Access to Justice and the Public Interest in the Administration of Justice

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Abstract: The public interest in the administration of justice requires access to justice for all. But access to justice must be "meaningful" access. Meaningful access requires procedures, processes, and institutional structures that facilitate communication among participants and decision-makers and ensure that judges and other decision-makers have the resources they need to render fully informed and sound decisions. Working from that premise, which is based on a reconceptualization of the objectives and methods of the justice process, the author proposes numerous specific changes in decision-making processes and practices. These changes are required to achieve a standard of decision-making that is consistent with the public interest in the administration of justice within a constitutional framework under the social and political conditions of the early 21st century. The essay illustrates the application of the principles and methods of "legitecture" to the analysis of problems of institutional design in law.

> *... justice and the just society... is essential to flourishing of men, women and children and to maintaining social stability and security.*[1]

INTRODUCTION

The public interest in the administration of justice requires that everyone have access to justice. Access to justice must be "meaningful" access. Meaningful access mandates procedures, processes, and institutional structures that provide judges and other decision-makers with the resources they require to render fully informed and sound decisions. This essay argues that changes in the judicial process are needed to meet that objective at a standard that is consistent with the public interest in the administration of justice within a constitutional framework under contemporary social and political conditions.

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[1] The Right Honourable Beverley McLachlin, PC, Chief Justice of Canada, Address (Remarks delivered at the Empire Club of Canada, Toronto, 8 March 2007), [unpublished] [McLachlin].

What makes access to justice meaningful?

The core purpose of access to justice is to ensure that all those who require the assistance of the legal system obtain it. Access to justice requires full and effective communication between agents and representatives of the legal system and all those who use its services. In matters before the courts, the core functions served by the judicial process are those of hearing and being heard. To have effective and meaningful access to justice, the parties must be heard. Cases do not decide themselves; judges do. To decide a case, a judge must hear and understand the case. Judges are not seers, oracles, or mind-readers. Cases need to be presented in a manner that can be fully understood by the judge who is required to make a decision based on the evidence and the law. This requirement extends to all the evidence adduced and all argumentation. Whether an action requires the judge to clarify legal rights, rule on an application, or resolve a dispute, practices and procedures that tend to limit or frustrate effective communication will also tend to have the effect of limiting meaningful access to justice. One or more of the parties to the process will be silenced, not have the direction they require, or fail to realize that additional steps need to be taken to place necessary information and perspectives before the court to ensure their evidence and submissions are understood.

Adjudicating in the contemporary context entails challenging responsibilities. Some of these challenges are due to social and cultural heterogeneity. Others flow from the complexity of the issues or specialized technical nature of some evidence. Diversity on the bench serves important social and political purposes and contributes to enriching judicial perspectives and the exchange of views among judges about emerging issues and the role of the judiciary.[2] But a diverse bench does not and cannot, for obvious practical reasons, ensure that the judge or judges presiding in any given case will have either the life experience and requisite social and cultural awareness and understanding or the technical background required to produce a well-grounded and soundly-reasoned decision. Judges must not only understand the evidence and the social and cultural significance of the issues that arise in the context of specific cases, but also need to appreciate the implications of their decisions for those affected, both the parties and other persons whose interests may be affected. In the increasingly diverse and complex social and

[2] R v S (RD), [1997] 3 SCR 484 stimulated wide discussion among Canadian jurists and academics about diversity on the bench. A representative sample includes: Richard Devlin, A Wayne MacKay & Natasha Kim, "Reducing the Democratic Deficit: Representation, Diversity and the Canadian Judiciary, or towards a Triple P Judiciary" (2000) 38 Alberta Law Review 734; Sonia N Lawrence, "Cultural (in)Sensitivity: The Dangers of a Simplistic Approach to Culture in the Courtroom" (2001) 13 Can J Women & L 107; Richard F Devlin & Dianne Pothier, "Redressing the Imbalances: Rethinking the Judicial Role After R v RDS (1999-2000) 31 Ottawa L Rev 1; Christine Boyle et al, "R v RDS: An Editor's Forum" (1998) 10 Can J Women & L 159; Maryka Omatsu, "The Fiction of Judicial Impartiality" 9 (1997) Can J Women & L 1.

political context of contemporary Canada, there may often be a gap between the level of judicial comprehension required to afford the parties meaningful access to the justice process, and the level of understanding any individual judge or panel of judges can single-handedly achieve within the current framework of judicial procedures and practices. In particular, any individual judge on the bench may often not have personal experience of issues that are crucial in a specific case or may not understand the cultural background or perspective of the parties.

This problem is not new, of course; this has arguably always been the case, although it has not always been recognized. But we now have a better appreciation of the complexities of decision-making and the resultant vulnerability of judges to misunderstanding and error in the face of differences in life experience, cultural background and socialization. And we recognize that law operates in a complex environment of competing social, cultural, and political values and must be interpreted and applied in a manner that is consistent with the Constitution. Mechanical formalist jurisprudence is now largely an artifact of the past; meanwhile the central elements of judicial process remain much the same as they have been for decades, even though they may not always be fully adequate to the challenges posed by many cases before the courts. All of these considerations in combination point to the conclusion that it is time to re-examine the judicial process to ensure that the procedures and practices used are tools that are effective to facilitate doing justice pursuant to the rule of law.

This essay postulates that the public interest in the administration of justice requires meaningful access to justice for all, not just for some. This is beyond question. It is in the collective public interest that all persons in Canada, as individuals and members of diverse groups, be able, when and to the extent they choose, to utilize the legal system to secure the benefits and protections to which they are entitled by law and to resolve any disputes they may have either with one another or with the government. This objective, in turn, mandates that judges be provided with the resources and assistance they need to render sound decisions in the cases they hear and decide. Indeed the responsibility to decide must be seen to entail judicial entitlement to the resources required to make sound decisions. Otherwise, the judiciary is placed in an untenable position and the administration of justice inevitably suffers a loss of integrity. Therefore, any modifications in the judicial process that may be necessary to ensure that the public interest in the administration of justice is well-served must be made.

