Preserving Public Confidence in the Courts and the Legal Profession

THE RT. HON. BEVERLEY McLACHLIN, C.J.C.*

I. INTRODUCTION

April 17th, 2002, marks twenty years since the Canadian constitution was repatriated and the *Charter of Rights and Freedoms* came into force. The two decades since the *Charter* was adopted have brought enormous changes in how our justice system operates. Litigation has increased. It has become more complex. And what Michael Ignatieff calls "The Rights Revolution" has changed the way we—lawyers, judges and the public—think about the law. As we stated in the last performance report of the Supreme Court of Canada:

> . . . Canada's increasingly diverse population seems more assertive and more willing to challenge the perceived wisdom of its leaders—often in court. Advocacy groups bring to the fore societal as well as legal problems such as the unequal treatment of women, the situation of Canada's aboriginal people and the sexual abuse of children. [And] it is not just the fact of the growth that is important. The areas into which the new growth has taken the law are equally significant. Biotechnology, euthanasia, the rights of same-sex couples, aboriginal entitlements—the list goes on.[1]

These changes have brought the legal profession and the courts into new prominence. We face more demands and more responsibility. The solutions we find resonate throughout society as never before. And the public is increasingly knowledgeable and critical, demanding accountability of the justice system.

These challenges, already great, have been compounded by the events of September 11, 2001. It was said after the September 11th events that the world

---

* Chief Justice of Canada. Remarks from a Distinguished Visitor's Lecture at the University of Manitoba, Faculty of Law, February 1, 2002.

1 *Supreme Court of Canada Performance Report*—for the period ending March 31, 2001 (Ottawa: Canadian Government Publishing, 2001) at 7; and, Michael Ignatieff, *The Rights Revolution* (Toronto: House of Anansi Press, 2000), being the CBC Massey Lecture for 1999.

was forever changed. If not forever—it has changed. Those events have shaken our complacency. We have looked at our responsibilities and asked how September 11th may impact on them. In the months and years ahead, our legal system will be tested as never before, as our society struggles to meet the security challenges of the post-September 11th world. You, our future lawyers, will be required to take up unpopular causes and fight for them in the courts. We, as judges, will be required to decide the cases you bring. In so doing, we will be required to draw difficult lines and trace the delicate balance between the freedoms that make our society worth fighting for and its security demands. Wherever we draw the line, there will be critics.

This brings me to my theme today. The justice system stands in need as never before of its public's confidence. Without public confidence, the task of lawyers and courts becomes more difficult, betraying the promise of the just society. Yet how, in the face of such challenges, can we maintain public confidence in our justice institutions? I would like to suggest to you that we must focus on three things: (1) ensuring the high quality of our justice system; (2) ensuring access to our justice system; and (3) upholding the fundamental values that underlie our legal system.

Before I get to these three goals, let me take a moment to assess where our justice system now stands on the public confidence barometer. It appears that the public holds the justice system in high esteem. Some of you may be familiar with a study that the Institute for Research on Public Policy conducted in 2000, which found that seventy-seven percent of Canadians were generally satisfied with the way the Supreme Court has been working. The confidence Canadians have in their courts is demonstrated by the fact that they continue to turn to the judiciary to resolve their problems.

Public support for the courts is not tied to the popularity of this decision or that, so much as to the perceived integrity of the judicial process. The IRPP study noted:

> [W]here Canadians are generally opposed to [a] ruling, as in *Feeney*, these attitudes have little leverage on overall assessments of judicial institutions. In contrast, where public sentiment is consonant with the Court's decision, [as in] *Vriend*, [...] opinion on the case is more tightly linked to general attitudes.[2]

Canadians—and I am sure it is the same in most modern democracies—appear to share a profound belief in the fairness of the courts.

