

CHAPTER 13

PRO BONO, THE BOTTOMLESS BOG.

There are a whole host of difficulties in bringing access to justice to the poor, many of which have to do with money issues. It seems to me that the problems present a picture rather like a bog, an Ontarian bog that can not be spanned without outrageous sacrifice! This chapter deals with some of the problems of bringing justice to the poor.

As I toiled over those endless Ontario roads clinging to an almost non-existent shoulder I could no longer fantasize over the wicked shortsightedness of Ontarian bureaucrats. Nor could I ignore my Canadian history which had a bearing on the issue!

It seemed to me as I rode through Ontario that the building of the CPR transcontinental line which I glimpsed from time to time had a lot to do with the reason the highway I was travelling had no proper shoulders! One of the greatest challenges to the building of the transcontinental railroad was the prohibitive cost of spanning the muskeg and bogs of Ontario. Prime minister Macdonald's government was almost bankrupted by the bottomless bogs of Ontario. Several of the railroad contractors in the effort to fill up the bogs with gravel did actually go bankrupt. Even after the track was laid whole trains were swallowed up in the morass. The problem was only eventually solved in the years following initial construction when trainloads of rock and gravel ran daily on the new track to eventually fill up the mire.

The road builders that came later had similar problems. Now that I thought about it I could see with my own eyes the tremendous quantities of fill that lay under the roadbed I was on. Bog was on both sides. The cost of filling those bogs must have been considerable. Any increase in width to provide a proper shoulder would greatly increase construction costs. Now I could understand one good reason why Ontario had the narrowest highway shoulders of the nation! As I struggled to survive from being run down by trucks on those narrow shoulders I dwelt on the point.

To a lawyer, trying to help the poor is sometimes rather like trying to span a vast bottomless bog. There are a number of problems: there are so many poor: some of them do not really want to be helped: you can pour in time and effort by the truckload and if you do not take adequate precautions the client may make claims and complaints against you and drag you into the mire. It can be difficult work!

The construction of the CPR struck me as a good analogy. There would have been no motivation to fill the bogs and build the CPR track were it not for a grand purpose, the construction of a railroad that would bind together and virtually transform the nation. There never will be enough motivation to build a truly effective network of pro bono clinics unless there be a grand purpose behind it all, real access to justice for all. If that goal were attained we would have taken a first vital step towards rolling back the universal cynicism that pervades our society when it comes to justice issues and the creation of a truly just society. The effect on all Society of creating a system of justice that could realistically bear the tired words, "Just Society" would have extraordinary

consequences! The results of a far reaching pro bono program throughout the nation are so significant that it is well worth the sacrifice!

The conflicts and legal problems of the very poor are not normally simply symptoms of their poverty. Injustice to them is not incidental but is central! If a person who has very little feels he has been wrongly fired, injured, or otherwise wrongly treated no amount of social assistance, job training or therapy will have the same lasting effect as help from a lawyer on the underlying unresolved conflicts.

Buddy Lee is a good example. Ever since he issued the first court document he has left behind the life of a drunken derelict. His life now is full of friends, unique inventions, journeys and adventures.

I have seen many other hopeless individuals restored to a productive life by a lawyer's assistance. Some at first appeared hopeless. In one case the client was clearly delusional and his complaint against the counsellors who had tried to help him was that they all insisted he see a psychiatrist. He wanted court relief from a number of international companies that he alleged were conspiring to have him locked up. I said to him that I regretted that I too would have to recommend that he see a Psychiatrist or Psychologist but for a very different reason. Being a lawyer I knew what the main problem in his case was going to be. The defence lawyers would maintain that he was nuts! His only prospect of success was to fight fire with fire and engage a psychiatrist to give evidence in his favour that he was sane. However, he would have to be prepared to work with the psychiatrist!

Eventually he did see a Psychiatrist and was diverted to the real problem, his sense of reality. I do not think there was any other road to his recovery other than the one he selected, the road to justice! Only a lawyer could walk that treacherous road with him and steer him towards reality.

