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Are Radical Solutions in Order? Affordable Legal Services & Access to Justice

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Access to Justice: Will I be able to Afford the Services of a Lawyer in the Future?

Legal services in contemporary society, particularly in the world of dispute resolution, are, by reason of high cost, beyond the reach of most individuals and small businesses in society. There is force to the argument that perhaps two-thirds of individuals in society are unable to afford a lawyer if the purpose is to exhaust available remedies in the resolution of disputes. Increasingly, this has resulted in self-representation. The incidence of self-representation in family law matters is said to be as high as 70%. In civil litigation, generally more and more citizens are going to court without a lawyer. The situation is the same in administrative tribunals. For example, in the Appeal Tribunal established under the *Health Professionals Act*, over 90% of appellants are unrepresented; in the Transportation Appeal Tribunal of Canada where individual citizens are involved, 80% are unrepresented. More troubling is the fact that in these situations where professionals or institutions are involved, virtually all of the parties opposed in interest to self-represented persons are represented by a lawyer. Judges and tribunal members in their numbers are increasingly being provided with materials to educate themselves in the difficult process of conducting a trial or hearing where one or more parties are unrepresented.

The increase in the numbers of persons representing themselves is, in historical terms, a new development. It is well to remember that we are not speaking just of candidates for pro bono services.[1] The self-represented include the middle class. Most of these citizens can afford to pay for other services offered in society…just not legal services.

Causes

As Justice Coulter Osborne's recent report relating to the administration of justice in the courts establishes, an important reason for lack of access to the courts is the increasing complexity of the process resulting in high cost. The extraordinary growth of mediation in the last two decades is proof positive of this phenomenon, particularly when one notes that in every single mediation being conducted as this note is being written, the mediator is advising the adversaries that they should settle their dispute because they cannot afford the cost of taking it to a final resolution by a court or tribunal.

a) The Cost of Legal Services

Complexity of process aside, the fundamental reason for self-representation and the rise of dispute resolution by mediation is the high cost of legal services.[2] Hourly rates, the current methodology for setting fees have, and are continuing to escalate. For high-end services in the major business centres of North America, rates are at or near $1000 per hour. While these rates are not typical, they do not represent an aberration.

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1 Insofar as pro bono services (viz. services for the poor) are concerned, the legal profession has, and is, responding admirably in helping to meet the need.

2 Indeed, the high cost of legal services is also an important reason for the extraordinary reduction in the overall number of trials.

b) Urbanization of the Profession & Changing Client Profile

Furthermore, high fees have resulted in the urbanization of the profession and an obvious shift in the client base. More and more young lawyers are electing to practice in large urban law firms in their economic self-interest. This is driven in part by the need to discharge education-related debt (as evidenced by a troubling flight from the profession of young lawyers after only a few years in practice). While it is true that in the broad sweep of our province the majority of lawyers are in small firms, these firms are increasingly opting to specialize in ways that will enable them to increase revenues. The notion that there are thousands of lawyers in practice who service the middle class at modest rates is a fiction, as evidenced by the phenomenon of self-representation. The development of urbanization and pursuit of income has also resulted in a shift in the client profile.[3] The typical client is more often today an institution or business than it is an individual citizen. The content of the law reports, legal journals and CLE are empirical evidence of this phenomenon.

In short, in the current environment very few ordinary citizens can afford to engage, by conventional means, in the dispute resolution process.

What of Solutions?

a) The Role of the Law Societies

Currently, apart from the function of the courts in assessing compensation for legal services, there are no mechanisms in place to control cost in the interest of securing access. Should this situation be of concern to the governing body of the profession? In an environment in which the profession represents a monopoly in a self-governed environment, a strong case can be made that the profession has a responsibility through its governance mechanisms to temper the processes which have given rise to the high cost of legal services in order, not only to ensure access, but to justify its role in the social order of things. Admittedly, solutions are far from obvious. Still, a serious discussion leading to a design of initiatives is overdue. In the interests of promoting such a discussion, two thoughts.

b) Licensing Initiatives

Access to the middle class is denied in large measure due to high cost. Amelioration of this situation could be addressed if, for example, a condition of licensing were the imposition of a requirement that a fixed percentage of professional time would be required to be devoted to "reduced fee services," the "services" and the "reduction" to be suitably formulized. In this way, the entire profession would be engaged in providing affordable, or at least more affordable, services to individuals as opposed to institutions in society. The full impact of an initiative such as this, imposed by the regulator, would have to be weighed in the balance, bearing in mind our traditional free enterprise model driven by competitive forces. Further, whether all branches of the profession could be realistically drawn into an initiative designed to cope with the high costs of legal services in dispute resolution is an interesting and challenging question. What needs to be said, it would appear, is that if our governing body fails to confront this problem of access, it should at least consider the prospect that some other institution in society, inspired by government action, may do it for us.

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[3] A recent and troubling trend which adds to the picture is a reduction in the number of lawyers representing legally-aided clients. A recent article in the *Lawyers Weekly* under the heading "Number of Legal Aid Lawyers Plummets" suggests that the "flight of the private bar from legal aid" is represented by a 10% reduction in the number of lawyers doing legal aid in the past year.

c) Limited Retainer Services

In the meantime, a secondary initiative, the so-called "unbundling of legal services," ought to be considered and encouraged by the governing body as a method of tempering the impact of self-representation. "Unbundling" otherwise known as "limited retainer" services are those in which the self-represented client engages a lawyer on a fee-for-service basis wherein the engagement is limited to a particular service in the litigation process, ie. arguing an important motion or conducting an aspect of discoveries without being retained to conduct the entire proceeding with the usual consequence in terms of expense. In an environment of self-representation this service offering is becoming much more common in the United States. In the view of some, it features the added benefit of enabling the client to retain ownership of his or her lawsuit while at the same time retaining a lawyer from time to time and at critical junctions only. Since the complaints of many clients are related to the loss of control over the process when the case is turned over in its entirety to a lawyer, it is proving to have considerable appeal.

Conclusion

In dispute resolution in North America, the profession collectively bemoans the disappearance of the trial (or adversarial hearing) as a key component in the process. Some attribute the phenomenon to complexity and delay, others, probably short-sightedly, to the incidence of mediation. In fact, more often than not it is all about cost. Implicit in our constitutional imperatives is access to the courts and the right to have our disputes resolved by an impartial trier in a fair and open environment. In contemporary society, the notion is, to many, an illusion. More and more citizens are representing themselves, confronting a skilled advocate as his or her adversary, and relying on a presiding judicial officer whose appearance of impartiality is tested by having to coordinate an unbalanced and fundamentally unfair process. The exploration of meaningful solutions to this unacceptable situation are now an imperative.

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