

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Christie v. AG of B.C. et al*
2005 BCSC 122

Date: 20050208

Docket: A993472
Registry: Vancouver

In the Matter of the *Social Service Tax Act*, R.S.B.C. 1996, c. 430, the *Social Service Tax Amendment Act (No. 2)*, 1993, the *Excise Tax Act*, R.S.C. 1995 c. E-15, and the *Crown Liability and Proceedings Act*, R.S.C. 1995 c. C-50

Between:

Dugald E. Christie

Petitioner

And:

**The Attorney General of British Columbia and
Her Majesty the Queen in Right of the
Province of British Columbia and the
Attorney General of Canada and
Her Majesty the Queen in Right of Canada**

Respondents

Before: The Honourable Madam Justice Koenigsberg

Reasons for Judgment

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Date and Place of Hearing:

April 19-21, 2004
Vancouver, B.C.

INTRODUCTION

[1] This petition challenges the constitutionality of the ***Social Service Tax Amendment Act (No. 2), 1993***, S.B.C. c. 24 (the "**Act**"). By agreement of the parties, the hearing of this petition is confined to arguments relating to this **Act**.

[2] The primary grounds for finding the **Act** *ultra vires* the Province of British Columbia are set out in the further amended petition, *inter alia* as follows:

- (a) The *Act* is a tax on the provision of lawyers' services and as such is contrary to the right to employ legal counsel, and thereby impedes or, alternatively, denies, access to justice, contrary to the Rule of Law and the *Charter*.
- (b) Alternatively, the *Act*, as a tax on lawyers' services, (i) increases the cost of such services to members of the public who cannot by reason of such increase afford appropriate lawyers' services, and/or (ii) increases the cost of providing such services by lawyers who provide their services to members of the public on low income, and who cannot by reason of the tax continue to provide such services, and thereby impedes or, alternatively, denies, access to justice to persons on low income, contrary to the Rule of Law and the *Charter*.
- (c) Alternatively, the *Act* is a tax on lawyers' services for enforcement or protection of civil or criminal constitutional rights, and as such is contrary to the right to employ legal counsel for the protection of those rights both at common law and under the *Charter*, and thereby impedes or, alternatively, denies access to justice, contrary to the Rule of Law and the *Charter*.

HISTORY OF PROCEEDINGS

[3] In 1999, the petitioner, Dugald E. Christie, filed a petition in this matter arguing that the **Act** was *ultra vires* the Province of British Columbia insofar as it affects lawyers who provide services for persons on low income, because it constitutes indirect taxation and is a tax on justice contrary to the **Magna Carta** and the Rule of Law.

[4] Due to difficulties in finding counsel willing to act on behalf of the petitioner on a *pro bono* basis, the matter did not proceed any further.

[5] Eventually, Mr. Christie was able to secure *pro bono* counsel and on January 26, 2001, the petitioner filed an amended petition, which expanded the relief sought.

[6] Unfortunately, that counsel was unable to continue acting for Mr. Christie. The matter did not continue then until May of 2003.

[7] At that time, Mr. Christie secured new counsel, Darryl W. Roberts, Q.C. On May 22, 2003, Mr. Roberts filed a Notice of Intention to Proceed and a Notice of Appointment or Change of Solicitor.

[8] On October 24, 2003, Mr. Roberts signed a further amended petition. The further amended petition was filed in

court with the consent of the respondents on October 28, 2003 and served on the respondents by letter dated November 4, 2003.

[9] That petition amended the already amended petition by striking the ground based on indirect taxation and expanding the constitutional grounds to include a number of alternative grounds as summarized above.

[10] In support of the petition, the petitioner filed and served on the respondents the following affidavits:

- (a) Dugald E. Christie, declared December 29, 1999, June 29, 2001, and August 19, 2003;
- (b) James Buzunis, declared February 9, 2001 and May 15, 2002;
- (c) Frederick Van Mulligan, declared June 12, 2001; and
- (d) David B. Walker, declared May 21, 2002.

[11] The respondents have filed and delivered to the petitioner the following affidavits:

- (a) Carissa Demian, sworn March 15, 2004;
- (b) Neilane M. Mayhew, sworn March 18, 2004; and
- (c) Hunter W. Gordon, sworn March 30, 2004.

[12] Reply affidavits were delivered and filed by the petitioner as follows:

(a) Dugald Christie, declared April 8, 2004; and

(b) Terry Woo, sworn April 8, 2004.

LEGISLATIVE AND JUDICIAL HISTORY

[13] The ***Social Service Tax Act***, R.S.B.C. 1996, c. 431 originated in 1948 as the ***Social Security and Municipal Aid Tax Act***, R.S.B.C. 1948, c. 333. The ***Social Service Tax Act*** imposes a tax on purchasers and on receivers of taxable services in British Columbia. Legal services were not taxable under this legislation until 1992.

[14] In 1992, the legislature of British Columbia passed the ***Social Service Tax Amendment Act, 1992***. This Act expanded the ***Social Service Tax Act*** by requiring tax to be paid, with certain exceptions, on legal services provided in British Columbia. One of the exceptions to the tax was if the legal services had no "connection" with British Columbia.

[15] The ***Social Service Tax Amendment Act, 1992*** was challenged by the Law Society of British Columbia and the B.C. Branch of the Canadian Bar Association. In ***Canadian Bar Assn. v. British Columbia (Attorney General)*** (1993), 101 D.L.R.

(4th) 410 (B.C.S.C.), Lysyk J. held that the Act was *ultra vires* the Province of British Columbia on the basis that it offended s. 7 of the **Charter** and was not saved by s. 1. Specifically, Lysyk J. found that the term "connection" in the central charging provision of the Act was so vague that it did not meet the standard of fundamental justice. No appeal was taken from this decision.

[16] In response, the British Columbia legislature passed the **Social Service Tax Amendment Act (No. 2), 1993**, S.B.C. c. 24. The **Act** was again challenged by the B.C. Branch of the Canadian Bar Association and the Law Society of British Columbia on the basis that it was not a "direct" tax and did not constitute a tax within the Province. Humphries J., in **Canadian Bar Assn. v. British Columbia (Attorney General)** (1994), 91 B.C.L.R. (2d) 207 (B.C.S.C.), upheld the **Act's** constitutional validity, finding that the tax was a direct tax and that it constituted taxation within the Province. No appeal was taken from this decision.

[17] The **Act** was again challenged in 1995 by John Carten, a lawyer. It was upheld by a margin of 2-1 by the Court of Appeal in **John Carten Personal Law Corp. v. British Columbia (Attorney General)** (1997), 40 B.C.L.R. (3d) 181

(McEachern, C.J.B.C. dissenting). The majority and minority decisions are both relevant to this petition.

