

## **Responding to the Needs of Unrepresented Litigants: A Call to Action**

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### **Introduction**

The fundamental goal of our civil and criminal justice systems is to provide access to justice for members of our society. And yet, for many individuals the high cost of litigation has become prohibitive and precludes true access to justice. As Justice Cory observed in *Coronation Insurance Co. v. Florence*:<sup>1</sup>

For many years it has been rightly observed that only the very rich and those who qualify for legal aid can afford to go to court. This point was brought home with shocking clarity by Mr. Justice George Adams in his paper presented the week of July 11<sup>th</sup> at the Cornell Lectures. There he noted that the total legal bills to all parties in an average General Division lawsuit (including those that settle before trial) may easily amount to between \$40,000 and \$50,000. Truly litigation can only be undertaken by the very rich or the legally aided. Legal rights are illusory and no more than a source of frustration if they cannot be recognized and enforced.

These increasing costs and the shortfalls in our legal aid system have led many who seek to pursue justice to appear as unrepresented litigants.<sup>2</sup> Others, of unknown number, have simply opted out of the system thus foregoing their rights. Yet another category of self-represented litigants, who could pay counsel prefer to appear on their own behalf either to save costs or because they want to engage directly in the adversarial process.

### **Unrepresented Litigants**

There is little precise statistical evidence available with respect to the number of unrepresented litigants. However, professionals within the court system observe that the numbers of such litigants in the system are increasing. Some estimate that over 50% of proceedings involve one or more unrepresented litigants.<sup>3</sup>

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<sup>1</sup> [1994] S.C.J. No. 116 at para 14 (S.C.C.) (a case dealing with contingency fees).

<sup>2</sup> In this paper, I use the term “unrepresented litigants” to refer to litigants who want to be represented by counsel but cannot afford to retain counsel, as opposed to those litigants who choose to be self-represented.

<sup>3</sup> The Special Committee on Self-Represented Litigants, *Report on Self-Represented Litigants, Background & General Recommendations*, Ontario Court of Justice, 1999.

In a recent report, *Developing Models for Co-ordinated Services for Self-Representing Litigants: Mapping of Services, Gaps, Issues and Needs*,<sup>4</sup> a project team based in the Vancouver courts has outlined several needs of unrepresented litigants identified by both the unrepresented litigants and professionals within the courthouse environment. Of particular concern to the unrepresented litigants that participated in the study was the difficulties faced at a trial or appearance in court. In our adversarial system, litigants and their lawyers are responsible for presenting the case and persuading the trier of fact. For many unrepresented litigants the experience is overwhelming and distressing, as is reflected in the following comments set out in the Report:

“Being in court was the scariest part and the other party always had a lawyer. It’s a terrifying experience... It’s an awful set up. I’d stand in front of the microphone and my knees would give way.”

“I didn’t have a lawyer but he did... I didn’t know I could have asked for an adjournment. I didn’t know how the court rules worked. It was totally new to me and it totally changed my life. I lost custody of my daughter.”

“Being in Supreme Court is going down a hole into hell.”

### **The Need for Action by the Bar**

It is critical that members of the Bar, as participants in our civil and criminal justice systems, contribute in a meaningful way to programs that will assist unrepresented litigants. The legal profession has a long tradition of providing services pro bono or for the “public good”. As Justice Major has observed:

It has long been part of the duty and tradition of the legal profession to provide services gratuitously for those who require them but cannot afford them. The profession, recognizing its commitment to the larger principle of justice, has traditionally not let such cases go unanswered merely because the individual is impecunious. Instead, the profession has collectively accepted the burden of such cases, thereby championing the cause of justice while at the same time sharing the cost that such cases entail. This is a tradition that dates to the very inception of the profession in medieval Europe in the thirteenth century.

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The concept of service *pro bono publico* is found at the very core of the profession. In fact, it distinguishes the practice of law as a profession.