This essay proposes a number of specific measures related to the handling of cases by the courts. The measures discussed here are not exhaustive of those that should be considered but do include a number of measures that are essential to assist judges in addressing the challenges posed by the cases they hear and must decide. Although the scope of the discussion in this essay is limited primarily to matters

before the courts in non-criminal cases, with particular attention to issues related to meaningful communication, full comprehension, and sensitive and informed interpretation in the face of experiential, social, cultural, and linguistic diversity, the further intent is to stimulate reflection about procedure and practice in the legal system overall. Practices and procedures that tend to diminish or undermine rather than enhance the quality of the administration of justice need to be identified and changed. The public interest demands no less. Justice must be administered in accordance with the rule of law and the Constitution. Failure or refusal to make the changes in legal processes that are required to enable judges and other decision-makers to do justice according to law is not an option for Canadians.

Legal representation

(A) Legal representation in judicial proceedings

Judges prefer that parties appearing before them have legal representation. The difficulties judges experience when presiding in a case involving one or more unrepresented parties are well-known and have been discussed at length by others.[3] Similarly, the parties to judicial proceedings ordinarily prefer to be represented by legal counsel but increasingly find that option unaffordable. The issues related to the provision of legal aid and the development of funding mechanisms to ensure that individuals and groups will be able to afford legal representation have been carefully analysed in the literature, discussed, and debated on more than one occasion.[4] One

[3] John Schofield, "Self representation in court common nuisance" The Lawyers Weekly, 31:15 (26 August 2011); Jeremy Hainsworth, "Court resources shift to unrepresented litigants Supreme Court of BC Chief Justice says bumped trials may come" The Lawyers Weekly, 31:1 (6 May 2011); Philip Slayton, "Top Court Tales: The self-representation problem" Canadian Lawyer (January 2008); Canada, Canadian Judicial Council, Access to Justice: Report on Selected Reform Initiatives in Canada, (Sub-Committee on Access to Justice (Trial Courts) of the Administration of Justice Committee, June 2008) at 24 [Selected Reform Initiatives]; Saskatchewan, Ministry of Justice and Attorney General, Unrepresented Litigants Access to Justice Committee, Final Report, (Unrepresented Litigants Access to Justice Committee, November 2007) at 45; and McLachlin, *supra* note 1 and accompanying text.

[4] Clayton Ruby, "A proposal for improving access to justice", The Lawyers Weekly, 31:24 (28 October 2011); Adam Dodek, "Articling and Access to Justice: Ontario Legal Corps---Why not?", Slaw, (25 October 2011) online: Slaw.ca <http://www.slaw.ca>; Melina Buckley, Moving Forward on Legal Aid: Research on Needs and Innovative Approaches, (Report for the Canadian Bar Association, June 2010); Principal Researcher, Lorne Sossin, Listening to Ontarians: Report of the Ontario Civil Legal Needs Project (OCLNP Steering Committee, May 2010) online: <http://www.lsuc.on.ca/media/may3110_oclnreport_final.pdf> [OCLNP]; Ontario, Attorney General of Ontario, Report of the Legal Aid Review 2008 (University of Toronto, 2008) (Prepared by Michael Trebilcock) [Trebilcock]; Canadian Bar Association, Canada's Crisis in Access to Justice (Submission to the United Nations Committee on Economic, Social and Cultural Rights on the occasion of the consideration of its review of Canada's Fourth and Fifth Reports on the Implementation of the International Covenant on Economic, Social and Cultural Rights, April 2006), online: <http://www.cba.org/CBA/submissions/pdf/06-61-eng.pdf> [Crisis in Access]; Vicki Schmolka, Making the Case: Right to Publicly-Funded Legal Representation in Canada (Prepared for the Canadian Bar Association, February 2002); Lisa Addario, Getting a Foot in the Door: Women, Civil Legal Aid and Access to Justice (Prepared for the National Association of Women and the Law, 1998).

commonly expressed concern is that the lack of legal representation places unrepresented parties at a disadvantage in the adversarial process. The result is real and apprehended inequality in the judicial process and a consequential detrimental impact on interests of the unrepresented party. Persons who are not parties to the action may also be directly and indirectly affected. The specific outcome in a case may affect their interests, the ruling in the case may entail reinterpretation of a law of general applicability and affect them because they are similarly situated, or the case may be relied on as a case precedent in a subsequent case to which they are a party. Thus, the effects of lack of representation of one or more parties in one case may have a broad societal impact. Moreover, where the members of an identifiable group in Canadian society are disproportionately unrepresented or under-represented before the courts, laws regulating activities and issues affecting members of that group will often be interpreted and applied without the benefit of rigorous analysis in an adversarial process. This appears to describe the circumstances of a number of identifiable groups in Canada, is contrary to the collective public interest, and raises equality issues under s. 15 of the Charter and international human rights conventions. The failure of government to ensure that adequate legal aid or other forms of legal representation are available to women, children, aboriginal persons, and members of other vulnerable groups in Canada for the purpose of protecting and enforcing their legal rights continues to be the subject of negative comment by the Committee on the Elimination of Discrimination Against Women.[5]

