

A ROADMAP TO ADEQUATE, EFFECTIVE ACCESS TO JUSTICE

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INTRODUCTION

I congratulate PBLA and its affiliates across Canada in taking proactive leadership steps in improving access to justice in this country. Pro Bono Law is a very recent development having not yet reached its 5th birthday in Alberta. Your Civil Claims Duty Counsel Project recently launched in Calgary and Edmonton relies on *pro bono* legal services provided by young lawyers from a growing list of supporting firms working with Pro Bono Students Canada. In Ontario, with four years of additional history, law firms are providing *pro bono* legal services in the Tax Court of Canada Pilot Project and serving as duty counsel in support of self-represented litigants on motions in the Ontario Court of Appeal. These and other Pro Bono Law initiatives demonstrate an invaluable and growing willingness of the profession to improve access to justice for disadvantaged Canadians.

My message today is that we are still a long way from achieving adequate, effective access to justice for deserving, disadvantaged Canadians. What I wish to lay out is a roadmap for some major reforms which I think would bring us much closer to achieving that goal. In laying out this roadmap, I see a leadership role that can be played by PBLA and your law firms which I earnestly hope you will all pursue.

ACCESS TO JUSTICE IS A RIGHT

Access to justice for deserving, disadvantaged self-represented parties who have meritorious legal issues is not a privilege. It is a right. I say this with confidence, but with the caution that the Supreme Court of Canada has not as yet fully embraced this principle.

Let me cite to you strong statements from a variety of sources that support the fundamental importance of adequate and effective access to justice in our legal system.

In the Canadian Bar Association 1996 *Systems of Civil Justice Task Force Report* we stated at page 69, "Access to legal services is integral to access to justice." The report went on to say that, "The legal profession has a major responsibility to assist efforts to increase access to justice" which, I am pleased to say, Pro Bono Law Alberta is pursuing with vengeance.

Chief Justice Dickson in 1988 stated the principle broadly: "The rule of law, enshrined in our Constitution, can only be maintained if persons have unimpeded, uninhibited access to the courts of this country." (*NAPE v. AG Newfoundland*, [1988] 2 SCR 204 at 213). While the Supreme Court of Canada ruled out "a general right" for all litigants to have "a Constitutionally mandated Legal Aid scheme for virtually all legal proceedings", the court in *B.C. (A.G.) v. Christie*, [2007] 1 SCR 873 at 883 did state that "this Court has repeatedly emphasized the important role that lawyers play in ensuring access to justice and upholding the rule of law" and that, "Access to legal services is fundamentally important in any free and democratic society."

Chief Justice McLachlin, at a February 10, 2010 speech to the University of Toronto, made a very strong statement when she said this: "The middle class and the poor may not be able to access our justice system ... How can there be public confidence in a system of justice that shuts people out, ... that does not give them access?"

Justice Tom Cromwell challenged the legal profession to engage in efforts to improve access to justice in a speech given to the American College of Trial Lawyers (reported in the Spring, 2011 edition of the ACTL *The Bulletin*, p. 23). He stated:

"Many lawyers and judges, let alone the average person in our country, could not afford to have a legal problem of any complexity. The number of persons who are representing themselves in our courts is large and growing. This not only puts in doubt whether their rights and interests are being protected. The presence of these self-represented litigants also adds to the legal cost and in some cases perhaps may jeopardize the rights of other represented litigants ... Is the legal profession sufficiently engaged in efforts to improve access to justice?"

Finally, Professor Eric Foner, a Pulitzer Prize winner, in a book on Abraham Lincoln and American slavery, *The Firey Trial*, stated at page 50, "The adversary system depends on every person called to court enjoying legal representation."

These are all strong statements of principle which support, in my opinion, the goal all of us in the profession should share of ensuring adequate, effective access to justice for every deserving, disadvantaged self-represented party.

