ACCESS TO JUSTICE: TOWARDS A COLLABORATIVE AND STRATEGIC APPROACH

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INTRODUCTION

It is a great honour and pleasure to present the thirty-third Viscount Bennett Lecture. I attended the Viscount Bennett Lecture in 1987 and took part in the Symposium on Dispute Resolution held in connection with it. Some of the themes we explored 23 years ago remain current when we turn to my subject for this year's lecture, Access to Civil and Family Justice.

My remarks will address three main areas. First, I will provide a working definition of access to civil and family justice and sketch what I take to be the dimensions of the problem. Second, I will tell you about the work of the Action Committee on Access to Civil and Family Justice, which was set up by Chief Justice McLachlin, and which I am chairing. Finally, I will turn to some thoughts about how law faculties could become more fully engaged in efforts to improve Access to Justice.

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What is Access to Justice and is there a Problem?

What do we mean by access to civil and family justice and is there a problem in this regard?

I will not spend much time trying to define with precision what is meant by Access to Justice. That in itself has been a topic of debate since at least the 1970s. But I think we can agree that, in general terms, members of our society would have appropriate access to civil and family justice if they had the knowledge, resources and services to deal effectively with civil and family legal matters. I emphasize that I do not have a "court-centric" view of what this knowledge and these resources and services include. They include a range of out-of-court services, including access to knowledge about the law and the legal process and both formal and informal dispute resolution services, including those available through the courts. I do not view Access to Justice, and I suggest we should not view it, as simply access to litigation or even simply as access to lawyers, judges and courts, although these are, of course, aspects of what Access to Justice requires.

Is there a problem with access to civil and family justice? My answer, and the answer of every commentator that I know of, is "yes." Is the problem serious? Again, I believe the answer is "yes." By nearly any standard, our current situation falls far short of providing access to the knowledge, resources and services that allow people to deal effectively with civil and family legal matters. There is a mountain of evidence to support this view. I will touch on only a few examples.

Perhaps the most sobering piece of evidence is the 2011 Rule of Law Index, published by the World Justice Project.[1] The report noted that Canada is among the top ten countries in the world in four categories of the rule of law, but that its lowest scores are in the area of access to civil justice. In that area, Canada ranks sixteenth out of the twenty-three high income countries indexed this year. This dismal ranking results in part from shortcomings in the affordability of legal advice and representation, and the lengthy duration of civil cases.[2] Perhaps the only good news in this report is that while we stood sixteenth out of twenty-three, the United States was twenty-first. Why, it might be asked, do we so often look south of the border for solutions to our problems with access to civil and family justice?

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[1] M Agrast, J Botero and A Ponce, *WJP Rule of Law Index 2011* (Washington, D.C.: The World Justice Project, 2011).

[2] *Ibid* at 23.

Recent reports in Canada have concluded that many legal needs of people in lower- and middle-income groups are not being met. I refer to the reviews of legal aid by the Canadian Bar Association[3] and by the Doust Commission in British Columbia[4] as well as reviews of legal needs in Ontario.[5] The Ontario Civil Legal Needs project found that 1 in 7 low- and middle-income Ontarians with a civil legal problem in the past three years did not follow through h on it because of cost.

Most recently, our Governor General has weighed in on the issue, adding his voice to other strong public pronouncements by leading jurists including Chief Justice McLachlin, Chief Justice Finch of British Columbia and Chief Justice Winkler of Ontario. The Governor General observed that "... for many today, the law is not accessible, save for large corporations and desperate people at the low end of the income scale charged with serious criminal offences."[6]

For the lawyers and judges here, I am quite sure that your own daily experience is consistent with the view that there is a serious problem of access to civil and family justice. You have seen the numbers of self-represented litigants in the courts – at all levels – rising over the years. While some of those people are self-represented by choice, many – I would suggest most – are not. The presence of self-represented litigants in the courts not only casts doubt on whether their rights and interests are being protected but also adds to delay and cost and, in some cases, may even jeopardize the rights of other, represented litigants. Related to the self-representation phenomenon, you also see the enormous costs that are incurred in litigation. Many of my lawyer friends freely admit that they could not possibly afford their own services.