Rather than focusing on the adverse effects of lack of legal representation for the interests of the individual parties in an adversarial system, this essay examines how the lack of legal representation for one or more parties to legal proceedings affects the legal process, legal deliberation and the decision. The focus is on the quality of justice rendered in the legal system. The comparative advantage or disadvantage that legal representation confers on individual partisans in an adversarial system is acknowledged, but the analysis focuses on the quality of the decision-making achieved in the legal process and the impact on the collective public interest in the administration of justice, not on arguments about equality or competitive advantage between individuals, as such. The focus is not on "fair fights" or "level playing fields," but on identifying the prerequisites of adequate decision-making processes as a means to ensure that the legal process leads to well-grounded, well-reasoned decisions. "Equality of arms", as such, does not guarantee either adequate advocacy or sound decisions. The argument here is instead that: 1) legal representation and advocacy on behalf of parties to a legal process is ordinarily necessary to ensure that the judge, or other adjudicator or decision-maker, has access to the full range of information, perspectives, alternate interpretations, and other resources required to render informed, well-reasoned decisions; and 2) the quality of the deliberation and decision-making that takes place in legal proceedings, of any

[5] Convention on the Elimination of Discrimination against Women, Concluding observations of the Committee on the Elimination of Discrimination against Women, UNCEDAW, 42d session, UN Doc CEDAW/C/CAN/CO/7, (2008) at paras 21 & 22.

type, is the ultimate measure of whether the public interest in the administration of justice is well-served.

In the case of court proceedings, full and effective participation by all the parties is one of the most effective means available to ensure that a presiding judge will have an opportunity to hear the entire range of perspectives and views that have a bearing on the issues and an opportunity to ask for clarification of submissions, as needed. This is most reliably achieved where the parties are represented by counsel and it is not difficult to identify the objectives competent advocacy serves.

> As a consequence of the presentation of the diversity of perspectives and views bearing on the issue to be decided--whether it involves application of a rule or law and policy-making functions, the decision-maker will ordinarily acquire some or all of the resources required to form a deliberate, informed, and conscious view and to that same extent will be able to make a decision that is less subject to influence by unconscious partiality and any biases and preconceptions that he or she brought to the proceedings.[6]

Bias, partiality, and preconceptions are matters of grave concern for the conscientious judge. She recognizes that her socialization, language, culture, and life experience shape her perceptions and reasoning process. The parties appearing before her often have knowledge and experience of subjects and issues that are unknown to her. She realizes she must be cautious when making inferences and drawing conclusions from the evidence. She knows that it is easy to make assumptions that are incorrect and rely on generalizations that lack validity without even realizing that one has done so. She is also aware that many biases that could influence fact-finding and legal reasoning are to some extent unconscious.[7] Like any judge, she strives to be impartial. But she can only be confident that her decisions are well-grounded and soundly-reasoned if the hearing process is conducted in a manner that permits her to acquire a comprehensive understanding of the evidence and the issues in the case. When one or more parties lack legal representation, it is ordinarily

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[6] Lucinda Vandervort, Legitecture---the theory and practice of institutional legal design: 'Like Lear, every decision-maker needs a Fool!' (6 October 2011) 1-21 at 15 [unpublished, archived with author][Vandervort].

[7] Cognitions, whether explicit and conscious or implicit and unconscious, are based on the schema and maps we use to organize our experience; to identify, categorize, and analyze or assess things, behaviour, and other people. The term "implicit bias" refers to unconscious biases in attitude (evaluative/ judgmental) or belief (stereotypes). Biases of which we are conscious are "explicit biases." For a brief introduction to implicit bias and a topical bibliography, see Jerry Kang, Implicit Bias: A Primer for the Courts, (Prepared for the National Campaign to Ensure the Racial and Ethnic Fairness of America's State Courts, August, 2009) available on the National Centre for State Courts online at http://ncsc.org: < http://wp.jerrykang.net.s110363.gridserver.com/wp-content/uploads/2010/10/kang-Implicit-Bias-Primer-for-courts-09.pdf >.

impossible to be confident that all essential aspects of the case have been adequately presented. That undermines the integrity of the judicial process and places the judge in an untenable position. The image of Justice wearing a blind-fold assumes a new and twisted, ironic meaning.

> …[I]f decision-makers are to have a well-grounded confidence that their decisions are valid even though they will inevitably bring implicit biases to the decision-making process, they need access to thorough education on the issues and the contexts in which such issues typically arise. Proceedings may often need to serve educational functions; this has implications for the conduct of legal proceedings and for the administration of the judicial system.[8]

The public interest requires judicial decisions to be informed, well-grounded on evidence, and soundly-reasoned. Insofar as lack of competent representation undermines attainment of this objective, the overall quality of decision-making is lower.

> That is contrary to the public interest in the establishment and maintenance of a system for the administration of justice that functions and is seen to function, in a manner consistent with the rule of law. The harm to the administration of justice and the public interest is separate and distinct from any harm to the personal interests of the unrepresented party or parties.[9]

(B) Legal advice should not be contingent on the filing of an action or application

One measure of whether a legal system functions well is its success in resolving legal questions and potential disputes long before recourse to the courts becomes necessary. Significant resources can be saved through advance planning that maximizes dispute avoidance. This is widely appreciated in the business community and the same rule of thumb applies generally. But the average person can only enjoy these benefits if legal information and advice is available in a form that can be understood and is readily accessible through service delivery mechanisms in the community. This is an issue that has been discussed well and at length by others.[10]

[8] Vandervort, *supra* note 6 at 15.

[9] Vandervort, *supra* note 6 at 16.

[10] Selected Reform Initiatives, *supra* note 3 at 10-12 on point of entry assistance; Trebilcock, *supra* note 4 at 80-108; OCLNP, *supra* note 4, passim.