Despite the support Canadian justice institutions enjoy, we dare not be complacent. Public institutions find themselves under increasingly close scrutiny, and we are learning that public confidence can be fragile. It is not enough

---

[2] J.F. Fletcher & P. Howe, "Supreme Court Cases and Court Support: The State of Canadian Public Opinion" (2000) 6:3 choices 30 at 60; and see *R. v. Feeney*, [1997] 2 S.C.R. 13 at 117, and *Vriend v. Alberta*, [1998] 1 S.C.R. 493.

to observe that Canadians trust their legal system. We must rather ask, how can we maintain that trust? The answer is that, like the members of all public institutions, the lawyers and judges responsible for the justice system must strive continually to make sure that it is meeting the changing needs of Canadians.

Against this background, I return to the three things I think we must do to maintain public confidence in the legal system: *maintain the quality* of the legal process, *ensure access* to that process, and *uphold the fundamental values* that underlie our legal system.

II. Quality of the Legal Process

One reason Canadians currently have confidence in the justice system is that it is one of the best in the world. This may sound boastful, but there is objective evidence to support it. The Institute for Management Development, in its report for the year 2000, ranks Canada's justice system second in the world—just behind Denmark, a smaller, less complex country.[3] And if Canada is often ranked by the United Nations as the best country in which to live, one reason lies in our fair, transparent, and professional legal institutions.[4] Our task is to maintain this quality into the future. We may begin by resolving to reinforce the characteristics that have made our justice system the envy of countries all over the world.

First, we enjoy a judicial system that is honest. Corruption, the bane of judicial systems in so many parts of the world, is virtually unknown in Canada. Influence and bribery, so common in many parts of the world, find no place in our judicial institutions. Our lawyers and law societies, moreover, observe the highest standards of ethical conduct. We must maintain these standards.

Second, we enjoy that linchpin of a good judicial system: independent, impartial judges. Judges are not influenced by parties or politicians. They render justice according to the facts and law, no matter how unpopular the result. Judges making difficult decisions may find themselves vilified in the press or on the morning talk show, but that does not deter them from doing the right thing.

Third, our profession is served by adequate numbers of highly educated, professionally trained lawyers and judges. The educational standards of our legal profession are among the highest in the world. Once practising, lawyers continue their education through professional enhancement courses. For the good lawyer, education never stops. The same is true of judges. It used to be that

---

[3] Institute for Management Development, *The World Competitiveness Year Book 2000* (June 2000) at 418.

[4] See the annual United Nations Development Programme, *Human Development Report* (New York: Oxford University Press).

judges were deemed to have learned all they needed to know about the law and judging from their years as practising lawyers; that is no longer so. In the complex modern world, judges too need special training. The National Judicial Institute, together with other institutions, provides a rich menu of courses for judges, ranging from "new judge" seminars, through effective judgment writing, to detailed instruction in new areas of the law.

Fourth, our judicial system is good because we have striven—and keep striving—to improve its procedures to make litigation fairer, more efficient, and less costly. We constantly amend our rules to streamline procedures, and we constantly look for new ways to meet parties' needs. Mediation, alternate dispute resolution, pre-trial settlement procedures: these, and more, play vital roles in contemporary Canadian litigation.

Fifth, we work hard to achieve just results. Lawyers and judges sometimes describe a colleague as possessing a keen sense of justice. For them, there can be no higher praise. Our legal profession and our judges work constantly to achieve just results according to the law in all manner of cases, small and large. For most of us, this is far more important than any other goal, outstripping money or repute. And we are supported by a public that places great store on doing what is right, fair, and just, as attested by the debates that surround many of the more difficult Court decisions, like the *Latimer* case.[5] Canada, in short, has a culture committed to justice.

We must maintain, nurture, and carry forward these qualities in our justice system in order to preserve public confidence in its working in the future. But important as these qualities are, we must never forget the human element in our work if we are to keep the public's confidence. This brings me to the final characteristic that I think is essential for a quality justice system: humanity.