[18] The ***Social Service Tax Amendment Act (No. 2), 1993*** amended the ***Social Service Tax Act*** to require all purchasers or recipients of legal services provided in British Columbia to pay to the government 7 percent (at the time of the Petition 7.5 percent) of the purchase price of those services. The only exemptions are if the purchaser or recipient ordinarily resides or carries on business outside of British Columbia and the matter is not in relation to certain listed matters, if the services are provided through legal aid, or if the services are provided by in-house counsel. The ***Act*** stipulates that the tax must be paid by the date on which the purchase price of the legal services is paid or payable, whichever is earlier.

[19] The charging provision of the ***Social Services Tax Amendment Act (No. 2), 1993*** is set out in s. 2.012(2) as follows:

If the purchaser or recipient of legal services provided in British Columbia resides, ordinarily resides or carries on business in British Columbia, a tax on the provision of the legal services shall be paid to Her Majesty in right of the Province by the purchaser at the rate of 7% of the purchase price.

[20] This charging provision is found at s. 46(1) of the ***Social Service Act***, with an increased rate of 7.5 percent.

THE FACTS

[21] The facts as set out below are taken from affidavits provided by the parties.

[22] The petitioner, Dugald Christie, is a lawyer and has been practicing in Vancouver for over 30 years. Throughout his career, Mr. Christie has acted primarily for low income persons. He is also the co-founder and volunteer director of Western Canada Society to Access Justice, a Vancouver-based organization which focuses on assisting low income persons who cannot obtain Legal Aid or *pro bono* legal services.

[23] Mr. Christie's net income from his practice of law in the years 1991 to 1999 did not exceed \$30,000 per year.

[24] On March 10, 1997, Mr. Christie received a Demand Notice, issued pursuant to s. 22 of the ***Social Service Tax Act***, from the Ministry of Finance and Corporate Relations of the Province of British Columbia, demanding that he pay social service tax allegedly due from his practice of law. The Notice stated that Mr. Christie had to "pay to the Crown any funds currently on deposit, received for deposit or advanced under a loan or other credit arrangement (including VISA/Mastercard)

up to the amount of this notice." At that time, Mr. Christie had not received from his clients the amount claimed for tax, being \$3,668.15, and his receivables exceeded \$52,684.15.

[25] On or about March 10, 1997, the Province of British Columbia seized \$3,668.15 from Mr. Christie for tax which was due with respect to unpaid bills by his low income clients.

[26] The seizure had a catastrophic effect on Mr. Christie's practice, the details of which are set out in an affidavit he declared March 26, 1997. Due to the seizure, Mr. Christie did not know if he could pay his secretary \$1,560 (gross) or his articled student \$250 (gross). He was also unable to afford to renew a post office change of address renewal card costing \$130 or a \$200 fee for the issue of a writ for a client injured in a motor vehicle accident. Mr. Christie stated at that time that if he was not granted relief from the government from paying social service tax which he had not received and if the government collected the balance that it claimed, he would be obliged to quit practicing law.

[27] On or about December 19, 1997, the Province of British Columbia seized a further \$5,349.66 from Mr. Christie for unremitted tax.

[28] As a result of the second seizure, Mr. Christie was prevented from paying his Law Society fees. He states that he

did not have sufficient funds to cover the fees and could not borrow them.

[29] On December 30, 1997, Mr. Christie ceased to work as a practicing lawyer.

[30] The affidavit of Dugald Christie, sworn December 29, 1999, states that he stopped working because he was unable to bear the responsibility for his clients' social service tax, as well as the cost of calculating, reporting and collecting the tax.

[31] Mr. Christie deposes he was unable to practice law because the social service tax required him to lower his fees by the amount of such tax, to purchase and learn a special computer program, to engage a part-time bookkeeper, to devote time away from the practice of law to supervise accounting, to require his secretary to devote additional time to billing and responding to enquiries, and to pay to the Province money he had not received. It also exposed him to the catastrophic effect of government seizures of his bank account.

[32] A typical example of the effect of the tax on his clients willingness and ability to pay was described as follows:

[A] client would come in to my office, state that \$150 was all the client could afford and ask for a

will. If I could not prepare a will for that sum less tax the client would not retain my services. It would take at least an hour and a half to do the job for which I could theoretically charge \$270 (at \$180 per hour) but had to be satisfied with \$150 less G.S.T. and S.S. Tax (\$9.21 G.S.T. and \$9.22 S.S. Tax) leaving me \$131.57. My clients were not interested in what my fees were. They were interested in the total amount of my account and the cheque or payment to my firm.

[33] Moreover, Mr. Christie deposes that in order to calculate the tax on his bills, he had to hire a part-time bookkeeper. Prior to the tax being introduced he was able to keep most of his accounts himself. Notwithstanding his accountant's assistance, Mr. Christie then had to spend an average of three hours per month administering the tax on his bills, time taken away from his practice of law. If a client ever objected to his bills for fees and disbursements, this would take him considerably longer to do. Hiring a bookkeeper, paying his secretary for extra work in responding to clients' enquiries, correspondence and accounting, and time Mr. Christie spent supervising this work, were additional costs to him personally.

[34] A further difficulty for Mr. Christie is that the social service tax must be paid when his accounts to his clients are rendered. Frequently, his low income clients have difficulty paying their legal bills when due and Mr. Christie therefore carries a number of unpaid accounts for a time, often years.

Notwithstanding the fact that the accounts had not been paid, he received demands from the Ministry of Finance for British Columbia for payment of these amounts. When their demands were not met, Mr. Christie's accounts were seized.

[35] On July 1, 2000, Mr. Christie resumed the practice of law as an unpaid volunteer central coordinator of the Western Canada Society to Access Justice. He also resumed private practice on a part-time basis, which is his sole source of income and is entirely separate from the *pro bono* work he does for the above Society.

[36] In May, 2001, Mr. Christie resumed the full-time practice of law, but has not reported, collected or paid social service tax on his clients' bills since that time.

[37] Attached as Exhibit "B" to his affidavit declared on December 29, 1999, is a draft affidavit of Mr. Christie prepared on June 3, 1995, where Mr. Christie states that over the last ten years in managing and regularly attending on a voluntary basis a *pro bono* clinic at the Salvation Army in Vancouver, many hundreds of people have come to him with their legal problems who could not obtain legal aid or legal assistance elsewhere.

[38] He goes on to state that he has had to reduce his fees to his clients by reason of the social service tax. Further,

were it not for the tax, Mr. Christie estimates that he would save approximately \$120 per month in bookkeeping costs and \$600 per month in fees, sums which in his case are enough to make the difference between survival and going out of business.