We all benefit when members of the community have an opportunity to organize their affairs in a manner that protects their interests and the interests of their families without recourse to legal action. It is not in the collective interest for the limited resources (e.g., time, money, attention, or other resources) of members of the community to be diverted into the prosecution or defence of legal actions, especially when the need for formal proceedings could have been easily avoided by the dissemination of legal information, advice and planning. Some individuals and groups who lack ready and affordable access to legal information and legal services use informal, traditional, and community-based approaches to organize their affairs, and resolve disputes and claims within their social circle or cultural group.[11] When such arrangements prove inadequate or fail to provide adequate protection for Charter-protected rights and freedoms, affected parties need to have the option of recourse to the legal system and the assistance it may be able to provide. At present, some people just 'give up'.[12]

Legal advice in advance of formal legal proceedings is also essential insofar as the choices a party makes in the pre-hearing or pre-trial period may affect the outcome. Examples include the collection and preservation of evidence, and decisions and actions that may prove prejudicial for the rights or interest of a party.

> When legal representation is limited to the submission and hearing stages of proceedings and does not include the pre-hearing, investigation, and case development stages, some parties will participate in legal proceedings without an adequate understanding of the issues or a meaningful opportunity to take steps and make choices in the period prior to commencement of the proceedings to advance or protect their interests or to collect, preserve, and analyze relevant evidence.[13]

Consider, for example, the potential impact of lack of access to legal representation and advice in the pre-hearing phase for a mother whose children are subject to a state custody or guardianship application. In JG[14] the Minister of Health and Community Services of New Brunswick sought to extend an order granting the Minister custody of the appellant's three children for an additional six months. The appellant had applied for legal aid and been refused pursuant to provincial policy in

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[11] OCLNP, *supra* note 4, at 27 reported that their research indicated that such alternate forms of assistance appear to be most often used by "vulnerable persons" although the empirical data on this issue was too limited to provide a basis for reliable conclusions.

[12] OCLNP, *supra* note 4, at 21 reported that 14% of respondents stated that they had had a civil legal problem within the previous 3 years for which they sought no assistance.

[13] Vandervort, *supra* note 6 at 16.

[14] New Brunswick (Minister of Health and Community Services) v G (J), [1999] 3 SCR 46.

force at the time of her application. In the majority judgment on the appeal Chief Justice Lamer stated:

> I have concluded that the Government of New Brunswick was under a constitutional obligation to provide the appellant with state-funded counsel in the particular circumstances of this case. When government action triggers a hearing in which the interests protected by s. 7 of the Canadian Charter of Rights and Freedoms are engaged, it is under an obligation to do whatever is required to ensure that the hearing be fair. In some circumstances, depending on the seriousness of the interests at stake, the complexity of the proceedings, and the capacities of the parent, the government may be required to provide an indigent parent with state-funded counsel. Where the government fails to discharge its constitutional obligation, a judge has the power to order the government to provide a parent with state-funded counsel under s. 24(1) of the Charter through whatever means the government wishes, be it through the Attorney General's budget, the consolidated funds of the province, or the budget of the legal aid system, if one is in place.[15]

In concurring reasons authored for herself, Gonthier, and McLachlin JJ, L'Heureux-Dubé J observed that:

> …it is likely that the situations in which counsel will be required will not necessarily be rare. Proceedings will in many cases be complex, and the consequences, when the child may be removed from the home, are generally serious. Funded counsel must be ordered whenever a fair hearing will not take place without representation. The determination of this question must take into account the important value of meaningful participation in the hearing, taking into account the rights affected, and the powerlessness that a reasonable person in the position of the claimant may legitimately feel when faced with the formal procedures and practices of the justice system. The trial judge's duty to ensure a fair trial may therefore, when necessary, involve an order that the parent be provided with legal counsel, and trial judges should not, in my view, consider the issue from the starting point that counsel will be necessary to ensure a fair hearing only in rare cases.[16]

Lamer CJC contemplated that requests for state-funded representation would be considered on a case-by-case basis.[17] But in the context of an application

[15] *Ibid* at para 2.

[16] *Ibid* at para 125.

[17] Following the decision in JG, the various provinces amended their legal aid policies to ensure that in the future legal aid applicants would be eligible, subject to the usual means tests, for funded legal representation for the purpose of defending their parental custodial rights against the state.

by the state for custody, representation at the hearing itself is arguably too little, too late. Even when an adjournment is ordered to permit the parent time to obtain and instruct counsel, by the time of the date scheduled for the hearing, the opportunity to make crucial choices and take critical steps is already lost. Evidence that could have been collected and preserved may be lost and members of the family unit will likely have been questioned on a number of occasions without the benefit of legal advice or assistance. Preparation for proper cross-examination of state witnesses requires discovery of notes and discussions with family members to determine whether the notes appear to be accurate and complete. Time may be required for consultation with service providers and expert witnesses. There may be issues related to culture, religion, child development, family structure, or medical and employment history that need to be researched and discussed with the client. The cultural significance of events or relationships, etc., may affect interpretation of the law and the evidence in some material respect and change the manner in which key aspects of the case might be understood and handled by the presiding judge. Thus, although recognition of a right to state-funded counsel at the custody hearing is significant, it may not fully address the need for legal assistance and representation in the period prior to the hearing or even necessarily allow counsel sufficient notice to prepare adequately for the hearing.