NATURE OF THE PROBLEM

As Justice Cromwell stated, "The number of persons who are representing themselves in our courts is large and growing." Let me expand on that. There are reports that variously between 16% and 65% of the parties appearing in family law matters are self-represented. 40% of the parties appearing in Alberta Family Law Chambers are self-represented and that number has increased 160% since 2006. There are in Alberta 9,000-10,000 self-represented parties appearing in our Queen's Bench division. In the Supreme Court of Canada, 25% of those seeking leave to appeal are self-represented. I am told that a significant number of participants before the Human Rights & Citizenship Commission are self-represented and demonstrate a significant need for legal assistance. I suspect there are many other tribunals with a similar experience.

Self-representation may be a matter of choice for some, but for many it is forced on them through lack of financial resources or other disadvantages. The focus of this presentation is to ensure that adequate, effective access to justice is afforded to those who are self-represented by virtue of their disadvantaged circumstances.

Legal Aid ought to be society's first and essential resource when a disadvantaged person encounters legal problems. Legal Aid, which has been in existence in Alberta for 40 years and had a publicly funded budget last year of \$70 million, has a Mission Statement "To provide a continuum of innovative and cost effective legal services for people in need throughout Alberta." Its Vision Statement reads, "To be a leader amongst Legal Aid organizations in providing quality legal services to improve access to justice for people in need." These statements correspond very closely to the goal I have set out in this presentation of ensuring adequate, effective access to justice for every deserving, disadvantaged self-represented party.

Unfortunately, with inflation and diminishing funding, Legal Aid over the years has been forced to cut back on the clients it can serve, the areas of legal problems that it will address and the range of services that it can afford to offer. In 2010 there was a 30% reduction in Legal Aid's financial eligibility guidelines in an attempt to reduce the demand for its Legal Aid services. At the present time, Legal Aid will not provide most of its services to an individual without a family who earns in excess of \$1,225.00 per month. Two-thirds of its services are directed only at criminal law offences. The bulk of the rest of the services it offers are given in family law matters. "Unbundled" services involving approximately 20 minutes of legal advice before self-represented parties venture forth on their own in an attempt to represent themselves in court proceedings increasingly describes the majority of the legal services provided by Legal Aid. Full legal representation is still provided by Legal Aid for private lawyers prepared to accept \$85.00 per hour for their services. Last year 29,700 full representation certificates primarily for criminal law cases were issued by Legal Aid. Legal Aid also has a duty counsel system to provide summary legal advice and assistance to self-represented parties in the Criminal Courts, Family Courts and Family Justice Chambers in Queen's Bench.

While providing yeoman services with its very limited resources, Legal Aid is falling farther and farther behind in providing adequate, effective access to justice for every deserving, disadvantaged self-represented party in Alberta. My roadmap to adequate, effective access to justice would have the government and the Law Foundation expand significantly their funding to Legal Aid so that Legal Aid's financial eligibility thresholds can be raised, legal services can be provided in all areas of the law before all courts and relevant tribunals, and that full legal representation extending beyond "unbundled" legal advice for 20 minutes can be provided when that is legitimately required.

Extending beyond what Legal Aid is currently providing, Legal Guidance Clinics, Family Service Centres, Pro Bono Students Canada, Pro Bono Law Alberta and other institutions have struggled creatively and proactively to provide information and legal services to self-represented parties. As valuable as the combined contributions of all of these organizations are, regrettably they do not in combination supplement sufficiently what is provided by Legal

Aid in order to achieve the goal of providing adequate, effective legal services to deserving, disadvantaged self-represented parties. Chief Justice McLachlin was quite accurate in stating that under our present system, "The middle class and the poor may not be able to access our justice system."

It is against this background that I lay out my roadmap for some major reforms to bring us closer to achieving the goal of providing adequate, effective access to justice for all deserving, disadvantaged Canadians. Pro Bono Law, as a recent entrant to the access to justice service providers has, in my view, a very significant role to play on this roadmap. Your draft 2012-2013 Business Plan sets exactly that target by saying that PBLA "promotes access to justice by creating opportunities for lawyers to provide *pro bono* legal services to low income Albertans who are not eligible for Legal Aid" and "to ensure that access to justice is a reality for all Albertans regardless of their income level ...". These goals, when combined with what should be the comparable goals of Legal Aid, governments, other service providers and the profession, should bring us closer to providing adequate, effective access to justice for all.