Problems of Access to Justice do not only affect those who suffer from them directly. They also affect public confidence in the justice system generally. It is very disheartening to read, for example, that about 80% of the people surveyed in Ontario thought that the justice system favours the rich.[7] Inadequate Access to Justice also undermines the rule of law itself. The World Justice Project must be right to say that access to civil justice is a dimension of the rule of law, given that

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[3] Melina Buckley, Canadian Bar Association, *Moving Forward on Legal Aid: Research on Needs and Innovative Approaches* (2010).

[4] Leonard T Doust, *Foundation for Change: Report of the Public Commission on Legal Aid in British Columbia* (Vancouver: 2011).

[5] Ontario Civil Legal Needs Project Steering Committee, *Listening to Ontarians: Report of the Ontario Civil Legal Needs Project* (2010) at 21.

[6] David Johnston, "The Legal Profession in a Smart and Caring Nation: A Vision for 2017", speech delivered at the Canadian Bar Association Canada Legal Conference (14 August 2011), online: The Govenor General of Canada <http://www.gg.ca/document.aspx?id=14195>.

[7] *Supra* note 5 at 19.

one of its fundamental principles is that the process by which the law is administered and enforced should be accessible, fair and efficient.[8] It must be asked whether, for a large segment of the population, we have a functioning civil justice system at all.

I will take it as a given that we have a serious problem of access to civil and family justice.

There are many initiatives seeking to address aspects of this problem. Allow me to speak to you briefly about one of them.

The Action Committee on Access to Civil and Family Justice

Chief Justice McLachlin invited a group of representatives of the judiciary, the bar and government, and other leaders in the area of civil and family justice to meet together in Edmonton in September of 2008. This group, called The Action Committee on Access to Justice in Civil and Family Matters, had no budget, and no terms of reference other than to find ways to meaningfully address the urgent problem of Access to Justice in civil and family matters, a subject on which the Chief Justice had often urged action.

Initially, the Canadian Forum on Civil Justice, then based at the University of Alberta, served as the convener for this initiative and devoted considerable resources in money and staff time attempting to move it forward. The initial September meeting produced consensus that a national committee of leaders from all sectors of the civil and family justice community and the public had a useful role to play in improving Access to Justice. The meeting also put a working group into place, whose mandate was to flesh out priorities and possible courses of action.

The Forum was unable to continue in its role as convener of the Action Committee, and the initiative was stalled for want of administrative support and day-to-day direction. With the Chief Justice's leadership, however, the Canadian Judicial Council offered to provide some administrative support to allow us to get back on track and I accepted the Chief Justice's invitation to become chair of the initiative. Last spring, the Federal Department of Justice began to provide the Action Committee's secretariat and Alberta Justice provided financial support. The many groups and organizations that are participating on the Committee also support its work by funding their representatives who are serving on the Action Committee and its Steering Committee and Working Groups.

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[8] *Supra* note 1 at 1.

Nearly everyone acknowledges the importance of Access to Justice, and there are many initiatives under way which seek to improve the situation in one way or another. However, experience has shown that leaders in the legal profession, the government and the judiciary have had difficulty thinking about the issue strategically, with defining what their own contribution should be and coordinating their efforts. The Action Committee, therefore, sees three key elements that must underpin our approach: the first is fostering engagement by all of the players with the issue of Access to Justice; the second is fashioning a strategic approach; and the third is coordinating our efforts.