In an indeterminate number of cases, ready access to legal representation, advice, and appropriate referrals to community-based services for the mother and her children early on, perhaps even before there is a potential "case" to be considered, could lead to resolutions that support the well-being of family members and the stability of the family unit without a custody application ever being contemplated or brought by the state. Here, as in the civil, family, and administrative context overall, legal advice and services that have the potential to eliminate any need for formal legal proceedings will generally be of significant value to individuals, families, and the community.[18]

In the event that a case proceeds and is formally heard, the quality of the evidence adduced and the submissions made will probably be higher in a custody case if the custodial parent had legal assistance and advice well before the hearing stage, preferably with continuity in the service provided. This should be of assistance to the judge or other decision-maker who presides over the hearing and must decide

[18] Trebilcock, OCLNP, and Crisis in Access, all *supra* note 4, discuss the disruptive effect unresolved legal problems have on the lives of individuals and families; it is widely recognized that an unresolved problem, especially for a person who is already vulnerable, can "cascade" into an entire series of related legal and non-legal problems of ill-health, disrupted family life, loss of employment, poverty, homelessness, etc. Those who are not vulnerable or socially marginalized at the outset may become less resilient under the stress of their legal problems, develop other problems not previously experienced, and become less and less capable of addressing any issues effectively. Failure to fund basic legal services for those who cannot otherwise afford them is arguably a false economy, 'a penny wise, pound foolish' approach.

the case. Judges likely prefer that a custodial parent be assisted at the hearing by counsel who not only knows the file but has had an adequate opportunity to research and analyse the evidence and the issues as they arise in the unique circumstances of the case. To deny a presiding judge the benefit of having the parents' response to the application presented by counsel who is familiar with the evidence, the issues, and the personalities and perspectives in the case, not simply a copy of the state's application and supporting documentation, such as it may be, is hardly a recipe for well-informed and sound decision-making. There can be no real question where the public interest lies in such instances. Similar considerations arise in most other contexts in which a decision must be made by a judge or an administrator. Formal legal decisions should be decisions that are correct in law and factually accurate. Judges require and should have the assistance of counsel who has had adequate time and resources to become well-informed about the case and prepare for the hearing.

All aspects of the legal system are publicly funded in Canada, except legal representation for parties. Only government and persons for whom publicly funded representation is ordered by a judge or provided pursuant to legal aid regulations are represented at the public expense. This is an anomaly that needs to be addressed and remedied. To fail to do so only guarantees that judges and other decision-makers will often not have the assistance that they require from counsel and, as a direct consequence, the legal system will continue to fail to achieve the uniformly high standards of performance in the administration of justice that are required of it and that it could and should attain. This state of affairs is contrary to the public interest.[19] But legal representation is not the only factor that affects meaningful access and the quality of the administration of justice.

[19] Many discussions about legal aid focus on cost, in particular: 1) legal fees; and 2) the financial burden an expansion of services will impose on taxpayers. The evidence suggests, however, that the net cost to the public purse may be more modest than anticipated and may also generate public revenue savings due to reductions in costs in the categories of health care and hospitalization, unemployment, welfare, family dysfunction, crime, and corrections. See Evelyn L Forget, "The Town with No Poverty: The Health Effects of a Canadian Guaranteed Annual Income Field Experiment" (2011) 37:3 Canadian Public Policy 283 at 283: "An 8.5 percent reduction in the hospitalization rate for participants relative to controls, particularly for accidents and injuries and mental health. …[P]articipant contacts with physicians declined, especially for mental health, and…more adolescents continued into grade 12. We found no increase in fertility, family dissolution rates, or improved birth outcomes. We conclude that a relatively modest GAI can improve population health, suggesting significant health system savings".

It would be useful to have similar Canadian data from controlled studies of the overall net impact of Access to Justice models on the public purse, including items such as increased public revenue from consumer spending and income tax. The increased revenues that would flow into public coffers due to higher levels of participation in the workforce and increased consumer activity appear to be generally overlooked in discussions of the costs of publicly-funded legal aid. Measures that reduce the disruption of individual and family lives and the stress caused by unresolved legal problems likely enhance overall social well-being, especially where the service delivery model includes ample measures to prevent legal problems and resolve incipient disputes before they become disruptive. A community that enjoys a higher overall level of well-being is likely to have lower costs in all areas associated with ill-health and dysfunction of all types. It is conceivable that a universal system of publicly-funded legal services might well result in a significant reduction in the per capita requirements for beds in prisons, hospitals, and mental health facilities in Canada.

Findings of fact

Accurate fact-finding is essential for sound decision-making. Steps that tend to increase the accuracy of fact-finding should be identified, adopted, and incorporated into legal processes, both in the courts and in administrative settings.

(A) Draft findings of fact

Judges and other decision-makers are sometimes mistaken about the facts. Sometimes this has no impact on the outcome, sometimes it does. Sometimes the mistake is trivial, sometimes it is significant. Mistakes that do not appear to affect the outcome directly may nonetheless influence the judge's opinion on key issues. Erroneous and misleading assertions and omissions of fact and factual inference in the reasons for decision can also have secondary effects after the litigation is concluded. Errors may be due to misperception of the evidence, flawed reasoning about the evidence, sketchy note-taking, or simply lack of time for careful reflection, but an error is an error whatever the cause may be.

> It is not uncommon for decision-makers to arrive at findings of fact that include errors and omissions and conclusions of fact that are not based on the evidence. Bare beliefs, assumptions, and unverified generalizations are sometimes relied on in the process of making the inferences typically required to arrive at findings of fact. As a consequence, some decisions are based on inferences that have no demonstrably valid evidentiary foundation and are therefore indefensible.[20]

Factual errors undermine the actual and apprehended legitimacy of the judicial process; the impact of factual errors on the quality of justice rendered by the judicial process should not be under-estimated or disregarded. Judges, it is suggested, will welcome the introduction of measures that could be of assistance to them in avoiding factual errors and omissions.

> Release of draft findings of fact that explain the reasoning used to arrive at specific conclusions of fact serves two objectives: 1) the process of drafting written reasons for findings of fact requires the decision-maker to direct her mind to critical analysis of her own reasoning process; and 2) release of draft findings of fact permits the parties to assist the decision-maker to become aware of weaknesses in her reasoning. The latter may range from failure to appreciate the significance of the evidence, to errors in deductive inference, to reliance on one or more invalid or untested

[20] Vandervort, *supra* note 6 at 16.