More and more, judges are becoming aware that getting the right answer to a tricky legal question is not enough. We must remember that we *serve* people—men, women, and children—and we must do so in a humane way. We must, in a phrase, treat people well. Many of the comments judges receive—positive and negative—relate not to the particular conclusion the judge reached but to how he or she went about arriving at it. Did the judge listen? Did she seem to care? The same goes for lawyers. Other professions, like medicine, have long recognized that how service is delivered can be as important as what service is delivered. We increasingly realize that we can maintain and enhance public confidence in the legal system not only by providing quality service, but also by doing so in a compassionate, respectful way.

In the end, maintaining the quality of our justice system depends on preserving honest, independent courts, well-trained judges and lawyers, efficient

---

5 *R. v. Latimer*, [2001] 1 S.C.R. 3.

procedures, and our keen sense of justice; and, above all, by treating the public we serve with the respect and dignity to which each human being is entitled.

III. ACCESS TO THE PROCESS

The second means of fostering public confidence is to ensure access to justice. The finest justice system in the world is a failure if people cannot use it. Providing access to justice is a problem of venerable lineage. Charles Dickens in *Bleak House* is only one of a host of authors who have written eloquently of the injustices caused by judicial delay. Since the 1970s, Canadians have made great progress in improving access to justice through publicly funded programs.

Nevertheless, there is plenty of evidence that access to justice is a continuing concern in Canada, as in many parts of the world. A just society must provide its entire citizenry—young and old, rich and poor—access to the courts and other tribunals so that they can resolve the legal issues that confront them. The right to go to court to have one's rights defined and vindicated is a basic right. At the same time, we know that litigation, particularly in its modern form, is complex, costly, and time consuming. In the past two decades, in the face of a virtual litigation explosion, Canadian courts have struggled to meet the challenge of providing access to the justice system for all. We have accomplished much across the country. Yet the task is not done and the challenge remains. We have much more to do.

I would like to talk briefly about four problems we in Canada currently face in giving Canadians access to justice: (1) problems in providing adequate legal aid; (2) problems in delivering *pro bono* services; (3) the increasing number of unrepresented litigants appearing in the courts; and (4) the need for greater information about the law.

The first challenge pertains to legal aid. Governments have struggled to keep pace with the demands for legal aid; however, in an era of rising demands and shrinking budgets, the results too often fall short. Across the country, needy individuals with serious legal problems are being turned away from legal aid. People with low incomes cannot access the legal entitlements they are guaranteed by law, or they are forced to represent themselves in complex legal proceedings. Some practitioners have stopped taking legal aid work because it has become an economic burden. Staff legal aid lawyers may be overworked to the point that both their professional obligations and their personal well-being are strained. The systemic work done by lawyers in legal clinics, aimed at changing legislation, policy, and procedures to break the barriers to justice, is too often underfunded, unrecognized, and the first to suffer from financial cuts. In some jurisdictions, lawyers have withdrawn services to bring attention to the inadequacy of publicly funded legal aid.

How can we improve legal aid? It seems to me that two things may be useful. The first is a collaboration amongst all of the system's participants and stakeholders: low-income Canadians and their representative groups; governments; lawyers; law societies and bar associations; and the general public.

My second suggestion is that we change our focus, from the modalities of how we deliver legal aid, to its role as a component of the justice system. For twenty years, discussions about legal aid have been dominated by debates over the merits of legal aid delivery models: legal aid clinics with staff lawyers *versus* judicare, with legal aid provided by members of the private bar, *versus* a combination of both. Yet research on the efficiency and cost-effectiveness of these models is thus far inconclusive. It may be time to leave behind the divisive debate about the delivery of legal aid and move on to asking how legal aid should function as an integral component of the justice system. Providing legal aid to low-income Canadians is an essential public service. We need to think of it in the same way we think of health care or education. The well-being of our justice system—and the public's confidence in it—depends on it.

This brings me to the second challenge: provision and coordination of *pro bono* services. Historically, lawyers have donated many free legal services, "for the good" of those in need who cannot qualify for increasingly restricted access to legal aid. Lawyers want to maintain this *pro bono* tradition; however, they face two problems. First, the realities of highly organized modern legal practices, dominated by structured tasking and accountability, complicate the process of stepping outside the firm's commercial structure and giving *pro bono* assistance to needy litigants. Second, coordinating available *pro bono* services with the community groups and individuals who need legal services is often difficult.