With respect to engagement, there is an urgent need for all of the participants in civil justice to focus and institutionalize their efforts in this area. While many organizations express concern about this matter, there is a significant need to translate that concern into serious attention and action. Everyone involved in the justice system is busy with his or her own professional work. Governments and the public have many concerns about many things. We need to help bring attention to the problem of Access to Justice in a consistent and insistent manner. Moreover, we need to move beyond whining and wringing of hands and accusatory declarations. We are all quite good at pointing out what others should be doing about Access to Justice: the bar and bench say that governments don't provide enough funding, governments and lawyers say that the judges don't run an efficient process and government and the judges say that lawyers charge too much. What we need, however, is not finger-pointing but engagement with the issue by all of the players. All of the players need to ask what they can do to make things better. We do not need to point fingers at each other; we need to look in the mirror.

With respect to fashioning a strategic approach, the many efforts aimed in one way or another at Access to Justice tend to be undertaken in a piece-meal fashion and tend not to address this systemic problem in a strategic way. The problems in the civil and family justice area are so many and complex that we may at times feel helpless in trying to decide where to start. Moreover, many reform initiatives are, understandably, *ad hoc* attempts to address specific problems with little thought given to the causes of the problem or to the impact of the proposed "solution" on the system as a whole.[9] We believe, therefore, that we need to identify a short list of priority areas for reform viewed from the perspective of the system as a whole.

With respect to coordination, there is an urgent and largely unmet need for all of the players to coordinate their efforts in order to avoid duplication, and to ensure that agreed upon priorities are receiving meaningful attention in a world of

[9] See, for example, D M Engel & EH Steele, "Civil Cases and Society: Process and Order in the Civil Justice System" [1979] *Law & Social Inquiry* 295 at 298-299.

flat or diminishing resources. Too often, government, court administration, social services, the judiciary, the bar and the academy tend to operate in isolation, not recognizing their shared responsibility for ensuring that there is appropriate access to civil and family justice.

To try to avoid this isolation and improve consultation, coordination and collaboration, the Action Committee consists of leaders of virtually all of the groups and organizations concerned as well as a representative of the public. The Committee includes two deputy ministers of justice, federally and provincially appointed judges, leaders of the bar, legal aid, pro bono groups, public legal education, court administration, legal research and reform organizations, the academy and a representative of the public. While channeling the wide range of views and perspectives of such a diverse group can be challenging, we are seeing already the benefits of having all of these perspectives around the table.

So, what have we done so far? I ask you to remember that the Action Committee in its current form has had only two meetings!

The Action Committee has developed a clear statement of its purpose and role. In short, it sees itself as a broadly representative group of leaders in the field of civil and family justice which can develop consensus about priorities, encourage organizations and groups to take the lead with respect to them and provide ongoing consultation, coordination and advice. It seeks to:

- Provide leadership in the understanding and promotion of Access to Justice, and to advocate improved Access to Justice;
- Promote and foster engagement with decision makers, stakeholders and leaders in the justice community to make sure that access to civil and family justice is on everyone's agenda and is given high priority;
- Provide a forum for decision-makers, stakeholders, leaders in the justice community and the public to discuss plans for improving Access to Justice and to foster collaboration, cooperation and coordination of these efforts; and
- Define broad areas of common priority through a consultation process with decision makers, stakeholders and leaders in the justice community and to encourage and support concrete steps to improve Access to Justice.

The Action Committee has also identified a short list of priority areas and established Working Groups to define "doable" projects in relation to these priority areas. The Working Groups have progressed well. Let me tell you about the areas we have selected and what is happening in each very briefly.

(A) Developing Common Vision

The Action Committee decided that we needed to develop some consensus about what we mean by access to civil and family justice. A working group was established to take on this task and its work is now completed. In brief, as I indicated earlier, we have a broad rather than a narrow conception of Access to Justice that recognizes that effective access includes knowledge and resources as well as particular services and also extends beyond access to litigation.

(B) Access to Legal Services

The Action Committee quickly identified access to legal services as a critical component of efforts to improve access to civil and family justice and this area was the topic assigned to another Working Group. With the support of the Alberta Justice, a researcher was engaged and prepared a report which the Working Group reviewed and finalized and is now using to formulate its own recommendations.