> beliefs or empirical generalizations, to failure to consider alternate perspectives on the evidence.[21]

The parties will often be able to identify errors of fact that are due to misperception of the evidence or flaws in reasoning. There is no obvious reason, other than past practice, why the parties and their counsel should not have an opportunity to critique draft or provisional findings of fact issued by the judge before the reasons for decision are finalized.

> The overall quality of decisions rendered is higher when the parties to legal proceedings are afforded an opportunity to review and comment on draft findings of fact before the findings of fact are finalized.[22]

In some cases this process could lead the parties to adopt supplementary joint statements of fact. In other cases the judge might choose to reconsider certain findings of fact on the basis of points raised by the parties.

(B) Receipt of further written submissions from the parties

When the parties find errors and omissions in the draft findings of fact it will generally be most efficient for the parties to prepare, exchange, and file written submissions dealing with these matters. A second round of submissions commenting on the critiques prepared by the other parties should be permitted. In many cases the judge may not require further assistance from parties following the exchange of the written submissions critiquing the draft findings of fact. The additional time and resources required to exchange submissions is fully justified by the goal of sound decision-making.

(C) Hearing with oral submissions and argument to assist judge in finalizing the findings of fact

Either the judge or the parties might take the position that a hearing is needed to permit argument with respect to certain issues or to permit further evidence to be adduced to clarify key facts. A judge who determines that a hearing for either or both purposes would be of assistance to her in finalizing the findings of fact should not hesitate to hold the hearing. The judge could recall key witnesses and call witnesses not previously called by either party, as necessary, without the case for any party

[21] Vandervort, *supra* note 6 at 16-17.

[22] Vandervort, *supra* note 6 at 16.

being re-opened. This utilizes the current though rarely used power of a judge to call witnesses whose testimony is required although no party has sought to call them.[23] In many cases, further evidence will be unnecessary and the hearing will consist of dialogue between the judge and counsel for the parties about competing interpretations of the evidence on the record.

Reasons for decision

The argument for the release of draft reasons for decision is similar to that for release of draft findings of fact.

(A) Draft reasons for decision

The process of preparing draft reasons for decision:

> …helps to ensure that the legal norms (principles, rules, policy) that provide the basis for the decision are identified and the reasoning process relied on to arrive at the decision is articulated in explicit terms.[24]

Release of draft reasons makes it possible for the parties and their counsel to submit critical comments on the draft reasons that may be of assistance to the judge in drafting the final version of the decision. In drafting the reasons for decision the judge may find it necessary to make additional findings of fact not previously made and released in draft form.

(B) Exchange of further written submissions by the parties

Written submissions critiquing the draft reasons would identify errors, omissions, alleged misconceptions, and flawed reasoning and, where appropriate, might include observations about the collateral effects of the draft decision on non-parties. At this stage, in cases where the decision has the potential to change the law by re-interpretation, submissions from interveners on behalf of interested non-parties may be useful to the judge and should be considered. These proposals are all based on the premise that dialogue between the judge and counsel for the parties and any interveners will often assist the judge in drafting reasons that are clearer, more

[23] This may be seen as a step along the "continuum" (Cf. Selected Reform Initiatives, *supra* note 3 at 20) towards a hybrid adversarial-inquisitorial system. Insofar as it serves to ensure that the case has an adequate evidentiary base, and cross-examination by the parties is permitted, it is hardly inappropriate. In the end, the judge is responsible for any decision made and should be permitted to take steps to ensure that there is an adequate evidentiary foundation for any decision that cannot be avoided on evidentiary or other grounds by a non-suit. Further discussion of these issues is needed to compare cases arising in a family or administrative law context with civil law cases dealing with tort liability or contract claims, for example.

[24] Vandervort, *supra* note 6 at 17.

soundly-reasoned, and more likely to address concerns and perspectives raised by the parties and the broader community, and less likely to have unintended collateral effects on non-parties.[25]

(C) Hearing with oral submissions and argument to assist judge in finalizing the reasons for decision

Following the exchange of written submissions critiquing the reasons for decision, either the judge or one or both of the parties might take the position that a hearing is needed. A judge who determines that a hearing would be of assistance to her in finalizing the reasons for decision should not hesitate to hold one.

SUMMARY

These proposals for critiques and commentary on the draft findings of fact and the draft reasons for decision are intended to nurture and build on the creative collaborative potential of critique and dialogue between the judge and counsel. The proposals require counsel to engage in further work in order to assist the judge with multiple aspects of the decision-making task, while reserving ultimate responsibility for the final decision to the judge. The general working proposition is that judges and other decision-makers must be prepared to adjust procedures and practices in a flexible manner as needed to facilitate effective communication. The substantive challenges of individual cases must be permitted to shape procedure. Procedure and practice is a means to justice, not an end in itself, and must not be permitted to preclude steps and initiatives required to fulfill the objectives of the justice process, subject to constitutional protections.

Arms-length critics or legitects

Diversity on the bench clearly strengthens the capacity of the judiciary to engage in debate that reflects a range of perspectives and experience. A further

[25] Where a decision changes the interpretation or application of a law, it is arguably only appropriate that interested non-parties have an opportunity to intervene for the purposes of making submissions. But it will often not be feasible for non-parties to do so because interventions require planning and legal representation. Organizations are more likely to be in a position to seek intervener status than individuals are, but even a financially well-endowed organization is unlikely to have the institutional capacity required to intervene effectively in more than a few carefully selected cases. Only if the precedent system were discontinued prospectively, such that the decision in each case would affect only that case, and all changes in the law came about by a legislative or rule and policy-making process, would interveners cease to have a role in judicial proceedings in individual cases. Individuals and organizations would then influence law-making and law reform, rule, regulation, and policy development through processes designed to facilitate citizen 'input' (submissions to the decision-maker(s)) or 'direct participation' (decision-making role assumed by citizens generally or a community citizens board or panel).