FIRST POINT OF CONTACT: LEGAL TRIAGE CLINICS

The first step on my roadmap is to expand, possibly unify and formalize the initial point of contact between self-represented parties and the legal system. When encountering a legal problem of any sort, persons who do not have access to normal legal services need to have introductory information, practical guidance and referrals to appropriate resources. You might think of this as a legal analogy to triage clinics that perform admissions at emergency wards of hospitals. When a patient enters an emergency ward in a hospital, triage services are offered to all, irrespective of their particular circumstances and disadvantages. Self-represented parties encountering a legal problem should have similar access to the services of legal triage clinics. The aim of legal triage clinics should be to help self-represented parties understand the nature of the legal and other issues involved in their case and provide them with preliminary guidance and referrals, which include resources that may nip their problems in the bud. A simple referral to a drug rehabilitation centre with appropriate follow up might in a given case be all that is needed.

There are currently a number of institutions providing some of these services. Legal Aid Alberta provides upfront information and referrals through a Legal Services Centre for all individuals regardless of their income. Calgary Legal Guidance provides impressive point of entry contact services. To build on the hospital analogy, I think legal triage clinics should be present in every court house throughout Alberta and be governed by a common set of guidelines and resources. The court house legal triage clinics should be co-ordinated with the point of entry services provided by Legal Aid and Legal Guidance Clinics.

Let me be very clear that these legal triage clinics should extend to all self-represented parties. There should be no low poverty or other eligibility requirements. They should be available for all types of legal services irrespective of the area of law involved. I personally receive numerous calls through the Lawyer Referral Service that involve a wide range of commercial legal problems, none of which would probably qualify for Legal Aid, but all of which would benefit from the information and advice available at a legal triage clinic.

Access to the legal triage clinics should not be limited to cases involving court proceedings. We are told that 90% of legal problems encountered by self-represented parties do not involve the courts. Unresolved legal problems can lead to harmful personal, family, cultural, business and criminal consequences with significant downstream costs to individuals as well as to society as a whole. Legal triage clinics could provide valuable assistance to self-represented parties for a wide range of legal problems which have not as yet matured into legal proceedings.

Let me add to this that the services of legal triage clinics should be available throughout all areas of the province including rural and remote areas. The Alberta Legal Services Mapping Project conducted by the Canadian Forum on Civil Justice reported there are current inequities in the geographical delivery of legal and other services in rural and remote areas of Alberta. Legal triage clinics should avoid these geographical inequities.

I think these legal triage clinics should be publicly funded. Just like some of the services supplied by Legal Aid and Legal Guidance Clinics, they are an important first step in providing

adequate and effective access to justice for self-represented parties. With the contributions already made by Legal Aid and Legal Guidance Clinics, the additional costs and resources required to expand and co-ordinate or perhaps unify existing point of entry contacts should not be unduly burdensome.

PUBLIC DEFENDER, DUTY COUNSEL OR COURT HOUSE NAVIGATOR

Once legal proceedings are initiated in courts and relevant tribunals, the access to justice stakes go up dramatically. Introductory information and practical guidance of the sort provided at the legal triage stage are insufficient. Faced with legal proceedings, self-represented parties need narrower and focused information and advice as to how they should respond to the legal proceedings, what their rights and obligations are, and whether and how they can obtain adequate legal advice and representation. This builds on but goes beyond the legal triage stage and involves a higher degree of specialization, akin in the hospital analogy to an emergency room doctor. For the purposes of my roadmap, I would describe this resource as a public defender, duty counsel or court house navigator.