As a direct result of the Action Committee and Working Group's attention to this issue, the Federation of Law Societies has struck a strong standing committee of leaders of the profession from across Canada to address the issue of how to improve access to legal services. The Canadian Bar Association has also struck an Access to Justice Committee to bring together all of its work in the area. The CBA has a special interest in legal aid and has also recently expressed interest in legal services insurance. The Chairs of both of these important committees are also members of the Action Committee and its Legal Services Working Group, ensuring close cooperation and coordination of effort.

(C) Court Processes Simplification

The Action Committee identified the simplification of court processes as another key aspect of a strategic approach to access to civil and family justice. The focus here is not primarily on rules of court (although they are not excluded from consideration) but on the way courts conduct their business, including scheduling, use of technology, ensuring all appearances are meaningful and so forth. The Working Group has compiled an inventory of innovative ways to simplify and expedite court proceedings and will be making its recommendations to the Action Committee at its meeting next Spring. The Canadian Judicial Council, the Canadian Council of Chief

Judges and the Association of Court Administrators, among others, are engaged in this work, which will help ensure that the Working Group's recommendations will be valuable and given due attention by courts across the country.

(D) Family Justice

Last Spring the Action Committee identified access to family justice as another priority area. While much is being done in a number of provinces, there was a strong consensus that a national and broadly representative group could make important contributions to reform. This Working Group is just beginning its work.

(E) Prevention, Triage, Referral

This area was also one agreed to only last Spring and the Working Group is now up and running. While the name given to this area may seem somewhat exotic, it recognizes that much needs to be done in the area of preventing civil justice problems from arising and also in ensuring that when they do arise, people are able to find the appropriate community resources.[10] In most cities, for example, there is a multitude of agencies and services which, in one way or another, try to help people with problems that have a legal dimension. Think, for example, of landlord and tenant problems, workers' compensation problems, social assistance problems and so on. Unlike the agencies and services established to help in these areas, people's actual encounters with problems are generally not so neatly compartmentalized and rarely fall clearly within the mandate of only one of these services, let alone within the division of powers among municipal, provincial and federal authorities. People need help finding the service or services that may help them and also in coordinating their approach. Sadly, legal difficulties rarely come in one isolated and clearly defined package and often a plan is needed to tackle the most pressing and most serious issues first.

Those are the priority areas identified by the Action Committee. We hope to consider final reports from the Access to Legal Services and Court Processes Simplification Working Groups this Spring as well as interim reports from the other two Working Groups.

The Way Forward

Let me offer a few thoughts about how law faculties can contribute to improved access to civil and family justice. Of course I believe that all of us have contributions

[10] See, for example, Richard Zorza, "Access to Justice: The Emerging Consensus and Some Questions and Implications" (2010-2011) 94 *Judicature* 156 at 164-167.

to make, but it seems appropriate in the context of this lecture to concentrate on the legal academy.

Every university is built on the three pillars: teaching, research and service. Of course, these pillars are not silos. Teaching, research and service are complementary and synergistic. This is true in the law as in other disciplines. In all three areas, I believe there is much that the law faculties can contribute to improving Access to Justice; indeed many are contributing substantially already.

Turning first to teaching, I suggest that the need for improved Access to Justice should be part of the curriculum. What is Access to Justice? What are the lessons of the past in relation how to achieve better Access to Justice? What is a lawyer's responsibility to help provide Access to Justice? What are the emerging, novel approaches to the practice of law that may help to improve Access to Justice? How can students looking to enter the profession find opportunities that not only provide them with a good livelihood but also help their communities have better access to legal services? These are among the questions that I believe should be addressed during a law student's formal legal education.

Turning next to research, I suggest that there is much to be done to help us understand how our civil justice system actually functions. Everyone agrees that the system is too expensive to use, but where does the money actually go and how could cost be reduced while preserving high quality service? It seems inevitable that we have much to learn from others who study complex systems and the management of public services, suggesting that there is much room for interdisciplinary studies.