[39] Mr. Christie states that from time to time low income clients who are unable to obtain legal assistance elsewhere are delayed or prejudiced by reason of his inability to properly fund their files. For example, Mr. Christie states that he is unable, because of the increased burden of social service taxation, to afford the cost of writs or notices of trial for his clients who are unable to pay them. He repeatedly makes applications to the Supreme Court for indigent status to avoid paying such fees, which increases the delay and the work to Mr. Christie to obtain the exemption. Sometimes, he is unable to engage process servers, obtain transcripts from court reporters, or engage consultants. Legal Aid, which may pay disbursements but not fees for civil claims, do their best to accommodate Mr. Christie's requests, but frequently cannot give timely, or sometimes any, help. Mr. Christie must then tell his client that there are no funds available for a much needed disbursement.

[40] Finally, Mr. Christie estimates that in one month he could have collected \$1,500 in fees had the social service tax never been imposed. Such a loss is crippling for him. Due to the financial pressures caused by the tax, if his office ceases to operate, some of his clients will be unable to obtain legal assistance elsewhere and, being unable to act for themselves will be denied justice.

[41] Mr. Christie states that during the course of his travels to all parts of the Province on legal *pro bono* programs and after speaking to several hundred lawyers, it became evident to him that lawyers who spend substantial time acting for low income clients are being driven out of that part of their practice and are suffering similar hardships in collecting the tax. It is also his perception that the number of low income persons who cannot afford a lawyer is continuing to increase, causing much hardship and a denial of access to justice.

[42] Mr. Christie defines "low income" in the same sense as it is commonly used by the Salvation Army Family Services and other social agencies throughout the Province, as income less than \$1,500 per month for single persons, and \$2,500 per month for individuals with dependents.

[43] A report prepared by economic and financial analyst, Howard Teasley, and attached as Exhibit "C" to Mr. Christie's affidavit of June 29, 2001, states:

... the effect of the social service tax is to raise the cost of legal services to the consumer, reducing the likelihood that the potential consumer would purchase the service. Further, taxing legal fees and disbursements causes modest-income or other marginal clients, *i.e.*, those whose incomes are too high for them to qualify for Legal Aid or other free legal services but not enough to afford regular-scale legal services, to reduce their use of counsel. Finally, paying, charging and administering taxes on fees and disbursements may lead some counsel to decline marginal cases or may exclude other counsel from practice, which disproportionately affects those lawyers mainly offering low-priced services to modest-income persons. In summary, taxing legal fees and disbursements tends to diminish both the use of legal service by modest-income clients and the supply of low-priced services by lawyers.

I accept this opinion as relevant and in support of the facts deposed to by Mr. Christie and his clients.

[44] The affidavit of Dugald Christie declared June 29, 2001 describes the developments of his practice *vis-à-vis* the social service tax since his December 29, 1999 affidavit.

[45] It also sets out that if Mr. Christie had to comply with the social service tax collection procedures, he would have to increase his basic rate in order to continue practicing for

the benefit of low income persons. Such an increase would not be affordable however, to his clients.

[46] In his affidavit declared August 19, 2003, Mr. Christie states that the factual situations described in the affidavits of two of his clients, James A. Buzunis sworn February 9, 2001 and May 15, 2002, and David B. Walker sworn May 21, 2002, both set out below, are examples of the kinds of low income clients whose right to access justice is impeded or denied as a result of the social service tax.

[47] James A. Buzunis states in his affidavit declared February 9, 2001, that he has a claim against the Criminal Victims Compensation Fund for injuries he sustained in an assault. He was awarded damages against his assailant, but has been unable to collect those damages. He has been paid \$5,000 from the fund to date, but wishes to appeal that decision to obtain the maximum amount allowable, being \$50,000. He earns approximately \$2,600 gross per month. He cannot afford to pay more than \$90.00 per month for fees and \$10.00 per month for disbursements for legal services, according to his budget attached as Exhibit "A" to his affidavit. His litigation requires a minimum of two hours per month. Mr. Christie could provide legal services to Mr. Buzunis for \$45 per hour however, this amount would not

include the social service tax. If the social service tax were added to his bill, Mr. Buzunis would not be able to afford two hours of legal services per month, thereby seriously prejudicing his claim.

[48] The second affidavit of James A. Buzunis declared May 15, 2002, states that without Mr. Christie's assistance, he will have no counsel and will not be able to understand the issues raised on his petition or adequately represent himself. Further, if his claim is abandoned, Mr. Buzunis faces the probability that costs will be awarded against him, something which he cannot afford. He has attempted to obtain alternate counsel at affordable rates but has been unsuccessful. Accordingly, his situation continues to be that if he is not represented by Mr. Christie he will have no remedy.

[49] The affidavit of David B. Walker declared May 21, 2002, states that he was seriously injured in two accidents in November, 1997, which has affected his ability to work at his job as a construction contractor. Mr. Christie agreed to take on his claim for an initial retainer of \$1,500, and \$100 per month at a rate of \$45 per hour cash and another \$90 per hour from the proceeds of his claim. Mr. Christie was the only lawyer he could find who was willing to take on his claim at affordable rates. Mr. Walker states that he is currently on a

Level 2 disability administered by the Ministry of Human Resources and has a current monthly income of \$826.42. His family contributed \$1,500 to meet the initial legal bills. He further states that he is incapable of adequately representing himself due to the complexity of the proceedings, and will be seriously prejudiced if he does not have counsel acting for him. He does not have the funds to pay social service tax on Mr. Christie's bills, nor does Mr. Christie have the funds to pay that tax for him. If Mr. Christie is unable to practice because he cannot pay social service tax, Mr. Walker will have little prospect of recovering substantial damages for his injuries.

[50] In his affidavit of June 29, 2001, Mr. Christie sets out other typical cases of low income clients whose right to access justice is impeded or denied because of the social service tax.

[51] One example is Mrs. G, whose proceeding for damages against a hospital for negligence is stalled on a point of law raised by defence counsel. Her appeal to the Court of Appeal on that point of law will be dismissed if she does not file materials or deposit security for costs with that Court. She is not equipped to do either. She is prepared to pay Mr. Christie \$45 per hour including tax, but based on her

limited income and impaired health she cannot afford to pay more. Mrs. G's case will be struck out and she will be liable to pay costs of her aborted appeal unless she obtains legal representation to make an application to the Court to vary the stay or reach a settlement.

[52] Another example is Mrs. H, who urgently required a will to protect her children's interest. Mr. Christie was willing to act for her at a reduced rate of \$90 per hour. Were it not for his services she likely would have had to prepare her will from a will kit without proper legal advice, and, in Mr. Christie's view, certain important issues would not have been dealt with properly.