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<sup>4</sup> Gayla Reid, Donna Senniw and John Malcolmson, *Developing Models for Coordinated Services for Self-Representing Litigants: Mapping Services, Gaps, Issues and Needs*, January, 2004.

This is more than a mere accident of history. Service of the public good is, by necessity, the premise upon which the profession is founded.

Many advocates provide pro bono services on an ad hoc basis through programs such as The Advocates' Society Court of Appeal *Pro Bono* Program. As members of the Bar we must continue to do so, and expand upon these contributions where possible.

A particular need that can be effectively met by counsel is the need of the unrepresented litigant who is on the courthouse steps ready to appear at trial. That person requires assistance on an immediate basis.

It is interesting that a complementary need that has recently received significant attention is the need for counsel, and in particular junior counsel, to obtain sufficient courtroom experience to maintain the viability of the trial as a dispute resolution mechanism. An ideal opportunity exists to meet these complementary needs by facilitating the ability of members of the Bar to provide this type of immediate representation and assistance on a duty counsel or similar basis to those who would otherwise be forced to proceed on an unrepresented basis for economic reasons. By way of this type of pro bono project, advocates can offer assistance to those in need and make an important contribution to our justice system.

As noted, this type of project can provide counsel, and particularly junior counsel, with much needed trial experience. The ability of junior lawyers to develop as competent advocates continues to be affected by a lack of opportunity to appear in trials and at hearings. There are increasingly fewer opportunities for litigators to develop the advocacy skills necessary to provide professional, competent and effective advice and representation to clients.

Understanding the trial or hearing process is the unique skill of the litigator. The experience derived in trials or at hearings prepares a lawyer to be effective in making the myriad of decisions that arise in a litigation matter and in giving strategic advice to clients on litigation. Trial or hearing experience also provides counsel with the ability to participate effectively in settlement or mediation processes. It is the ability to evaluate what is likely to happen at trial, both with respect to process and result, that enables counsel to best fulfill these non-trial roles.

In 2004, The Advocates' Society's Task Force on Advocacy<sup>5</sup> reported several issues of concern with respect to the administration of justice that result from decreased trial and hearing practice for advocates, including the following:

- (a) if the cost of dispute resolution dissuades clients from involvement in the public court system then legitimate grievances may have no proper forum for resolution;

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<sup>5</sup> The Advocates' Society Task Force on Advocacy, *Report of The Advocates' Society Task Force on Advocacy*, The Advocates' Society, 2004.

- (b) clients may be accepting sub-optimal outcomes because the cost of trial is prohibitive;
- (c) if counsel does not have experience in conducting trials counsel may encourage sub-optimal outcomes because of a fear of trial, or a lack of appreciation of the opportunity for positive results;
- (d) individual settlement of disputes removes those disputes from the public system, which allows justice to be done and to be seen to be done; and
- (e) our legal system depends on the development of the common law through precedent. Without trials, precedent does not continue to develop.

Concern about the effect of this lack of experience has also been expressed by others, including The American Bar Association, which had a project on “The Vanishing Trial” and the American College of Trial Lawyers, through an *Ad Hoc Committee on the Future of the Civil Trial*.

In remarks made to The Advocates’ Society Task Force on Advocacy Policy Forum<sup>6</sup>, Chief Justice Brian Lennox of the Ontario Court of Justice provided the following perspective on what he described as “the golden age of oral advocacy for young lawyers”, which provides a disturbing contrast to the situation faced by today’s litigators:

When I began practice several decades ago, it was the field of criminal law that attracted my attention. It was not then uncommon for young lawyers, whatever their eventual field of interest, to practice initially in the criminal courts in order to gain experience. Legendary advocates such as J.J. Robinette, G. Arthur Martin, Charles Dubin and Arthur Maloney, to name but a few, had made the practice of criminal law respectable and Ontario was developing a strong, specialized criminal bar. Further, the relatively recent development of the Ontario Legal Plan made criminal practice, if not profitable, at least affordable for younger lawyers. The wide variety of criminal cases allowed new lawyers to practice their advocacy skills on cases which, by today’s standards, were of little real consequence and offered low risk, both to the defendant, and to the lawyer. Shoplifting charges were in abundance and it was not uncommon for the value of property in issue to be minimal. The introduction of absolute and conditional discharges further lessened the potential impact of a finding of guilt. Young lawyers not only argued these cases by the thousands, but also sat, watched and learned as their colleagues did the same. Larger firms offered the services of their junior lawyers as a form of loss leader to firm clients or to members of their families who had been charged with minor criminal matters or provincial summary offences.

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<sup>6</sup> Remarks of Chief Justice Brian W. Lennox, Ontario Court of Justice to Remarks to the Advocates’ Society (17 February 2004) *Opportunities for Advocacy in the Ontario Court of Justice*.

This provided junior counsel with a great deal of experience. Chief Justice Lennox further noted that:

The Ontario Court of Justice offers a wide variety of advocacy opportunities for counsel at all stages of their professional development and in all aspects of the jurisdiction of the Court. As is the Advocates' Society, so too is the Court concerned about the longer-term impact of declining opportunities for advocacy on the quality of representation and ultimately on the quality of justice. We are increasingly experiencing within our Court the phenomena of the self-represented, the unrepresented and the under-represented defendant/litigant.

These comments are as applicable in the context of civil trials (at all levels of court) as in the context of criminal trials.

### **Pro Bono Duty Counsel: A Call to Action**

Recently, Pro Bono Law Ontario ("PBLO") announced the launch of a project that will provide increased access to justice to unrepresented litigants and improve the administration of justice while also providing opportunities to junior advocates to contribute to society and develop their advocacy skills.

The Small Claims Pro Bono Duty Counsel Project is a pilot project that will provide eligible unrepresented litigants with duty counsel services in Small Claims Court, addressing the needs of those litigants for effective representation. As PBLO has noted<sup>7</sup>:

Unrepresented litigants are appearing before our province's courts, including Small Claims Court, in growing numbers. While some choose to appear without representation, most simply cannot afford to retain counsel. Despite the simplified procedures of Small Claims Court, many litigants still do not have sufficient understanding of procedural issues, courtroom protocols, and substantive law to argue their cases effectively. Not only are their outcomes negatively affected, but also unrepresented litigants frequently place inappropriate burdens on judges and court staff -- adversely affecting the administration of justice.

Duty counsel positions will be filled by counsel from private law firms who will attend approximately one day every six months in Small Claims Court in Toronto. The project, which provides an opportunity for counsel to make a difference in the lives of members of our society with limited means, will do the following:

- (a) provide litigants with information about the laws and procedures of Small Claims Court;

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<sup>7</sup> PBLO Small Claim Court Project Materials.

- (b) provide procedural assistance to help litigants identify and complete the appropriate court forms;
- (c) identify legal issues and available legal options; and
- (d) present the case and speak to the legal issues in court.

This project neatly fulfils the goals of improving access to justice, increasing pro bono contributions by lawyers in private practice, and providing counsel with trial experience.

### **Conclusion -- A Time for Commitment**

Given the continually escalating costs of litigation, it can be expected that the number of unrepresented litigants will continue to rise. Given the challenges this poses for the litigants, judges, court administrators and counsel, it is important that all participants in our civil and criminal justice system continue to work to develop solutions to ensure that a robust and accessible trial system remains a cornerstone of the justice system. Programs such as PBLO's Small Claims Court Project should be strongly supported and replicated in other appropriate venues as they promote meaningful access to justice, decrease the demands placed on judges and court administrators and increase the opportunity for advocates to become skilled and effective advocates and to use advocacy skills to secure justice for those in need. The time has come for law firms and lawyers of all levels of seniority to commit to respond by providing pro bono legal services to litigants in need. The profession must lead the way in fostering effective access to justice for all those who choose to resolve disputes through our justice system.

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