One recent and very encouraging development is the news that the Canadian Forum on Civil Justice, now located at York University, has received a roughly one million dollar research grant from the Social Sciences and Humanities Research Council for a major, multi-year and interdisciplinary research project on the cost of justice. We need a great deal more action-oriented research on civil justice and this project has great potential to assist in addressing the perennial problem of excessive cost in the civil justice system.

Turning finally to service, law faculties across Canada are engaged in providing a host of types of legal services to their communities. These range, for example, from clinical programs to student legal services to work with Pro Bono Students Canada. There are exciting opportunities to bring together teaching, service and research in clinical programs and a great deal is being done in this area.

CONCLUSION

The issue of Access to Justice and dissatisfaction with the degree of Access to Justice are not new. At many points in history, the legal profession – and by that I mean all of us who are part of the profession in its various spheres, such as the bar and the bench and the academy – has not only failed to be engaged by the problems of Access to Justice, but has been resolutely resistant to change. This is true not only in Canada but also in England and the United States.

The same issue of the U.N.B. Law Journal which published the 1987 Viscount Bennett Lecture included an article by Barry Cahill about a review of the administration of justice in Nova Scotia in 1774. Lawyer Richard Gibbons wrote in that year that "Many are the Complaints which have been made ... of Injuries received in the County Courts ... most of which were remediless from the Poverty of the Parties, or want of a proper and legal Mode of Redress ..."[11] Writing at the turn of the 19th century in England, Jeremy Bentham railed against the profession's resistance to change, which he attributed to self interest.[12] Mid-century, in 1850, a piece in the *London Times* had this to say:

> If the minds of legal men are to be forever perversely directed to the past, if they will not divest themselves of old prejudices, and accept new views and ideas suited to the exigencies of the present times, the public must be content with the attempts made by laymen to impose a system which cannot longer be permitted to remain in its old and mischievous condition ... The patience of society is at length exhausted.[13]

At the turn of the 20th century in the United States, Roscoe Pound wrote eloquently about the causes of popular dissatisfaction with the administration of justice to which many in the profession seemed to turn a blind eye.[14] As the 20th century came to a close, the General Council of the Bar and the Law Society in the United Kingdom found professional attitudes and resistance to change to be significant stumbling blocks to reform.[15]

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[11] Barry Cahill, "Richard Gibbons' 'Review' of the Administration of Justice in Nova Scotia, 1774" (1988) 37 UNBLJ 34 at 34.

[12] Jeremy Bentham, *The Works of Jeremy Bentham*, vol. 2: *Principles of Judicial Procedure*, ed J Bowring (London: Simpkin, Marshall & Co, 1843).

[13] *London Times* (24 December 1850).

[14] Roscoe Pound, "The Causes of Popular Dissatisfaction with the Administration of Justice", speech delivered at the Annual Convention of the American Bar Association (1906).

[15] Independent Working Party of the General Council of the Bar and the Law Society of the United Kingdom (H Heilbron, chair), *Civil Justice on Trial – The Case for Change* (London: General Council, 1993).

We in the profession are the trustees of our legal system. We not only function within it and know how it works in practice, but we are also primarily responsible for its preservation – and there is of course much worth preserving. By training and practice, we learn about and revere the justice system we have inherited. This, however, may not always permit us to see its flaws as clearly as we should. Moreover, the legal profession, like any profession, tends to have a large investment in its past knowledge and present practice. As Professor Veitch put it during the 1987 symposium, "Anyone who believes that the legal establishment ... can easily or will quickly be persuaded to give up the habits of a lifetime in favour of some temporary vogue for 'speedy justice' surely requires treatment."[16]

History, I fear, is not on the side of those who hope for real engagement by the legal profession with efforts to improve Access to Justice. I leave you, therefore, with this question. When our successors gather for a Viscount Bennett Lecture in the year 2100, what will be said about the contributions to improved Access to Justice by the legal profession – judges, practitioners and academics – of the early twenty-first century?

[16] Edward Veitch, "But That Is Theory and Has No Relation to Realities" (1988) 37 UNBLJ 116 at 117.