

Questions and Answers About Access to Justice

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What a pleasure it is to speak at this fine Law Faculty about access to civil and family justice. There is no more pressing or important challenge facing the legal system. And law students, as the future of our profession, and law faculty, with their important responsibilities in research and teaching, should be key players in our present and future efforts to improve access to justice. My work over the past several years as chair of the Action Committee on Access to Justice in Civil and Family Matters has had the effect of persuading me that we all must work together and do a great deal more to help address the access to justice challenge.

I will pose four questions and suggest some answers in the hope that this will stimulate your own thinking about what we can do to close the access to justice gap in our country.

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I. WHAT IS ACCESS TO JUSTICE?

There is of course a large body of literature about what access to justice is or should be. I will not wrestle with all the fine distinctions or try to resolve the competing points of view here. But I will suggest that we need to think carefully about what we mean by access and what we mean by justice.

I start with a working definition of access to justice, the one that we used in our work on the Action Committee's 2013 report, *A Roadmap for Change*.¹ We said that people would have appropriate access to justice if they had the knowledge, resources, skills, and services needed to meaningfully address their civil and family legal problems.

Note that this short statement contains some potentially transformative ideas in relation to both access and justice. It does not limit or even focus on the ability of people to get the help of lawyers, let alone go to court. Let us turn first to the notion of "access."

While of course courts and lawyers are indispensable aspects of our justice system, access to them ought not to be viewed as the beginning and the end of the sorts of access that are required. People may not need those services to address their issues; and even if they do, they will likely also require knowledge and skills and other types of resources. We must keep the full panoply of legal needs in mind when we are thinking about what access means.

Similarly, we should not equate justice with the outcome of a court proceeding. We have a strong – and laudable – tradition of fair process and of course fair process is a significant part of what we think of as justice. But we should also pay attention to just and practical outcomes. The fairest procedures in the world do not satisfy the need for access to justice if they cannot produce just and practical outcomes for the people who need them. There must be a balance between fair process and practical and just outcomes – as it was often expressed in an earlier time, procedure is the handmaiden of justice: it exists to ensure that justice is done. Fair process is not the end, but rather a means to an end.

¹ Action Committee on Access to Justice in Civil and Family Matters, *Access to Civil & Family Justice: A Roadmap for Change* (Ottawa: October 2013) [*Roadmap*].

Many think that our justice system is somewhat out of balance in this regard. We are, they say, process heavy and outcomes light. As we wrote in the *Roadmap for Change*, our civil and family justice system is “too often incapable of producing just outcomes that are proportional to the problems brought to it or reflective of the needs of the people it is meant to serve.”² Access to justice cannot mean unlimited resort to formal processes but rather to a just and practical outcome achieved through a process that is fair and effective, one that keeps the demands of fair process and just outcomes in a sensible balance.

With that working definition of access to justice in mind, I turn to my second question.

II. WHY SHOULD WE BE CONCERNED ABOUT ACCESS TO JUSTICE?

I will not dwell on this question. All of you, I am sure, are aware that we have a large and growing gap between what our system of justice ought to provide and the ability of people to have meaningful access to it. As we said in the *Roadmap*, “The civil and family justice system is too complex, too slow and too expensive. ... [T]he system continues to lack coherent leadership, institutional structures that can design and implement change, and appropriate coordination to ensure consistent and cost effective reform. Major change is needed.”³

Everyone in the legal profession has a professional responsibility to work to improve the administration of justice. But the access to justice challenge has special significance for law students. During your legal careers, you are going to see a transformation of how legal services are offered to the public. This transformation will bring with it challenges and opportunities. Some of those opportunities relate to making legal services available to a wider segment of the public in a way that makes economic sense both to them and to the lawyers providing the services. We need more innovative approaches that will facilitate delivery of legal services at lower cost but with appropriate return to the legal professionals providing

² *Ibid* at 1.

³ *Ibid* at iii, 1.

them. You are on the cusp of that transformation and will be part of it whether you want to be or not.

But there are more fundamental reasons to be concerned about the access to justice gap. That gap has serious adverse effects on the people who fall into it, adverse effects that go far beyond the legal system, but engage health, social services, and other agencies. Research is helping us understand the costs of not having reasonable access to justice. In other words, if you think that providing access to justice is expensive, look at the costs of not providing it.

Beyond the toll of human suffering and public expense resulting from inadequate access to justice, there are broader societal implications. Too often we forget that an effective civil justice system underpins important aspects of our civil society such as the protection of human rights and security of economic activity. An effective civil justice system ought to be considered an essential public service. If there is no meaningful access to or vindication of our civil and economic rights, we have to ask if those rights exist in any meaningful sense.