In dealing with a person that is grappling with reality it is especially important the lawyer maintain respect and integrity on the one side and empathy for the client on the other. The lawyer who abandons his or her own beliefs while entering into the delusional world of a troubled client loses integrity and effectiveness. On the other hand the lawyer who cannot stretch his or her own reality to embrace that of the troubled client will not even reach first base!

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There is many a law firm netting earnings of over ten million dollars per year that provide virtually no pro bono service. They may have a pro bono committee. Junior partners may be pushing for pro bono but the senior partners are not to be convinced! Action continues to be stalled from one year to the next. Big firm lawyers are quite capable of cutting down small forests to create piles of reports, questionnaires, surveys, research grant applications, minutes and every imaginable document on the

subject of pro bono . Their junior partners have endless committee meetings on the subject of helping the poor. All this can take years and meanwhile the firm does not help one pro bono client! The senior partners are against it! Dealing with such partners can be interesting work!

Some such lawyers have the attitude that clients too poor to afford a lawyer have brought their problems down on their own heads. In many ways the tough senior partner is correct! The poor often do bring disaster down on their own heads! The young man who is charged with an offence he may not have committed did sass the policeman who arrested him! The man who threatened his wife is locked out of his home, finds his wife has taken up with another man, has his assets and income tied up by a court order and suffers all manner of harm but he deserves what he gets! He should not have threatened his wife! That perspective is not a popular one in our overly tolerant society. However, there is a great deal of truth behind the tough senior partner's approach.

Once such a lawyer with the hard-hitting "they probably deserve it" attitude is persuaded to attend a pro bono clinic all kinds of things happen. He or she can do far more than the "bleeding heart" lay counsellors who so often meet with the poor. There are no "nurturing smiles". Clients go in cheerfully expecting a certain result but you can tell from the muffled raised voices and the angry look when they leave that the lawyer's advice is not what was anticipated. I have been a frequent spectator of such scenes. After the meeting the clients are sometimes angry, sometimes close to tears and sometimes delighted but usually they are fundamentally influenced.

It is hard for a client to confide private conflicts or problems with an experienced hard hitting lawyer and not be profoundly affected. It is a little like being interviewed by Dr. Laura! Some clients may reject tough advice out of hand but it will not be easy for them to forget. A client hell bent on some frivolous suit will usually remember the well chosen words of a senior litigator, especially if he writes them down. The client may be furious but the reality check usually sinks home. Not only is a needless lawsuit avoided but the client, perhaps reluctantly, takes a step forward in maturity.

Some lawyers and judges will bend over backwards to give the poor unrepresented party an unearned break even if the claim is idiotic. It is such an attitude that does great harm to the cause of the poor and encourages professional litigants to tie up the courts with nonsense claims and defences. The hard hitting lawyer sees beyond mere empathy with every and all poor litigants and can often get to the root of the problem, which may have to do with the client's own behaviour.

Tough lawyers and judges are not necessarily heartless! In fact often the contrary is so. Judges who give away the shop to every litigant claiming poverty do more damage to the cause of true justice than the judge who never gives the poor a break. It is better to be brutal than sloppy but a good judge is neither!

Another reason why so many large law firms in Canada make such a small contribution to helping the poor is that their senior partners know that pro bono clinics are usually run with scant attention to conflicts, proper note taking or research.

Professional standards tend to be low and that can eventually drag down the firm's standards. Once senior partners are satisfied these vital matters are adequately looked after in a properly run clinic they will often make a valuable contribution to the program.

Pro bono clinics need lawyers of both the "no nonsense" school and the "Patience of Job" school. The lawyers that exasperate me are the ostriches! They are neither tough nor soft on the poor. They change the subject every time topics of access to justice or the plight of the poor are raised. They simply are not interested! Such lawyers may be outstanding members of the community. They may point out that they have contributed to the Vancouver Symphony and they have therefore done their bit! My answer to them is: by all means give violins to the Vancouver Symphony, but that should never take the place of justice. A lawyer should always place justice first. That is what the law profession is all about! It is not just a moral imperative but common sense. A musician whose passion is reforming the law is unlikely to be a good musician. The lawyer whose first interest is the symphony is wasting his time at the law office.