[53] Another client of Mr. Christie's is Mr. P whose sole income is a disability pension. He suffered minor injuries in a motor vehicle accident. Mr. Christie acts for him on a contingency basis at a rate of \$45 per hour payable from the proceeds of his claim. Mr. Christie believes that Mr. P would not be able to obtain another lawyer because the amount involved, albeit significant for Mr. P, would not be sufficient to pay the legal fees. Furthermore, he is not able to represent himself.

[54] Mr. Christie charges \$45 per hour, including tax, for clients with a net income of less than \$2,837, and \$90 per

hour, including tax, for persons with higher incomes for matters for which they would not otherwise be able to find affordable counsel. Mr. Christie makes enough income to survive due in part to his little or no overhead practice. He lives in a Salvation Army boarding house and pays rent of \$360 per month. He owns his own office equipment and is provided an office in exchange for legal services. Mr. Christie bills his clients monthly, but frequently has to wait months or even years for his work to be paid. If he postpones rendering a bill until funds from his client are available, he often has difficulty in collecting the bill later. He is, however, still obliged to pay social service tax on all bills, notwithstanding the fact that they have not been paid by his clients. If he does not, he risks having his accounts seized. Mr. Christie deposes and I accept as a fact that he cannot afford to pay the tax on behalf of his clients from his own funds, nor does he have the credit available to borrow this amount.

[55] Thus, I find that the effect of low income clients who have difficulty paying even the very modest amounts Mr. Christie charges when he does not include the tax, combined with the precarious financial circumstances of any lawyer who is available to act for such persons - reduces the number of legal services available at a cost affordable by low income

persons. This in turn increases the number of low income persons who cannot find legal services at amounts they can afford.

[56] Mr. Christie sets out the particulars of the administrative work required from himself, his secretary and his accountant to collect the social service tax. Currently, his secretary charges an hourly rate directly from the client. Mr. Christie has to pay her salary for the time she spends on tax procedures. Such procedures include educating herself on procedures and taking instructions from an accountant, calculating and recording tax on each of Mr. Christie's bills, keeping a tax ledger, preparing tax returns for the accountant to review, reconciling the monthly tax ledger, paying the tax to the Province after calculating commission, and recording her time so that Mr. Christie can compensate her accordingly. Mr. Christie estimates that these additional secretarial functions cost him \$28 per month. Mr. Christie has to hire an accountant to supervise his social service tax accounting. Prior to the introduction of the tax, Mr. Christie did not need an accountant. Furthermore, Mr. Christie has to oversee all of the set-up and ongoing procedures with respect to the tax. Mr. Christie estimates that for every hour he works for a client he will have to bill an extra \$13.50 to cover his own work in collecting the tax. Combined with his secretary and

accountant, the administrative and accounting costs for each hour of work total \$18.60. Particulars of this estimate are set out at Exhibit "B" to his affidavit of June 29, 2001.

[57] The affidavit of Fredrick van Mulligan, declared June 12, 2001, an accountant for Mr. Christie, confirms Mr. Christie's assessment that if he has to comply with the tax collection procedures he would have to charge at least \$70.00 per hour in order to yield a net income of \$45.00 per hour.

[58] I find that the facts adduced with regard to the convenience or efficiency of Mr. Christie's law practice as he has engaged in it over the last several years and the effect of collecting, administering and remitting that social service tax on his legal fees, while I accept them, are not determinative of the constitutionality or unconstitutionality of the social service tax. I have had regard to the affidavit evidence of Hunter Gordon and Neilane Mayhew that it is possible to be both administratively and financially more efficient and prudent in collecting and remitting the social services tax than is Mr. Christie. However, that does not answer the fact that a lawyer in Mr. Christie's financial and client base position is significantly negatively affected. Nor does it answer the fact that such a tax reduces the number

of lawyers who are able to earn a living and act for low income people.

ISSUES:

STYLE OF CAUSE

[59] The parties agree that the style of cause is incorrect and that Her Majesty the Queen in Right of the Province of British Columbia should be removed as a named party.

PETITIONER'S STANDING

[60] The respondents raise the issue of the petitioner's standing to bring this petition. There are two grounds upon which the petitioner says he has standing. The first is that the petitioner is entitled to standing under the "exceptionally prejudiced" criteria set out in *Smith v. Ontario (Attorney General)*, [1924] S.C.R. 331.

[61] In *Hy and Zel's Inc. v. Ontario (Attorney-General)* (1993), 107 D.L.R. (4th) 634 (S.C.C.), L'Heureux-Dubé J. stated at pages 642-643:

Under the "exceptional prejudice" rule articulated in *Smith, supra*, in order to challenge a law of general application, a plaintiff was required to establish that the effect of the legislation was greater or different than its effect on the public at large. Moreover, the plaintiff had to establish a judicially cognizable interest in the legislation which, at that time, meant an interest affecting the

personal, proprietary or pecuniary rights of the plaintiff.

[62] In this case, I find that the petitioner suffers from exceptional prejudice in relation to the application of the social service tax, in that he is either forced to abandon providing legal services to low income clients by raising his fees beyond the reach of many of his clients, or suffer the unacceptable consequences of not remitting the tax.

[63] Further, the petitioner, having been on the receiving end of two government seizures of his bank account for the non-payment of the social service tax, to which he had not yet or had been unable to collect fees from his clients, has been and continues to be exceptionally prejudiced by this tax. On that basis, he clearly falls within the exceptionally prejudiced standing rule.

[64] The petitioner also says that he alternatively would have standing under the "discretionary public interest" standing rule. That test was discussed in **Canadian Council of Churches v. Canada** (1992), 88 D.L.R. (4th) 193 (S.C.C.).

Cory J., speaking for the Court, summarized at pages 204-205 the conditions which must be satisfied in order to be granted standing:

It has been seen that when public interest standing is sought, consideration must be given to three

aspects. First, is there a serious issue raised as to the invalidity of legislation in question? Second, has it been established that the plaintiff is directly affected by the legislation or if not does the plaintiff have a genuine interest in its validity? Third, is there another reasonable and effective way to bring the issue before the court?

[65] In this case, the ***Social Service Tax Amendment Act, 1993*** is said to breach the *Charter* protected right to have access to justice and to the court, especially in the case of low income persons. Thus, the petitioner who provides legal services to low income persons is clearly affected by the tax directly and also has a genuine interest in the validity of the ***Act***. There is no more reasonable and effective manner in which the issue can be brought before the court than by way of this particular petitioner. As a result, I find that the petitioner has standing.

DOES THE ACT DENY LOW INCOME PERSONS ACCESS TO JUSTICE?