Here are the important functions that I envisage for this public defender, duty counsel or court house navigator:

1. All self-represented parties would be required to consult with the public defender early in the legal proceedings in order to be advised of the legal nature of their case, the range of remedies and consequences to which they are exposed and the requirements and rights affecting their interests.
2. The public defender would have the responsibility to determine whether the self-represented party is deserving and disadvantaged in a way that justifies the provision of legal services through Legal Aid, Pro Bono Law or other means.
3. The public defender would assess what sort of legal services are required, including whether the self-represented party requires limited unbundled legal advice or alternatively full legal representation.

4. The public defender would then make appropriate legal service referrals to Legal Aid, Legal Guidance Clinics, Pro Bono Law, or to lawyers in the profession who are prepared to offer their services on a fee paying, sliding scale or *pro bono* basis.
5. Where referrals for the provision of legal services have been unsuccessful or inadequate, the public defender in appropriate and limited circumstances would have the ability to fill this gap by providing legal advice and representation for self-represented parties. This requirement to provide legal services might arise in cases requiring immediate access to the courts such as applications for Emergency Protection Orders.
6. The public defender would have the responsibility of monitoring on an ongoing basis the cases involving self-represented parties. An important part of this monitoring would be to ensure that self-represented parties have been advised of the relevant substantive and procedural elements of the justice system that apply to each particular case. This is intended to relieve the court or tribunal hearing the case of having to intervene excessively to assist self-represented parties during the course of any hearing. It is important that self-represented parties do not upset due process, a fair trial for all parties and the independence and neutrality of the court or tribunal.

This public defender, duty counsel or court house navigator resource might well be combined with legal triage clinics and should be available in all courts and relevant tribunals throughout the province. It should be funded and controlled by the government, just like court clerks and Sheriffs. The costs and resources required to establish this public defender system could be significant, but the contribution to effective access to justice would be profound. A pilot project aimed at establishing how a combination of legal triage clinics and this public defender system might best function and with what costs and benefits might be beneficial.

REFERRALS FOR LEGAL SERVICES

Where there are legal proceedings, what sort of self-represented parties should qualify for referrals and what range of legal services ought to be available on such referrals?

On my roadmap I have limited referrals to deserving, disadvantaged self-represented parties. I include the requirement of "deserving" to avoid servicing parties who seek to abuse the court system for improper purposes and also to exclude those who refuse to seek legal advice. I use "disadvantaged" to include disabilities relating to such things as health, linguistics, culture or age, but I think the main focus at the referral stage should be on the financial resources of the self-represented party. In this regard, the extremely low poverty eligibility requirements of Legal Aid and, in turn, the restriction of the bulk of the legal services to criminal and family law matters rendered in 20 minutes of "unbundled" advice fall, in my opinion, far short of providing adequate, effective access to justice.

To determine whether a self-represented party has insufficient financial resources to qualify for *pro bono* legal services is no easy matter. Contingency fee arrangements, sliding fee scales, loans and accessing all available financial resources are some of the ways that clients can finance normal fee arrangements. Persuading the insurance industry in Canada to provide affordable legal cost insurance protection would provide another welcome source of funding to help many people afford legal representation. For each deserving, disadvantaged Canadian who had legal cost insurance coverage, there would be one less person forced to apply to Legal Aid or Pro Bono Law for the provision of legal services. It is only when these and other arrangements cannot support the retainer of a lawyer that the self-represented party in my mind becomes financially "disadvantaged" and entitled to *pro bono* legal services. This is not simply a matter of picking an arbitrary level of annual income, whether \$15,000.00 or \$50,000.00. For a complex case, neither may be enough. There should be enough flexibility for a public defender to determine on particular fact situations whether a sufficient financial disability has been established to justify a referral to a *pro bono* law provider.

