

Remarks by  
The Honourable Neil C. Wittmann  
Chief Justice of the Court of Queen's Bench of Alberta

at the

**3<sup>rd</sup> NATIONAL PRO BONO CONFERENCE**

Fairmont Palliser Hotel, Calgary  
September 16, 2010 - 9:00 a.m.

Thank you for your kind introduction, Bruce.

I would like to speak to you about the problems the Court faces in dealing with those who cannot afford legal representation, and about the importance of pro bono work in solving those problems.

In reading over the Pro Bono Law Alberta Report of 2010, I was struck by both the number and the extent of partnerships it has created since its inception just three years ago. There is an incredible amount of behind-the-scenes work going on. I suspect that the same is true in all Canadian jurisdictions.

The members of the Bench appreciate the contribution that members of the Bar make as we all cope with the effects of societal change on the legal system. We also recognize the importance of the work done by both staff and lawyers in legal clinics. Despite fears by some, from my perspective, there is certainly no shortage of work to go around. Not only does pro bono work reside at the core of professional responsibility, but it is also becoming a necessary component of an independent justice system that is in danger of losing the confidence and respect of its citizenry due to cost and other access barriers.

At its highest, legal professionalism describes the relationship of the lawyer to the entire community. I will touch on this only briefly, because I know David Scott will address that issue far more completely.

In 2009, The Advocates' Society of Ontario published a booklet of guidelines called Principles of Professionalism for Advocates.

The aspirational principles include "An Advocate's duty to Ensure Access to Justice". That duty includes the suggestion that: "Advocates should provide legal services on a *pro bono*, reduced fee or alternative basis for those unable to pay and who would otherwise be deprived of adequate legal advice or representation."<sup>1</sup>

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<sup>1</sup> *Ibid.*, p. 7.

Increasing access to justice is now a main priority of both trial courts in Alberta and of the Justice Ministry. One thing is certain – we couldn't do it without the volunteer work performed by the Bar and by the legal clinics.

Twenty years ago, the services of the court, the practice of law and the role of litigants looked very different. How did we end up here? The shift in focus from an emphasis on legal expertise, to one of access to justice is the direct result of the groundswell of changes taking place in all the important parts of the legal system.

First, there are now many more people using the services of the courts. This is partly because of changes in family structures, and partly because of the regulation of more aspects of daily life. Inevitably, more and different user types means more people cannot afford a lawyer. Our court records show the number of applicants in 2006 in the Court of Queen's Bench Motions Court in Alberta who appeared without lawyers was about 2,900. In 2009, that number had shot up to over 5,600. That's almost double in four years. And the number of unrepresented respondents has increased by 25% in the same period.

From counter clerks to judges, everyone is affected by the burgeoning needs of unrepresented litigants. I personally have seen a dramatic increase in the numbers of disaffected litigants who write to me hoping that I will intervene on their behalf, both during and after decisions by court staff or judges.

A significant proportion complain that "you can't get justice without a lawyer". In many of those cases, it's plain that they see the comfort-level that counsel for the other party enjoys, and which they believe is being used to their disadvantage. One recent correspondent wrote that she returned to court to observe several proceedings which she said were comparable to hers. She said that they got an adjournment so why didn't she?

From my perspective, this change means we are faced in the courtroom with persons who have very limited understanding of the legal process and principles. This puts pressure on the judge, on the lawyer, if the other party has one, and on court staff. Judges must balance their duty to be impartial adjudicators with the need to ensure a just result. Any attempt to assist the unrepresented litigant which tips that balance can turn the proceeding into an unfair one.

Lawyers are hampered by their duty as an officer of the court on the one hand when faced with an unrepresented opposite party who is clearly at a disadvantage, and their duty to advocate fully for their client, on the other. And court staff do their best to deal with more and more requests for assistance that go beyond their capacity to provide.

The second big change in the legal system is cost. Access now costs a lot more than it used to. According to the Canadian Lawyers Magazine, June 2010, the national average cost of a two-day civil trial was \$26,444.

In Alberta, about five years ago, the average cost of a contested divorce was about \$24,000, and the average child custody and support proceedings cost \$16,000.<sup>2</sup>

Making things worse are cuts to Legal Aid funding. The cuts are the result of revenue losses experienced by the Alberta Law Foundation, one of Legal Aid's major funders, due to the economic downturn. Total funding in 2009/2010 was down more than 19% over original expectations, and another \$5 million cut is expected for 2010/2011. It is a tribute to the Province of Alberta and the Minister of Justice that the government contribution has steadfastly remained constant in these economic times.

And to their credit, Legal Aid is working very hard to offset lower funding with innovative programs. One of these is the creation of Legal Services Centres throughout the province. They have also temporarily reduced financial eligibility requirements and expanded criminal duty counsel in major centres.

Despite these efforts, we continue to see a greatly stepped-up need for low-cost or free legal and procedural assistance. Moreover, the level of assistance needs to be more in-depth than clinics are able to provide. Many self-represented litigants are well-educated and still have difficulty navigating the system in a timely way.

Summary legal advice clinics do not have the ability to do more than direct a litigant to an appropriate agency, or to prepare them for self-representation. If they are not eligible for Legal Aid, they are referred to Pro Bono Law Alberta. It is my view that better preparation for self-representation is valuable, but it is no substitute for representation by a lawyer, especially if a matter must come before the courts.

To meet this more complex need, Pro Bono Law Alberta has recently completed a study on the feasibility of an Alberta Lawyer Roster Program. The Roster would consist of a centralized database of lawyers available to provide pro bono or unbundled legal services in specific areas of law. The program would match eligible candidates with lawyers and either pro bono time or limited scope retainers. This is a new concept in Alberta, where there are no formal programs designed to leverage this service option to the problems of unrepresented litigants.

A service such as this would be of immeasurable value to the Court. If someone did a study to find out how much time is used up by judges and staff in assisting unrepresented litigants due to missteps in navigating the system, we could quantify the waste of resources more precisely. But take it from me, if we had a system whereby at least one side, if not both, could be represented by counsel, numerous adjournments,

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<sup>2</sup> Miller Boileau Family Law Group, Edmonton, Marla S. Miller, Q.C., "The High Cost of Divorce", 2005. [http://www.millerboileau.com/high\\_cost.php](http://www.millerboileau.com/high_cost.php)

prolongation of applications, hearings and trials, hand-holding by court staff would be prevented or at least alleviated.

I understand that the Roster Program proposal has been turned down for funding by both the Law Society of Alberta and by the Alberta Law Foundation at the time of their initial assessment, pending further review. I would urge that review to reconsider this valuable program, which is already in place in similar forms in four other major jurisdictions in Canada, namely British Columbia, Ontario, Quebec and Saskatchewan.

Lawyers who give their time to help such litigants are essential to the advancement of the principle of access. They represent the highest and the best of our profession. It is no exaggeration to say that without the contributions of pro bono members of the Bar and of the clinics, “modern justice” today would be an oxymoron.

As most of you may know, the rewards of pro bono work can be great. Besides earning the respect of colleagues, lawyers who donate time without compensation enjoy enormous professional satisfaction. A lawyer may ask the question, “What’s in it for me?” The answer is: “A great deal”. The reward for mastering the complex art of the advocate or the advisor and skillfully providing that service to a grateful client is, like the MasterCard commercial – priceless. It takes commitment, energy, compassion and imagination to dedicate time to volunteer work that could otherwise be used for personal gain.

Speaking for myself, I can think of no higher calling. Congratulations and thank you to all of you who are doing such important work for people, and for society.

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