[66] In 1995, John Frederick Carten, a lawyer practising in British Columbia, brought a petition challenging the ***Social Services Tax Amendment Act, 1992***. He raised numerous issues which, by the time they got to the Court of Appeal of British Columbia, numbered eight. Although the eight grounds set out in the Court of Appeal decision in ***John Carten Personal Law Corp. v. British Columbia (Attorney General)*** (1997), 40 B.C.L.R. (3d) 181 (B.C.C.A.) were, in part, different from

those set out in this case, the first ground essentially captures the essence of the issues before this Court. That ground was described at paragraph 4 of **Carten** as follows:

The tax on legal services constitutes an interference with, impedes or otherwise fetters the right of a member of the public to access to the courts and interferes with, impedes or otherwise fetters the right of a member of the public to acquire knowledge of his or her legal rights all of which is inconsistent with the concept of a nation founded on principles that recognize the rule of law.

[67] In a split decision, the majority in **Carten** upheld the **Social Services Tax Amendment Act, 1992**. This case is very similar to the case brought by Carten. Fundamentally, this case then stands to be decided on the extent to which the facts and arguments put forward here, significantly differ from those which did not find favour with the majority of the British Columbia Court of Appeal in **Carten**.

[68] The position of Mr. Christie in this case is that the tax on legal fees is a hindrance, impediment and denial of access to justice because it impairs even further the considerable financial burden borne by any citizen who requires legal counsel in order to access the courts of justice in British Columbia. Mr. Christie says and provides specific evidence that legal fees for the preparation and presentation of any case in our courts are significant. He

demonstrates that many people in our society with legal needs cannot seek redress in our courts because they are not able to prepare and argue their case themselves, although they have the right to do so, nor can they afford the cost to obtain legal services.

[69] One of the bases upon which the Attorney General of British Columbia submits that this tax cannot be found to be unconstitutional is the fact that legal aid exists to assist poor or low income litigants.

[70] Mr. Christie provides legal services to people who are ineligible for legal aid, but do not earn enough to afford legal services at the hourly rates charged by the overwhelming majority of practising lawyers. Mr. Christie offers evidence that at the hourly rates he charges, he can barely make a living. He states, and it is uncontradicted, that he earns less than \$30,000 a year from the practice of law. I take judicial notice that the hourly rates for legal services charged by Mr. Christie are far below the average hourly rate charged for legal services in B.C. Mr. Christie deposes that even at his rates, many of the low income persons to whom he provides legal services do not and cannot pay the bills as rendered.

[71] In this context, it is not amiss to note that the tax on professional legal fees is the only provincial tax imposed on professional fees. Further, when the social service tax was proclaimed into law, the stated purpose was to assist in funding legal aid. Since that time, the tax has not been used to fund legal aid and, over the last 10 years, the availability of legal aid has shrunk to new lows. As a result, the number of people in B.C. who require legal assistance in order to have access to justice and who cannot afford to pay the cost for such assistance has grown.

[72] The principle that access to justice is a fundamental constitutionally protected right was accepted and discussed by Lambert J.A., speaking for the majority in **Carten**:

9 I consider that everyone in Canada has a right to come to court and seek the help of the court in obtaining a resolution of the legal issues that have given rise to that person's problem. Everyone in Canada has a right to seek the protection of the court from any perceived oppression by the state. Everyone being prosecuted in our courts has the right to counsel and the right to make full answer and defence. And I consider that our social system and our system of government depend not only on our rights relating to dispute resolution, in courts and otherwise, but also on our rights relating to dispute prevention through a legal system which regulates succession to property, family law, and other areas of potential disharmony.

10 Some of the rights to which I have referred may be guaranteed, though not necessarily created, by the *Canadian Charter of Rights and Freedoms*. See *B.C.G.E.U., Re* (1983), 48 B.C.L.R. 5 (B.C.S.C.);

(1985), 64 B.C.L.R. 113 (B.C.C.A.); (1988), 31 B.C.L.R. (2d) 273 (S.C.C.). Others of those rights may be so fundamental that they may properly be regarded as having constitutional status. In this connection see the preamble to the *Constitution Act, 1867* and the discussion in such cases as *Saumur v. Quebec (City)*, [1953] 2 S.C.R. 299 (S.C.C.) at pp. 331, 353-4 and 373-4, *Switzman v. Elbling*, [1957] S.C.R. 285 (S.C.C.) at pp. 327-8, *Canada (Attorney General) v. Dupond*, [1978] 2 S.C.R. 770 (S.C.C.) at p. 796 and *O.P.S.E.U. v. Ontario (Attorney General)*, [1987] 2 S.C.R. 2 (S.C.C.) at p. 57. See also the lively and learned debate in the House of Lords on 14 July 1997 when Lord Ackner "rose to ask Her Majesty's Government what action they have taken or propose to take to protect the constitutional right of access of a litigant of modest means from the impact of new and increased court fees." Lord Irving of Lairg, the Lord Chancellor, gave particular emphasis in his speech to whether the right of access to the courts was a constitutional right in the sense of an absolute right.

11 In the course of argument on this appeal we indicated to counsel that we were so persuaded of the existence of those fundamental rights that we did not need to hear any argument to the effect that they were granted by Magna Carta of 1215, or by some later version of the Great Charter or, assuming that was so, that they derived any additional force in British Columbia from having that provenance.

[73] Following this discussion, the majority dismissed Mr. Carten's submissions regarding hindrance, or impediment to the exercise of access to justice on the basis of a lack of proof that the tax denied any person or class of persons access to justice:

12 All that being said, in my opinion Mr. Carten's arguments on those issues cannot be sustained in this Court because of lack of proof that rights of access to the courts, to justice, or to legal

services, have been denied because of this 7 percent tax on the amount paid or payable for legal services.

13 There are many reasons why the cost of legal services, or a lack of funds, may restrict, hamper, or even prevent a person from exercising rights of access to the courts or rights of access to other legal services. What would be required in order to find this Act wholly unconstitutional, or even unconstitutional in its application in a particular case, would be proof that people, or a class of people, in general, or some person in particular, who would have been able to exercise the legal rights in question if this tax were not in effect, were or was *prevented by this tax* from exercising those rights. It would not be sufficient to found an argument that the Act was unconstitutional in concept or in application merely to show that the tax operated as an impediment or a discouragement to the exercise of a protected right. What would be required would be proof that the right was denied, or its exercise was prevented, by the existence or operation of this tax. In other words, that a right which would have been exercised but for this tax could not be exercised because of this tax.

14 In my opinion the evidence in this case is insufficient to provide a basis for a conclusion that the Act is unconstitutional. Mr. Carten's affidavit is the only evidence. It indicates that the tax gives rise to inconvenience and expense to him in his law practice. But, of course, that is not the point. Then Mr. Carten's affidavit goes on to say this:

14. That during the past year I have used the services of a lawyer for private matters and I find that the legal services tax on the services of the lawyer causes me to limit my use of the services of the lawyer. In certain instances the cost including the extra amount for taxes has interfered with my ability to make application to court.

