal aid status) about the two defendants versus what interested members of the public have already learned about them.

The amount of privacy that individuals have depends to at least some extent on what they have done, or are alleged to have done, as persons in our society. Thus the Premier of this province, a hockey star, any person accused of serious crimes, a pop singer, and other media figures, or those who become public figures, receive less privacy than those who are fortunate enough to remain more obscure. Most trials are public events; defendants sometimes become public figures in this sense.

Counsel for the B.C. and Yukon Community Newspaper Association also indicated in its submission that "members of the bench are prone to reveal publicly the need for a client to apply for legal aid when they appear in court unrepresented. Further, members of the bar are far less circumspect than LSS purports to be with respect to this information." (Submission of the BCYCNA, p. 7) Again, I find this practical evidence persuasive with respect to the realities of life that I would like to reflect in my Orders whenever possible.

The Legal Services Society's guide to Legal Aid tariffs

The "Tariff for Criminal Matters" (Exhibit 7) has two relevant objects:

1. To reasonably remunerate the members of the bar providing service.
2. To be internally consistent so that payments to counsel are proportionate to the work involved. (p. 4)

To this end, payments are made for blocks of services according to the average amount of time required for a proceeding. Only a block fee is billable, although for specifically indicated services, the block fee is payable per half-day. (p. 4) "'Half-day' means a court sitting either before or after the lunch adjournment." (p. 5) For hearing beyond three days, a Record of Appearances must be completed: "This is necessary because the LSS Audit and Investigation department has noted a high rate of errors on billings for long hearings." (pp. 6, 57) The tariff department processes approximately 2,000 accounts received each week.

Murder or manslaughter appear as category IV (most serious offences). Preliminary hearings are paid at a half-day rate of $900 for the first two half-days. (p. 29) Trials are paid at $700 per half day. (p. 32) Disbursements need to be itemized, including photocopying, travel, and phone calls. (pp. 52, 53, 59) There is a separate guide to "Disbursements for All Tariffs," which includes 42 categories from Accommodation to Travel Costs. The guide notes that "[t]o the extent possible, we have provided for automatic authorization for necessary and reasonable disbursements." (p. 1) Lawyers are warned that "[b]y submitting an account for a disbursement, you are representing that, in your opinion, the account is reasonable and proper in the

circumstances. LSS will query accounts that appear unsupportable." (p. 5) There is obviously a substantial amount of self-policing in this system.

Effective August 14, 1995, the Legal Services Society is now requiring financial contributions from clients who can afford to contribute on the basis of an assessment of their net monthly income.

I find that disclosure of the information requested in this case, does not constitute an unreasonable invasion of the third party defendants' personal privacy.

22. Order

In respect of the information requested by the applicant, I find that the Legal Services Society is not authorized or required to refuse access under section 11 of the *Legal Society Act* and is not authorized to refuse access under section 14 of the Act. I also find that the Legal Services Society is not required to refuse access under section 22 of the Act.

Under section 58(2)(a), I require the head of the Legal Services Society to give the applicant access to records which may reveal the costs of the two criminal matters at issue in this inquiry.

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David H. Flaherty
Commissioner

December 22, 1995