Recently, Canadian lawyers have been directing their attention to these problems and reviving the venerable professional tradition of providing free legal services to needy men, women and organizations. For example, a new entity called Pro Bono Law Ontario provides a new, coordinated approach to the delivery of *pro bono* services throughout Ontario.[6]

The impact of both legal aid and *pro bono* services on the public's access to justice cannot be denied. It is not only the rich who need the law—poor people need it too. Often their needs relate to serious, even dangerous situations. Children may be hurt, perhaps permanently; criminal records established, sometimes in cases of innocence; and indeed people may lose their shelter and very ability to feed themselves and their dependents. The trauma of having to go to court over personal issues is compounded when a person is forced through it without professional representation. People need lawyers, trained in the law and its

---

[6] The Law Foundation of Ontario, 25th Anniversary Millennium Fund, online: <http://www.lawfoundation-on.org/lawmillenium.htm> (date accessed: 15 January 2002).

technicalities, to represent their interests and ensure that their rights are upheld.

Despite the efforts of lawyers and governments, the harsh reality remains: lawyers are not always available. This brings me to the third challenge: the increasing number of unrepresented litigants appearing in the courts. Significant numbers of litigants are electing to represent themselves in a variety of legal matters. Lawyers and courts must work together to stem what Chief Justice Richard Scott of the Manitoba Court of Appeal describes as the increasing flow of "lawyerless litigants".[7] And insofar as lawyerless litigants cannot be avoided, we must assist them.

Unrepresented litigants encounter their first difficulties at the courthouse door. Court staff—already overburdened, especially in large urban jurisdictions—face increasing numbers of self-represented litigants who ask for explanations of the legal process as it pertains to their cases. While court clerks have traditionally assisted lawyers and their staff by providing instructions as to the appropriate rule to follow or form to file, they are rightly hesitant to offer legal advice.

Once in the courtroom, self-represented litigants come up against additional barriers to justice. Judges, who expect to play the traditional role of passive arbiter in the litigation process, operate on the assumption that lawyers will adequately represent the parties. In order to maintain judicial impartiality in appearance and in fact, an individual judge may be unable to devote the necessary time to explain fully the litigation process, and may feel constrained from advising a litigant. As a result, basic information, such as the necessary elements of the cause of action or defence raised, might remain known only to judges and lawyers.

If a lawyer appears on behalf of an adversary, the self-represented litigant is frequently at an even greater disadvantage. The self-represented litigant's case may fail for lack of adequate proof. Even in forums such as small claims courts, where procedural rules are somewhat relaxed, self-represented litigants fortunate enough to obtain judgments might be denied instructions as to the available means for their enforcement.

It cannot be denied that the barriers encountered by self-represented litigants both outside and inside the courtroom deprive them of access to justice. Our democratic principles, the Canadian Constitution, and the rule of law require that our justice system meet the needs of all people, including self-represented litigants. It should not be necessary to establish indigence to secure the basic knowledge required to raise a reasoned claim or a defence. The man-

---

7 Kirk Makin, "Lawyerless Litigants Slow Wheels of Justice" *The Globe and Mail* (14 January 2002) A1.

ner in which people are treated in the justice system is critical to the effectiveness of the courts as a public institution. That means not only devoting sufficient resources, but also using the most creative mechanisms possible to ensure full and meaningful access to, and participation in, the legal process.

Fortunately, some courts are already doing so successfully. A recent publication of the American Judicature Society describes a variety of assistance programs underway or under consideration in that country. Ideas include easy accessibility to forms and instructions, provision of brochures and other educational materials, and information about the availability of lawyers for consultation about specific questions.[8] Likewise, in Alberta, a publicly funded advisory service operates out of the Edmonton courthouse to advise "in person" litigants in family matters.[9]

In addition to adopting such programs, courts should consider making changes that promote fair and meaningful hearings for all litigants. For instance, rules or guidelines governing the unauthorized practice of law, although necessary to protect the public, can be modified or interpreted to allow court staff to help self-represented litigants with simple procedural matters and information. Protocols to guide judges in helping self-represented litigants should be established, and judges should be educated on when they might consider relaxing procedural and evidentiary rules to ensure fairness.