15. That as a result of the additional imposition of Social Services Taxes on legal services I am now requiring my clients to pay

the corporation a higher retainer than I did in the past so that the corporation will have the funds on hand to pay taxes. Some of my clients are not able to pay me the requested retainer and thereby fail to obtain the legal services they wish or they ask me to try and limit the scope of my work; in both circumstances, the client's access to the courts is restricted or interfered with.

That evidence is, in my opinion, insufficient to provide a basis of constitutional facts adequate to support the constitutional arguments made in Mr. Carten's first seven points. And we are not entitled to speculate, in the absence of any sufficient proof, that surely the very existence of the tax would prevent someone, somewhere, from going to court. If we were tempted to engage in any such speculation we would immediately have to confront the fact that legal aid is widely available to those who are financially challenged and that the tax does not apply to legal aid services.

[74] In spite of the existence of legal aid, there is an increase in persons representing themselves in our courtrooms. Most are there because they have no choice but to represent themselves since they do not have the financial resources to pay for legal services. While this phenomenon is a testament to the fact that there is no fetter on access to courthouses in this Province, those of us who face the task of assisting such persons in presenting their case, understand all too well that there is often a risk that even if a cause of action is obvious and a judge is willing and able to assist in explaining courtroom procedure, there may be evidence determinative of an issue which the self-represented person is

incapable of presenting in an admissible form. In addition, it is not uncommon to encounter a self-represented individual who is psychologically or emotionally unable to present his or her case in a courtroom in such a way that justice is not only done but can be seen to be done. Thus, I take judicial notice of the fact that many self-represented individuals in a wide variety of cases are denied effective access to justice when they cannot afford appropriate legal representation.

[75] The primary issue before this Court is whether on the basis of the factual evidence before this Court, there is sufficient proof that but for, the 7 or 7.5 percent tax, people, a class of people or a particular person is denied access to justice.

[76] Counsel for the Attorney General suggests that the evidence from Mr. Christie's clients that they cannot pay any more to Mr. Christie than they already pay, is insufficient to meet the "but for" test as set out by the majority in **Carten**. The evidence offered by Mr. Carten which was summarized and quoted at paragraphs 14 and 15 of that decision was considered "insufficient to provide a basis of constitutional facts to support the constitutional arguments...."

[77] In contrast to the findings of the majority in **Carten**, there is, in this case, clear uncontradicted proof not only of

impediment, hindrance and discouragement by the imposition of this tax to access to justice, but also evidence of a denial of access to justice. The evidence of Mr. Christie's clients demonstrates that each is potentially denied legal services if the tax is applied. Mr. Christie's affidavit evidence demonstrates the limits on lawyers' abilities to earn a living and provide low-cost legal services to those who either don't qualify for legal aid or, if they do qualify, can't get it because it is not available for the kind of case which they wish to bring before the courts. The report of Mr. Teasley provides further support for the generalizability of the evidence of Mr. Christie and his clients.

[78] In my view, the evidence offered by Mr. Christie is far more substantial than that offered by Mr. Carten. First, Mr. Christie's evidence of the impact of the tax on his practice, devoted as it is to low income persons, is evidence not only of inconvenience and added expense (which I accept as true), but is also evidence supportive of the theory that the greater expense there is in providing legal services to low income persons, the fewer lawyers there will be to provide such services.

[79] It is not surprising nor even difficult to predict that persons like Mr. Buzunis who swore he could not find

alternative counsel at affordable rates to Mr. Christie, would not find counsel to represent them in cases such as those which Mr. Christie takes on.

[80] The Court of Appeal in **Carten** opined that if they were tempted to speculate on the probability that anyone was prevented from going to court because of the social services tax, they would immediately be confronted with the fact that legal aid is widely available to those who are financially challenged. Here, Mr. Christie's practice is primarily aimed at individuals who do not qualify for legal aid, but still cannot afford the typical cost of legal services because of their modest incomes. In addition, I infer from the evidence adduced in this case, buttressed by common knowledge in the courts, that legal aid is no longer widely available, if it ever was, to all litigants except those charged with criminal offences. In coming to the above conclusion, I take comfort in the words of McEachern C.J.B.C., as he then was, in dissent in **Carten**:

75 While there is no absolute right to counsel, it is part of our legal culture that persons involved in litigation, civil or criminal, should have a lawyer. It is a truism of the law that anyone who is his own lawyer has a fool for a lawyer and a fool for a client. Many who need lawyers cannot afford to have the counsel they might wish, or any lawyer at all except in the limited circumstances where the state furnishes this kind of assistance. The cost of lawyers is a function of a private bar the independence of which is another

necessity of justice. While the cost of lawyers is not directly a function of state action, a tax on lawyers' bills is clearly a state action.

....

82 Moreover, the increasingly complicated society we enjoy makes it impossible for the overwhelming majority of our people to represent themselves in ordinary, let alone *Charter*, litigation. The cost of counsel is already practically prohibitive.

[81] Counsel for the Attorney General of Canada submits that Mr. Christie's arguments rely on the notion that access to justice is equal to a right to access a lawyer on all court matters. He quite rightly points out that in Canada generally and in British Columbia specifically, that is not the law. In my view however, this argument sets up a straw man more easily to knock him down. The issue of the tax is not whether the government must provide and pay for legal counsel in any matter requiring legal services, but whether the state can impose an additional financial burden on those seeking to obtain legal services. In my view, these are two entirely different issues.

[82] The "but for" test is surely not intended to set the standard of proof bar higher than a balance of probabilities. Mr. Christie deposes and I find as a fact, based on all of the evidence presented, that some of Mr. Christie's clients could not obtain needed legal services if Mr. Christie did not act

for them. Further, I find as a fact that if Mr. Christie were to charge them his hourly rate plus the social services tax, they could not pay him. I also find that if Mr. Christie is not paid the minimum amount which he charges, in most of his cases he could not continue to practice law, thus denying those individuals access to justice.

[83] As a result, I infer that the imposition of the social service tax, does in fact deny access to justice in some cases of low income persons. This case is distinguishable on its facts from the **Carten** decision, and this court is prepared to declare that the constitutional rights of low income people who cannot afford legal representation have been breached.

IS THE WHOLE OF THE ACT UNCONSTITUTIONAL?