option is the use of arms-length non-peer critics employed by the courts to assist judges much as clerks do. These critics would be individuals with legal training and training in "legitecture"[26] who would review and comment on legal decisions and reasons for decision by administrators and judges and monitor the operation and effects of the rules of courts with a view to strengthening the overall quality of legal deliberation by judges and administrative decision-makers.[27] A court system or administrative agency could also establish a separate division of legitects, independent from the bench or hearing panel to act as intervener critics in legal proceedings on a non-partisan basis for the purpose of enhancing the quality of fact-finding and deliberation. Legitects might also be retained by individuals and groups in the community to assist with case development and litigation strategy, including the collection and analysis of evidence. Meaningful access to justice within a constitutional framework under current social and political conditions requires the proficient exercise of skills and knowledge in legal analysis and deliberation in relation to diverse subject matters in a social and cultural environment that is characterized by differences in interpretation and significance. Decision-makers, including citizens, administrators, or trial or appellate judges, could all benefit from being able to call on the assistance of well-trained legitects.[28]

> Institutionalization of these critical functions would acknowledge their value as a means to ensure the attainment of high standards in decision-making. A secondary effect would be to affirm, as a matter of general

[26] Vandervort, *supra* note 6, where a new discipline of "legitecture" as "the theory and practice of institutional legal design" is proposed and discussed. There it is suggested that: "A basic legitecture program would include training in law and legal theory, critical reasoning, logic, rhetoric, communication theory, phenomenological theory and methods, epistemology, ethics and value theory, psychology, political theory, policy analysis, statistics, and qualitative and quantitative research methods. Specialists would, in addition, be trained in one or more substantive disciplines and demonstrate competence in critical analysis and empirical research using mixed methods in specific area(s) of specialization," *ibid*, n 18.

[27] Expanded in-house court resources for specialized non-legal research and analysis could be one response to questions raised about the use of expert opinion evidence in Anderson v St. Jude Medical Inc.,[2011] OJ No 1956 by John Chapman & Adam Stephens, "Professor, Take the Stand: Class proceedings may require a re-thinking of evidentiary rules" Lawyers Weekly, 14 October 2011 at 9. Courts, especially specialized tribunals that repeatedly confront certain specific issues in the cases they hear, may require such resources to strengthen their rule and policy-making capacities. Such issues arise frequently in the law of evidence at present. A strong research and rule and policy development capacity could also be useful whenever the governing statute, if any, is worded in general terms and few regulations have been promulgated, effectively delegating the "regulatory" task to the judiciary. In the family law area, for example, the regulatory task is, for the most part, effectively delegated to the courts. Detailed and specific criteria such as those provided by the Child Support Guidelines, are rare. An expansion of in-house court resources for research and analysis would support collegial judicial initiatives undertaken to address recurring and emerging issues in a systematic fashion.

[28] Following the recent decision in Canada (Attorney General) v PHS Community Services Society, 2011 SCC 44 [Insite] courts and potential litigants will clearly continue to require the assistance of persons who are capable of collecting and analyzing evidence of the effects of laws and state action, including the exercise of discretion by government, on Charter-protected rights.

> principle, that initiatives and innovations designed to improve the quality of legal decisions and decision-making are legitimate and appropriate.[29]

Development of the discipline of "legitecture" and a cadre of "legitects" would also strengthen the collective societal capacity to generate systemic responses and solutions to institutional design problems that impede meaningful access to justice at present.[30] This would advance the public interest in the administration of justice.

Written reasons

Thus far in this discussion the tacit assumption has been that reasons shall be given for decisions, declarations, orders, etc., and it has been further assumed that these reasons shall be in writing, not merely delivered orally. That assumption would likely to be rejected by many decision-makers as impractical given the time and effort required to draft written reasons. Oral reasons, recorded on audio tape are an acceptable alternative if they are also transcribed. Either will suffice, but in all cases there should be a written record of the decision and reasons for the decision that is readily accessible by the public. This is imperative to provide a comprehensive record of individual decisions and the reasoning process relied on to justify them. Without records of decisions and reasons for decision that are readily accessible to the public, government, journalists, academics, judicial councils, and court administrators, the particulars of the day-to-day administration of justice are shielded from effective scrutiny. This makes it more difficult to determine how law affects society, what the effects of our laws as interpreted and applied are, how effective specific laws are as tools to achieve the objectives they were designed to advance, whether a law has unanticipated adverse effects, is ambiguous, over-broad, under-inclusive, and whether and in what respects it requires restatement or reform. When there are no accessible written reasons, the public is largely dependent on journalists' reports about both the proceedings and the outcome, including any oral reasons

[29] Vandervort, *supra* note 6 at 18.

[30] C.f. Trebilcock, *supra* note 4 at 81-82. The observations by Professor Trebilcock: "The general body of citizens of Ontario is entitled to assurances that legal aid resources are being expended to facilitate the smoother, more timely, and more effective resolution of disputes, rather than the opposite - underwriting seemingly interminable wars of attrition that may appeal to some lawyers, but to almost nobody else. Moreover, they have legitimate cause to ask why costly legal aid resources are being used to prop up and sustain underlying dysfunctions in the justice system and in some cases to exacerbate them, rather than deploying those same resources to repair those dysfunctions at their foundations. In their daily economic and social environments, they are expected to adjust to ever more rapid processes of change, and they wonder why the justice system seems largely impervious to similar processes of change but instead, in their perception, resembles some baroque institutional period-piece from a by-gone age. I believe that these attitudes should be taken seriously, because they are largely true. The implications for reform of the legal aid system are that such reforms must be seen as part of a broader project of progressive and incremental reform of the justice system at large."

delivered in open court. Journalists are understandably selective in their reporting and the information they transmit is not raw data; it has already been interpreted. Transcripts of court proceedings are expensive and few court proceedings are well-attended by the public. Oral reasons are typically recorded on audio tape but not transcribed unless counsel for one of the parties requests that this be done, often only in contemplation of a possible appeal.