All of this is necessary to preserve the public's trust and confidence in the courts. Without this, courts risk losing legitimacy, becoming irrelevant and failing to serve a basic purpose: to maintain an open, accessible justice system. Much is at stake in the formulation of policy affecting those members of the general public—rich, middle class, and poor alike—who find themselves, or choose to be, in litigation without counsel.

The fourth challenge to access to justice is access to *information* about the law and legal system. People should be able to know and understand what the law is, at least in a general way. This requires that laws be drafted in ways that people *understand* and that those laws be made reasonably available to the interested public. A plain language style that minimizes complexity and repetition, and uses words according to their ordinary meaning, might assist. To that end, several federal agencies have created a partnership to develop a process for drafting in plain language. As part of a pilot project, they redrafted the *Consumer Fireworks Regulations*, consulted with typical users about the redraft, tested it on typical users, and then revised it. They concluded that although this

---

8 Jona Goldschmidt, *et al.*, *Meeting the Challenge of Pro Se Litigation: A Report and Guidebook for Judges and Court Managers* (Chicago: American Judicature Society, 1998).

9 Family Law Information Centre, online: <http://www.albertacourts.ab.ca/familylaw/index.htm> (date accessed: 15 January 2002).

process might involve some short-term costs, it would produce considerable long-term benefits.[10]

Realistically, the idea of producing laws that everyone they affect can understand on a single reading is unlikely. Lawyers will always be necessary, and will themselves disagree on the application of particular laws to particular situations. However, we should do what we can to make the law clear and accessible to average Canadians. The law is, perhaps, the most important example of how words affect people's lives. There is truth in the proposition that if we cannot understand our rights, we have no rights.

Beyond the content and impact of law, access to the law also requires that the public be informed about how the institutions of the law are structured and how they operate in its interest. And it requires that participants in the legal system be available to explain and respond to legitimate queries about that system and the principles that underlie it, such as our commitment to the primacy and rule of law.

Let me tell you a little bit about what judges have been doing in this area. The mandate of the Canadian Judicial Council is to promote efficiency and uniformity and to improve the quality of judicial services in federally appointed courts. Three-and-a-half years ago, the Canadian Judicial Council published a document entitled "The Judicial Role in Public Information"; it concluded that judges had an important part to play in educating the Canadian public about their legal system and explaining the role and function of the judiciary.[11]

The Council went on to make specific recommendations about the judicial role in public information. In general terms, the Council supported the involvement of judges in various programs of public information about the law and encouraged courts to develop organized plans for making their judges available to the public for educational purposes. Many courts have taken up this challenge in a serious way with a variety of efforts; the most common being programs involving judges speaking to school groups. Judges in Manitoba have been particularly active in this area and I congratulate them.

The legal profession owes a comparable duty to inform the public about the law. Lawyers, like judges, should see communicating with the public as being a fulfillment of their ethical responsibilities towards the good administration of justice. This is why I think public access to the law is important for enhancing

---

[10] Department of Justice Canada, *Consumer Fireworks Regulations Final Report* (Working Document) by Shelley Trevethan, Wendy Gordon & Marie-Andree Roy (Ottawa: Department of Justice, 1995) at iii.

[11] Canadian Judicial Council, *The Judicial Role in Public Information* (September 1999), online: <http://www.cjcccm.gc.ca/English/publications/JudicialRole3.htm> (date accessed: 10 May 2003).

public access to justice. As previously mentioned, lawyers have made a commitment to offering *pro bono* legal services to the public in terms of legal advice and representation. But to my mind, an equally meritorious kind of *pro bono* activity is to enhance public understanding of our legal system—its purposes, principles, and institutions—to advance the public's knowledge about rights and responsibilities, and to deepen its appreciation of the rule of law.