[84] The next issue to be considered is whether the whole of the **Social Services Tax Amendment Act 1993**, as it applies to legal fees, is unconstitutional. An example of finding the **Act** unconstitutional in part, is the dissent of Chief Justice McEachern in **Carten** who found the social services tax unconstitutional to the extent that it applied to legal bills incurred for the purpose of enforcement or protection of civil or criminal law constitutional rights. Although McEachern C.J.B.C.'s decision confined the *ultra vires* of the **Act** to cases involving *Charter* issues, regardless of the income level

of the person seeking legal services, his reasoning applies to low income persons with equal force. His analysis is both illuminating and relevant to the case before this court. For those reasons I quote it here at length. In **Carten**, McEachern C.J.B.C. based his decision on broader grounds than those which were stated in the majority judgment:

32 Fundamental to my view on the proper disposition of this appeal is the fact that the supreme law of Canada, including the Preamble to the *Canadian Charter of Rights and Freedoms*, provides that Canada is a country founded on principles that recognize the rule of law. Other provisions of the *Charter* guarantee a number of fundamental rights and values that can only be properly secured in many circumstances with the assistance of legal counsel. These rights and values are not limited to legal rights in a narrow, criminal law sense. They also include aboriginal, equality, language and education rights.

33 It is true, as counsel for the Attorney General argued, that many persons of limited means cannot afford some legal services at the present time. But, with respect, that is not the point. The question, in my view, is whether the state, having guaranteed these rights to all citizens in some cases and to everyone in Canada in other cases, can add a tax burden upon those who require legal assistance related to those rights.

34 In my view, it is unnecessary to establish specific instances, as constitutional facts, in the usual sense because it is obvious that even an extra 7% charge on legal fees will impede justice at some levels. It is not relevant in this case, but worth mentioning, that ordinary court user fees in civil cases in this province are already the highest in Canada.

35 But it is not enough that hardship or unfairness exists. There must be a violation of a

constitutional right before the courts can intervene.

....

53 Nor, in my view, is it necessary to consider whether a 7% tax instead of some lesser or larger amount would tip the constitutional scales of justice against our citizens be they rich or poor. I say this because, in my view, the dilution of *Charter* rights values in innumerable cases with widely varying circumstances is incapable of conventional proof except perhaps by anecdotal evidence. Wealthy citizens can always afford an add-on to their lawyer's bill: poor people, unless subsidized by the state, can seldom afford the bill let alone an additional tax. Either the province has the constitutional authority to levy a tax upon legal fees or it does not, although I would not rule out the possibility, as in the Alberta bank cases, that a truly prohibitive tax might lead to a different result, even on a federal-provincial division of powers analysis.

[85] Chief Justice McEachern then traced the historical development of the rule of law and considered how the tax might impair *Charter* rights and protections including the right to counsel. With respect to the preamble to the *Charter* and the development of the rule of law he wrote:

68 The leading authority on the Preamble is *B.C.G.E.U., Re*, [1988] 2 S.C.R. 214 (S.C.C.), where Dickson C.J.C. referred to the historical development of the rule of law. In giving the majority judgment, he wrote at 228-29:

For the moment I wish to highlight certain sections of the **Charter** which, it seems to me, are a complete answer to anyone seeking to delay or deny or hinder access to the courts of justice in this country. Let us look first at the preamble to the **Charter**. It reads:

"Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law". So we see that the rule of law is the very foundation of the **Charter**.
[emphasis added]

69 He then discusses the remedy sections of the *Charter* before continuing:

The rights and freedoms are guaranteed by the **Charter** and the courts are directed to provide a remedy in the event of infringement. To paraphrase the European Court of Human Rights in *Golder v. United Kingdom* (1975), 1 E.H.R.R. 524 at p. 536, it would be inconceivable that Parliament and the provinces should describe in such detail the rights and freedoms guaranteed by the **Charter** and should not first protect that which alone makes it in fact possible to benefit from such guarantees, that is, access to a court. As the Court of Human Rights truly stated: "The fair, public and expeditious characteristics of judicial proceedings are of no value at all if there are no judicial proceedings." And so it is in the present case. Of what value are the rights and freedoms guaranteed by the **Charter** if a person is denied or delayed access to a court of competent jurisdiction in order to vindicate them? How can the courts independently maintain the rule of law and effectively discharge the duties imposed by the **Charter** if court access is hindered, impeded or denied? The **Charter** protections would become merely illusory, the entire **Charter** undermined.
[emphasis added]

70 In another passage at 230, Dickson C.J.C. adopted the following statement from the decision of Nemetz C.J.B.C. (reported at (1985), 64 B.C.L.R. 113 (B.C.C.A.)) in that same case as follows:

We have no doubt that the right to access to the courts is under the rule of law one of the fundamental pillars protecting the rights and freedoms of our citizens. It is the preservation of that right with which we are

concerned in this case. Any action that interferes with such access by any person or groups of persons will rally the court's power to ensure the citizen of his or her day in court. Here the action causing interference happens to be picketing. As we have already indicated, interference from whatever source falls into the same category. [emphasis added]

[86] In coming to a conclusion on the issues in **Carten**

McEachern C.J.B.C. held:

74 Any impediment to access to the courts for the purpose of exercising guaranteed rights and any impairment of *Charter* protections necessarily involves restrictions on access to remedies. As already mentioned, these remedies can only be obtained through the courts and, as a result, they are just as important as enumerated rights.

....

76 This appeal, however, raises more than just a question of physical access to the courts. The doors of the court houses of the nation are always open and anyone may represent him or herself in litigation. The context of *Charter* litigation, however, persuades me that the *Charter* guarantees much more. Physical or *de facto* access is surely not enough. To withstand *Charter* scrutiny, access to courts of justice must be effective access, which in practical terms means access to counsel.

77 In my analysis, this tax by its very nature impairs effective access in two important ways.

78 First, as already described, the *Charter* cannot tolerate hindrance of access which in no way advances the purposes of justice: *B.C.G.E.U.*, (supra). In that case there was at most a hindrance of access because the courts and their Registries remained open. Anyone who wished to enter the court houses could freely do so. There was no violence or other obstruction of court house use. Nevertheless, access was, as Nemetz C.J.B.C. pointed out in the

appeal judgment, "effectively impaired", and an outright denial of physical access was not identified as necessary by any level of court considering that case.

79 In my view, access to counsel is essential to effective access to *Charter* rights and remedies. This can hardly be disputed and it is no answer to argue that the poorest of our citizens facing serious criminal sanction do have access to counsel and that they can by that means assert their *Charter* rights and remedies. The criteria for legal aid support continues to narrow, and most legal aid schemes do not cover at all the middle classes who can have their lives economically destroyed by a lengthy court battle. Houses must be mortgaged or sold, educations postponed, and savings exhausted to pay legal fees. Moreover, undue emphasis on the criminal law overlooks the scope and affect of the *Charter* in the lives of those who by choice or circumstances find themselves in the eye of the constitutional hurricane.