Unfortunately the number of lawyers whose first interest is something other than justice increases every year. One need only compare a modern issue of the best respected law journals with those of twenty years ago to see the change. Articles used to abound on ethical issues, recent developments in the courts and issues to do with justice. Today the articles are all about marketing strategies, computers, billing techniques and ways of increasing efficiency, satisfaction and the take home cheque! The perspective of the profession has changed. Sometimes it seems to me that only a minority of lawyers see anything wrong! The vast majority are totally bewildered by the public's hectoring criticism of the legal professions and see the problem as simply one of public relations. According to them the problem would go away if the profession ever got its act together to invest the time, effort and money to "educate" the public on how truly wonderful the profession is!

The same attitude prevails as in the merchandising of Coca Cola ; it does not matter if the product rots the teeth away or contains hidden quantities of caffeine and other harmful substances as long as everyone loves it and it makes lots of money! The thought that the only lasting answer to the profession's public image problem is to acknowledge that the public is right and that things are fundamentally wrong is to most lawyers a ridiculous and dangerous heresy!

Some lawyers' impenetrable minds see the crowding of the courts or increased crime as just things that happen, inevitable results of the folly of mankind, having nothing to do with the legal professions! Nobody is responsible except society itself! I do not buy that self serving argument! To hold all society accountable for the massive injustices of the court system is to avoid responsibility. It is the legal professions, judges and lawyers, that are responsible for justice in our society and they tolerate widespread injustice to the maimed and the helpless to their own advantage. Change requires difficult decisions, time and money and the majority are not prepared to make such sacrifice!

Fortunately there are many lawyers who accept more than their fare share of the burden. It is a great tragedy that many lawyers earn very little in comparison with

teachers or professionals whose training is not as long or rigorous as that of the law. I believe such "good Samaritans" to be in the majority outside greater Vancouver. For example a good law firm in the interior is now offering Associates a salary of from \$22,000 to \$25,000 per annum. Perfectly good lawyers with ten years experience in practice can make as little as \$30,000 per annum, put in long hours and endure poor work conditions. Paradoxically it is usually such overworked underpaid lawyers who offer their time for free to the really needy client.

My own guess is that in the larger cities about a third of lawyers fall into the "good Samaritan" pattern. From half to two thirds of lawyers in rural areas are in that category. I therefore do not blame such lawyers who do not have the time to attend or contribute to pro bono clinics. They may be ill advised in not attending a clinic where they could do more work for the poor in less time but nobody could justly accuse them of not doing their bit for the poor! In my view it is brutally unfair that the good Samaritans, and there are many of them, are branded by the public, along with the ruling majority who richly deserve it, as uncaring for the needs of those unable to pay exorbitant legal fees and overly concerned with their own pocket book.

It is the lawyers who can afford to help the poor and refuse to do so that so often oppose funding of pro bono programs. There is a hidden majority of lawyers who will not face problems of access to justice and leave it to their poor country cousins. Their first interest is not justice. Their main interest is the country cottage, the children's special education, the cars, a host of "necessities" such as the club fees and most important of all the year-end net!

For the last fifteen years that I practised law I charged, with very few exceptions, a contingent fee of no more than 19% and lived reasonably off my income. Though the claims I handled were relatively small I often took difficult cases that other lawyers would not take. I therefore find it difficult to sympathise when I hear successful lawyers complain of the crushing demands on their time and pocket book. I do not know any lawyer in Vancouver who charges a contingent fee for as little as 19% other than for major claims. Many of my lawyer friends take more than \$100,000. per annum out of their practice. Yet a proposed assessment of \$100 per year to help pro bono was voted down on the grounds that it was too great an imposition on lawyers!