Since becoming Chief Justice, I have travelled to countries with legal systems far less accessible than ours. Consider China: its justice system, when compared with Canada's, is in its infancy. Yet one senses an emerging recognition of the need to improve the administration of justice through law reform and judicial education. The challenge is enormous, but many there realize that an essential part of improving a legal system is public legal education: through schools, relations with the media, and even phone-in hot lines. Before the legal system can provide a means of enforcement of legal entitlements, the public must know what the system can offer and how to use that system. The same is true in India, where many people are unable to avail themselves of the legal system because they do not know their rights.

The reality is clear: public understanding of the law is a basic and essential part of a functioning legal system. This applies not just in places like China and India, but here in Canada as well. If we are truly to improve access to justice, we must ensure that Canadians understand the law and their rights, and know where to go when they encounter legal difficulties. We must communicate with the public. I believe that public appreciation of the law has greatly improved in the past decade. We must ensure that this continues.

IV. UPHOLDING THE VALUES THAT UNDERLIE THE LEGAL SYSTEM

We can maintain public confidence in our legal system by ensuring both the quality of our legal system and access to justice, but more is required. I believe that respect for any legal system ultimately depends on confidence that it will uphold the fundamental values that underlie its constitution and our nation. We are fortunate that our country possesses a document that sets out those values—our *Charter of Rights and Freedoms*. We can also take comfort in the fact that the *Charter*, according to the polls, enjoys widespread national support.

We must remain true to the values and liberties upon which our nation and our democracy are founded, in bad times as well as good. If times were always good, there would be no need for a charter setting out our fundamental norms. The purpose of bills of rights is to provide protections for difficult decisions and guidance for difficult times. The task of the courts, and indeed the justice system as a whole, is to uphold our nation's long-term values through the varying moods and challenges that events impose.

Here we must distinguish between current public opinion and the long-term values upon which confidence in the justice system ultimately reposes. Public opinion follows the passion of the moment. The law's wisdom, by contrast, is not influenced by passions or by propaganda pressure. It seeks rather what is fundamentally right in the long term, based on an appreciation of our most fundamental values.

Where do we find these values? The *Charter* states them, but the *Charter* speaks in broad, general terms. It is the task of judges and lawyers to infuse these general terms with meaning. We constantly must make these context-related decisions: how to define free expression, or equality, or the right to counsel in a particular case. The broader our vision, the better our choices. The peril of lawyers is often the short and narrow view: the win; the fee; and the *status quo*. I urge you to cultivate the broad view, the long-term perspective: to read widely; to travel; to think critically. In this way you will be better able to bring to the judicial process and the courts a true perspective on the fundamental values that are the law.

We must also distinguish between lip-service to values and practising values. In *Faust*, Goethe wrote: "He only earns his freedom and existence who daily conquers them anew." Or, as the political thinker Edmund Burke put it, "Abstract liberty, like other mere abstractions, is not to be found."

This applies to all of those who play a role in our justice institutions. It applies to you, as future lawyers, as much as to judges. If we are to preserve confidence in the legal system, we must uphold the long-term values that underlie our legal institutions and our society, in our decisions and in the way we represent the law to the public we serve daily. Other institutions may look to the mood of the moment, but it is our unique role to take the long view of principle.

V. CONCLUSION

I believe the Canadian justice system enjoys the confidence of Canadian men and women. Our challenge is to maintain this confidence in the difficult times that lie ahead. To do so, we must ensure: first, that our justice system maintains its high quality; second, that all Canadians—rich and poor—can access the system; and finally, that as lawyers and judges we uphold the long-term values on which our legal system and our society rest. I have suggested some of the challenges we face and some of the steps we might consider taking. You, the lawyers of the future, doubtless have other, perhaps better, ideas. Together, we must work toward maintaining, indeed enhancing, public confidence in our justice system. No challenge can be more important.