Reasons for decision are essential when an individual seeks judicial review or appeals a decision, but they are also essential at a systemic level to enhance the general accountability of decision-makers and administrators of the legal system to the public and to facilitate internal and external scrutiny of the administration of justice. Written and accessible reasons for all judicial and administrative decisions would be invaluable as a resource to secure a new, more concrete, and therefore more meaningful level of accountability to the public, quite independent from the benefits that may accrue to the parties in specific cases. At present, the practical inaccessibility of the reasons for many judicial and administrative decisions impedes public knowledge, scrutiny, and criticism of the actual functioning of the administration of justice. This is contrary to the public interest. The absence of effective accountability mechanisms is anomalous in a system of self-government based on the rule of law.

Reporting the reasons on settlement of a decision, declaration, or order

No one knows how often Canadian justice 'mumbles' or speaks in ambiguous terms with the result that the wording of a decision, declaration, or order fails to address or lacks clarity with respect to one or more issues that are crucial for its interpretation and enforcement. Sometimes the reasons for the decision provide necessary and sufficient clarification. When counsel for the parties can amicably agree on an interpretation and wording for the order in question and there is no risk of future uncertainty because of the ambiguity, no further formal steps are required or apt to be taken before the order is entered. When this is not the case because the reasons for decision or judgment do not address the issue, the parties may find it necessary to request a further hearing before the judge to resolve the ambiguity and settle the wording. On occasion, comments by the judge at this further hearing reveal for the very first time that the judge is not aware of or does not fully understand crucial elements of the evidence in the case or the relevant law or both. Clearly this is an extremely unfortunate and potentially awkward situation and a cause for concern at the systemic level. In an ideal world, the judge would use the settlement hearing to sort out the outstanding issues, clearly and correctly, and vary the order as necessary; this is not an ideal world and that may not occur for a variety of reasons. In all cases, any supplementary reasons delivered on settlement should be transcribed and reported, or otherwise made available to the public, together with the original reasons for decision or judgment. This is necessary to provide an accurate representation of the practical outcome and, with that, a type of public accountability that does not

exist at present in relation to many judicial decisions.[31] Lack of access to this material by court administrators, researchers, government, etc., distorts the public's knowledge about the actual effects of current law, as applied, and shields a key aspect of the administration of justice from scrutiny.

Where an ambiguous and contradictory outcome is the result of an extended and expensive trial, it is unlikely that the parties will see themselves as "beneficiaries" of the "access to justice" they were accorded or be left with much trust in the judicial process. The practical consequences for the parties can be extremely dire where the effects of the decision are irrevocable or the parties are individuals of modest financial means. In the first case an appeal is pointless; in the second it is usually too expensive for the parties to even consider. In any event, an appeal in such a case could well be hindered by the state of the record, and might well result in an order for a new trial: again, hardly affordable by the parties in most cases. Regrettably, such outcomes do occur and are arguably symptomatic of the dysfunction that can result at present using current trial practices and procedures.

No party who is left with a decision that fails to address the central practical issues in the case in a legally correct and coherent manner will agree that their case was "heard" in any meaningful sense. Such outcomes raise serious questions about the quality of justice rendered by the judicial process, bring courts and judges into disrepute in the community, and explain why some people in Canada lack confidence in the justice system and simply avoid both lawyers and courts if at all possible. The problem appears to arise from poor communication with the judge in the course of legal proceedings; it could be significantly reduced, if not completely eliminated, by use of the proposals set out above providing for release by the judge of draft findings of fact and draft reasons for decision, the exchange of further submissions, and an opportunity for a further hearing and expanded dialogue between the judge and

[31] Reasons on settlement of orders are not routinely reported or otherwise made readily accessible by the public although they may be transcribed where they are required to perfect an appeal. The absence of reported reasons on settlement makes it difficult, at present, for researchers to ascertain the incidence and extent of disparities between what the law, correctly applied, provides, given the findings of fact and the judgment, and the practical effect of the final order in some cases. Ironically, at present a case may be used as a precedent based on the original reasons for judgment as reported even though the practical effect of the order as settled is quite different. No one knows how often there is ambiguity on crucial points, or inconsistency between the original reasons for decision or judgment and the practical effects of the final order as settled. In the future, hopefully, researchers may find it possible to examine examples related to specific cases and discuss the factors that adversely affected the legal process. Here it is possible only to raise these questions. It should be apparent, however, that within the framework of current trial procedure and practice, choices made in the conduct of the proceedings by counsel, the judge, or both, may contribute to clarity or confusion about the law, the evidence, and the practical import of the decision. Most readers with experience on either side of the bar will be aware of instances to which these comments apply.

counsel. In all instances, it should be incumbent on counsel to take affirmative steps to provide the presiding judge with genuine assistance.[32]

CONCLUSION

Many judges and legal professionals agree that the old ways of doing justice are not adequate to meet current challenges. Some would say that the legal system is in a state of crisis, if not worse. In any event, the challenges are quite real and some systemic and fundamental changes in how the legal system does justice appear to be needed. In particular, this essay has argued that judges and other judicial, quasi-judicial, and administrative decision-makers must be entitled, and seen to be entitled to all the resources and institutional structures and supports they require to fulfill their responsibilities to an appropriately high standard. The public interest in the administration of justice is not and cannot be truly well-served under the present arrangements. This is not acceptable; inaction is not an option.

[32] Assignment of cases to judges who have some expertise in dealing with the issues raised may be useful, but that is no substitute for a process that is effective to ensure that the presiding judge actually understands the evidence, the law, and the submissions of counsel in the case at bar.