One of my lawyer friends takes home, before tax, approximately \$110,000 per annum and is worried sick that he does not earn enough to pay tax, the boat's necessities, his new car and a hundred and one other demands on his cheque book. Another friend with his wife earns over \$800,000 per annum and he complains in sincere bewilderment that he is not a high spender but he does not know where the money goes! He does not have enough to set aside enough for the years of retirement ahead. Both these lawyers do a lot of work for the poor and so I am not reproaching them in any way. I am simply pointing out that the best of us can easily become slaves to money and it has little to do with the net income. I know I have been in that dilemma earlier in my life.

On the other hand I see exactly the same inability to properly deal with money persons who are at the other end of the scale and have hardly a penny to their name. When I was in practice I made a point of letting the client know in writing exactly how

much the client could reasonably expect to receive from a judge if the matter went to trial. In more than one instances the client would become infuriated with me that I would not press for hundreds of thousands more. When I would not relent some clients would fire me or complain to the Law Society. The fact that no other lawyer would agree with the client's assessment made the client all the more aggravated!

The theologians are right! Plain old fashioned greed is a besetting sin of almost everyone, myself included! The love of money is the cause of untold misery on the part of both the "richest" lawyers and the poorest of clients. In pro bono work the love of money is a mud that sticks to everyone's shoes and unless participants are willing to act truly "pro bono", without remuneration, the best layed plans will be thwarted.

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Seen from a world wide window the importance of justice to our poor should be obvious! On the international scene Canadians see the issue correctly. Canada gives priority for international aid to those countries with governments that provide their citizens reasonable access to the justice. We do not generally give aid to dictatorships or oligarchies where the poor have no rights. We know that a country must have a viable justice system that will protect its citizens before the ordinary citizen will benefit from foreign aid. The best way to help a country is to encourage it to provide its ordinary people with laws and freedoms so they can help themselves.

We do not apply the same principles to our own citizens in Canada and especially the poor. We dump huge amounts of money on the poor in the form of welfare and pension payments but pay scant attention to their access to justice. We would never be so foolish with the money we spend on others in the form of Foreign Aid! We should apply what we know to be true abroad to our domestic affairs. The best way to help our poor is to provide justice whereby they can help themselves.

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Cycling over many a bog in Ontario I started writing out some of my thoughts on the bog-like problems of pro bono in my usual manner. However, I have to confess that most of this poem was not finished until I returned to Vancouver:

FILLING THE MORASS.

The CPR challenge
Was not mountain or hill!
It was the bottomless bogs
That devoured the fill!

The Prime minister's faith
And the engineers' skill
Finally prevailed
But at an enormous bill!

Until it was built
The track disappeared
And all seemed in vain
As enemies sneered.

But once it was built
Mountains of rubble
Were moved down the tracks
To fill up the trouble!

I picture the scene
Of our morass of ill-will
And our thousands of poor
Being filled with good fill.

The fill is crude gravel
With course, sharp edges,
Replacing soft living
With clear cut pledges.

This fill lies in piles
Flinty and rough.
No nurturing smiles
From such love that is tough!

Victims need lawyers,
A friend by their side.
Losers turn winners
When their foes are defied!

It is not just the winning
It is the striving that heals
For losers are quitters;
Thin blood soon congeals!

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When one lawyer fails
Another takes his place
Till the client sees light
And makes sense of his case!

The poor crave justice
Like an unfed dog
And will absorb good advice
Like a bottomless bog.

Vast quantities of love
Must be dumped in the mire
With endless caring.
The workers won't tire!

As trainloads of lawyers
To the railhead are brought
Many the victory
For justice is fought.

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The client at first
Exudes banality,
Self always centre
Defying reality.

Smiling he goes in
Distorted and twisted
In tears he comes out
But genuinely assisted!

That client a week later
May be back out of touch
But still holds a paper
Screwed up in his clutch.

The lawyer wrote down
A clear message on life,
Now crumpled but true
To end all his strife.

A few sessions later
The client's passions yield,
Truth takes hold,
His destiny at last sealed!

He makes up with the landlord
Or finds a new place
As he discovers the way
To win and keep face.

Just one such statistic
Shows it can be done!
It is realistic:
Pro bono has won!