To sum up, the gap in access to justice causes human suffering, drives up social costs, and even puts into the question the viability of our civil society. If that does not justify deep concern about this problem, it is hard to know what would.

This brief discussion of what access to justice is and why we should care about it brings me to my third question.

III. WHAT HAVE WE DONE TO CLOSE THE ACCESS TO JUSTICE GAP?

There is a lot of good news on this front – a lot more than I can cover here. But let me tell you something about the work of the Action Committee on Access to Justice in Civil and Family Matters which I have been chairing at the invitation of Chief Justice McLachlin since 2009.

The Committee was convened by the Chief Justice and it is the broadest coalition of organizations and individuals concerned about access to justice ever assembled in Canada. It consists of representatives of the judiciary, the bar, senior justice officials in federal and provincial governments, pro bono organizations, legal aid organizations, public legal information organizations, several law related NGO's, and members of the public.

We quickly identified four priority areas – access to legal services, court process simplification, family law and prevention, and triage and referral – and struck working groups to study each area and advance proposals for change. Those reports led to our October 2013 report, the *Roadmap for Change*.

In that Report, we focused on what we called the “implementation gap” – the wide gap between the many and repeated calls for reform and achieving meaningful change. We identified factors that contribute to that gap and proposed some strategies to help to address them.

We thought that the leaders of the system were not yet persuaded that significant change was required. We addressed this by setting out in some detail the case for change. And this has helped to bring about greater awareness of and commitment to the issue at the leadership of the profession, the judiciary, and the ministries of justice.

We thought that responsibility for reform was too diffuse, with some of the key actors including the government, the judiciary, and the bar, operating in silos without sufficient cooperation and coordination. We proposed that each jurisdiction should have a multi-sectoral access to justice group that would promote cooperation and coordination across the sectors and provide effective leadership of reform efforts. These sorts of leadership groups have been set up in nearly every Canadian jurisdiction. We are starting to see real commitment by justice system actors to more collaborative approaches to change.

We thought that a lot more than tinkering was needed and that a new culture of reform was required. We tried to spell out what that change would look like by setting out six principles for reform. The first one was “put the public first.” These principles have got considerable traction, including this first one. Justice system professionals now nearly unanimously recognize the importance of involving the public in justice system reform efforts. The provincial/territorial access to justice committees have taken this to heart: most include representatives of the non-legal public.

We thought that we should conceive of our civil justice system as a continuum in which formal adjudication by a court was only a part. This idea is widely accepted at the conceptual level, but we have miles to go before the concept is transformed into concrete action.

We thought that there was an urgent need for more action-oriented research. We are now seeing a flourishing of academic interest. There are

access to justice centres at the University of Victoria and the University of Saskatchewan as well as the long-established Canadian Forum on Civil Justice at Osgoode Hall Law School, York University. A major research initiative on the Costs of Justice is just winding down while another, multi-pronged access to justice research project is gearing up. There are now several doctoral students in our law faculties doing research on access to justice.

Overall, there is much positive momentum to report. But significant change on the ground is hard to achieve and slow to come. Making the sort of change that is needed will require a sustained effort over a long period of time.

IV. WHAT CAN YOU DO?

There are many things that law students and the legal academy can do to further the cause of improved access to justice. Universities are built on the values of research, teaching, and service. Each of these values supports enhanced engagement with access to justice.

First, law students are not only the lawyers and judges of the future; they are also citizens, and often citizens in leadership roles in society. Your personal engagement with the issue of access to justice should lead you to be a better-informed citizen and leader. Lawyers ought to be knowledgeable about the problem and possible routes to improvement. Lawyers ought to be vocal advocates and strong leaders of change.

Second, law students and law professors are making and ought to continue to make important contributions to much-needed research about our civil and family justice system. Too often in the past our reform efforts were based on “anec-data” – anecdotal reports of what was going wrong in the system and what would fix it. Too often, the result was little real improvement and unintended adverse consequences. There is an enormous need for action-oriented, empirical research about the justice system and for quantitative and qualitative evaluation of our reform efforts. There is an enormous need for innovation in delivery of legal services. University-based research is already making important contributions in these areas, but much more could be done.

Third, in the area of service, law students are stepping up to the plate all across the country. They are participating in legal clinics, pro bono work, and social development initiatives in large numbers. But of course,

there is much more to be done. Clinical education, in particular, has the potential to provide much-needed professional training to law students as well as to help meet the mountain of unmet legal need in the community. Clinical programs are flourishing, but more opportunities for clinic placements are needed. Indeed, I think that a clinical placement should be part of every student's legal education.

In all of these ways, law students and legal academics can make important contributions to improving access to justice. That issue, after all, is the most important issue facing our legal system, and its biggest challenge.