This takes me to the question of what legal services ought to be provided once a referral has been made. In a fairly routine, low level case, 20 minutes of unbundled legal advice from a duty counsel may be quite sufficient. Undoubtedly, that is far better than no advice at all. But many cases are not routine and low level. I have suggested that the public defender resource should assess what sort of legal services are required in any given case. There are, in my view,

cases where self-represented disadvantaged parties should have the benefit of full legal representation. The test for determining whether full legal representation is required ought to be what would reasonably and properly be required in a comparable case involving a fee-paying litigant. Anything less would treat the self-represented party in a manner that would be unfair and unequal to the services provided to a fee paying litigant. The unfair effect of this, in the words of Melina Buckley of the CBA Access to Justice Committee, is to force self-represented parties to navigate the court system on their own. It is, I think, self-evident that self-represented parties do not have the skills and experience of qualified lawyers to conduct their own cases and protect their own interests in anything extending beyond a fairly routine, low level case.

Expanding the referrals and the range of services available on referrals will be costly for Legal Aid and other publicly-funded lawyer referral services. For Pro Bono Law and its participating law firms, the goal is much more achievable through the continued expansion of your services and with the growth of your roster of volunteer "private bar" lawyers, to which I hope today's function will contribute.

IMPLEMENTATION

The steps I have set out above on my roadmap will not be easily achieved, but I do not perceive PBLA or the profession creating a major obstacle. Pro Bono Law has a wide array of initiatives underway which my roadmap would have you pursue and expand. What I encourage you to accomplish is to have a wide ranging roster of volunteer lawyers, young and old, in the widest range of legal areas possible. These lawyers should be made available to provide a full range of legal services to deserving, disadvantaged self-represented parties who do not qualify for a significantly expanded range of services provided by Legal Aid that I am proposing. Pro Bono Law will then fill the gap between what a reformed Legal Aid regime provides and what is necessary to achieve the goal of providing adequate and effective access to justice.

I also encourage Pro Bono Law and the profession to continue to be leaders and advocates in the pursuit of adequate, effective access to justice. As the Governor General

stated at the CBA Annual Meeting last August in Halifax, "We enjoy a monopoly to practise law". With that monopoly we have an obligation "to improve justice and to continuously create the good". The Governor General encouraged us to "Move the industry standard of *pro bono* work including cases, teaching and law reform, from the current rate of less than 3% to 10% and build those 'honourable hours' rigorously into the firm's revenue structure."

The real road block to the implementation of my roadmap will be governments and public funders. They must be persuaded that legal triage clinics, public defenders, duty counsel or court house navigators, a significant expansion of Legal Aid throughout the country, and the provision of legal services to deserving, disadvantaged persons on a basis equivalent to fee-paying litigants are all justified and essential in the pursuit of adequate, effective access to justice. This is where your strong advocacy and leadership can make a difference.

Can you, in combination with the courts, with Justice Cromwell's Action Committee on Access to Justice, the Canadian Bar Association, the Law Societies and all the others who are pursuing access to justice, find at least one government in this country that would embrace something like my roadmap? Is there at least one government that would be prepared to embark on a pilot project implementing at least some of the steps of my roadmap? Could we come up with policy and practical reasons to support such an access to justice initiative that would complement the current study underway by the Canadian Forum on Civil Justice that is aimed at demonstrating the net savings to governments and society by improving access to justice?

Let me invite you to take your advocacy and leadership one further step. Could just one government that embraced something like my roadmap be persuaded to refer a carefully articulated question to the Supreme Court of Canada aimed at obtaining an opinion that deserving, disadvantaged Canadians are entitled to adequate, effective *pro bono* legal services under the rule of law and our Constitution? A sufficiently narrow question with the support of a provincial government would have, in my view, an excellent chance of success.

CONCLUSION

That is my roadmap. Obviously, it will not be easily achieved. But absent these or alternative, equivalent steps, I do not see how we can achieve the essential goal of providing adequate, effective access to justice. I encourage every one of us as members of our honoured profession to analyze my roadmap, make improvements to it and pursue with utmost diligence the goal of improving access to justice. In response to Justice Cromwell's question, "Is the legal profession sufficiently engaged in efforts to improve access to justice?", let us all answer unequivocally "yes".

Thank you.