....

83 ... For good reason, the law bars anyone from the practice of law who has not met minimum requirements in order to guarantee a level of competency. The rationale for this legislation was well stated by Esson J.A. in *Great West Life Assurance Co. v. Royal Anne Hotel* (1986), 6 B.C.L.R. (2d) 175 (B.C.C.A.), where he barred a layperson, claiming to be the "controlling mind and body" of a corporate litigant, from representing the company in court proceedings. At 185 Esson J.A., wrote:

There are points to his credit which should be mentioned. Judging from what I have seen of Mr. Nelson, he is quick-witted and intelligent, he puts forward much effort into preparing his cases and conducts himself towards the court in a courteous and appropriate manner. I do not conclude that he deliberately misleads the court and I am prepared to assume that he sincerely believes that he and the others whom he represents are victims of injustice...

But whatever his motives and intentions, the result of his efforts is often seriously misleading and inimical to an orderly resolution of the issues. What is clearly lacking is objectivity as to the essential worth of the position he takes. Few who act for themselves can be as objective as is desirable. That is a fact of life for which courts make allowance when litigants appear before them in person. But Mr. Nelson appears to have reached the point where he often cannot separate hard facts from suspicions, and where he is so carried away with the desire to pursue his goal that all else must give way - including regard for accuracy and for the convenience of those who oppose him. As a result, it is impossible for the court to know whether it can give credence to that which he says in court or swears to in affidavits. Many of the affidavits and much of the argument contains such a jumble of facts, suspicions, argument and hyperbole that it is inordinately difficult to impose order upon it or to reach a conclusion as to what part of it, if any, is relevant and factual.

[87] The following paragraphs of McEachern C.J.B.C.'s dissent speak particularly aptly to low income persons who require access to justice through the courts:

86 Fundamental justice requires the law to be knowable, but knowable to whom? The answer must be to lawyers. This is because of how the law is structured. They could not be known by persons without legal knowledge. This requires access to counsel who can figure out what the law means in the context of relevant circumstances. Scott L.J. considered this question in *Blackpool Corp. v. Locker*, [1948] 1 All E.R. 85 (Eng. C.A.), at 87 where he wrote:

There is one quite general question affecting all sub-delegated legislation and of supreme importance to the continuance of the rule of law under the

British Constitution, namely, the right of the public affected to know what the law is. That right was denied to the defendant in the present case. The maxim that ignorance of the law does not excuse any subject represents the working hypothesis on which the rule of law rests in British democracy. That maxim applies in legal theory just as much to written as to unwritten law, i.e., to statute law as much as to common law or equity, but the very justification for that basic maxim is that the whole of our law, written or unwritten, is accessible to the public - in the sense, of course, that, at any rate, its legal advisers have access to it at any moment as of right. [emphasis added]

[88] Thus I find the **Act** infringes the fundamental constitutional right of access to justice of low income persons and the **Act** is *ultra vires* to that extent.

SECTION 1 ANALYSIS

[89] Having found that the effect of the **Act** infringes a *Charter* protected right, the onus shifts to the Attorney General to show that the law constitutes a reasonable limit that can be demonstrably justified in a free and democratic society (*R. v. Oakes* (1986), 26 D.L.R. (4th) 200 (S.C.C.)). The underlying principles animating this approach were stated by Dickson C.J. at page 225:

Canadian society is to be free and democratic. The court must be guided by the values and principles essential to a free and democratic society which I believe embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and

political institutions which enhance the participation of individuals and groups in society. The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the Charter and the ultimate standard against which a limit on a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justified.

[90] Here, as in *Carten*, the Attorney General did not seek to justify the social service tax based on s. 1 grounds. In *Carten*, Chief Justice McEachern provided the opinion that:

94 ... Perhaps this is because it is difficult to imagine how a law that impairs access to constitutional rights and remedies could be justified in a free and democratic society.

[91] In *Carten*, McEachern C.J.B.C. held that the tax could not be saved by section 1 of the *Charter*:

100 Absent extraordinary circumstances not relevant here, it is obvious that a significant burden on access to counsel and the courts for constitutional protection additional to reasonable cost of service charges could not likely be reasonable or demonstrably justified in a free and democratic society.

101 That being so, and having regard to the position taken by the Attorney General, I find it unnecessary to attempt a full s. 1 analysis. If, however, it were necessary to satisfy the precise terms of the *Oakes* test, I would rule that this *Act* cannot be characterized as a minimal impairment of constitutional rights since the tax could have been imposed just on legal bills that do not relate to the exercise or protection of guaranteed rights.

[92] Having gone further than Chief Justice McEachern did and finding, on the facts before this court, that this tax is unconstitutional because it denies low income persons the right to access justice, I would briefly expand the s. 1 analysis. I find that the **Act** cannot be characterized as a minimal impairment since the tax could be imposed on the legal fees of persons whose income level does not qualify as low by the test I set out below. In addition, in applying the **Oakes** test, in my view, it cannot be said that the **Act** pursues an objective that is sufficiently important to justify limiting the *Charter* right delineated. The stated objective of the **Act** when it was introduced was to raise revenue from the collection of taxes on all lawyers' fees in the province in order to fund legal aid in the province. As noted elsewhere in these reasons, such a purpose has not been fulfilled. If the fees applied exclusively to expanding legal services to low income persons, then s. 1 would likely save the tax.

CONCLUSION

[93] The petitioner seeks a number of declarations in relation to the application of the **Social Services Tax Amendment Act, 1993** to legal services, including a declaration that the **Act** is *ultra vires* legal services provided for the enforcement or protection of civil or criminal law

constitutional rights regardless of the income level. As a result of the reasons set out here, I would grant such a declaration however, I am bound by the majority of the Court of Appeal in **Carten** who had such an issue before them and decided otherwise.

[94] I am prepared to grant the following declarations:

- A declaration that the **Act** is *ultra vires* the Province of British Columbia to the extent that it applies to legal services provided for low income persons.
- A declaration that the definition of low income for these purposes is the level of income and assets which exist for the Family Duty Counsel Program of the Legal Services Society of British Columbia under the **Legal Services Society Act**, S.B.C. 2002, c. 30, as set forth in its policy and procedures manual. (Filed by affidavit of Dugald Christie dated April 16, 2004.)
- A declaration that the seizure by the respondent Crown in Right of the Province of British Columbia of the sum of \$6,321.75 from the petitioner was invalid to the extent that it represented a tax

levied on legal fees payable by persons of low income as defined above. And I declare that the said sum together with interest should be returned to the petitioner.

"M.M. Koenigsberg J."

The Honourable Madam Justice Koenigsberg