The judgment of wider courts

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If you only have a hammer, everything looks like a nail

Anon.

Introduction

As most commentators would agree, access to justice is part of any just society. This does not only mean either access to the justice system if by justice system one refers exclusively to the courts usually understood, i.e., the formal courts of law) or access to law and the formal legal apparatus. Justice is a much broader concept. In order to connote this broader concept of justice (while not sinking the notion of justice entirely into a philosophical swamp), I will use the expression wider courts. It may be neither the most elegant label nor the most enlightening, but it will serve our purpose here.

The March 31, 2000 symposium of the Deputy Minister of Justice of the Government of Canada was entitled Expanding Horizons: Rethinking Access to Justice in Canada. It focused on the emerging challenges facing those who wish to ensure that Canadians have access to justice (in this broad sense mentioned above) in an increasingly complex environment.

This is not the first time that the issue is examined in Canada. Steven Bittle (2000) has reviewed the previous Canadian conferences and symposia on this theme in a background document for the present symposium. But the March 31st symposium was meant to be of a special nature from its inception. It was launched with an unusual invitation by the Deputy Minister to explore the concept of access to justice beyond its traditional boundaries, and into wider courts to speak. Morris Rosenberg, the Deputy Minister of Justice, called on the participants to go outside the box and to use lateral thinking in developing strategies for better ways to provide access to justice for Canadians.

This invitation to self-subversion by the legal establishment (indeed the establishment constituted a significant portion of those participating) was surprising for some. The confrérie of lawyers and law professionals is traditionally very conservative. It is also perceived as being quite defensive when it is accused, as the professional group at the core of the formal system, either of not doing enough or not doing the best of all jobs in providing optimal access to justice for all Canadians. The exhortation to explore widely extra-murally and to roam freely over a much wider territory than the traditional courts sounded subversive.

A multi-voiced challenge
The first session of the symposium was meant to provide the participants with a sense of direction in their search for new strategies for optimal access to justice by Canadians. The multifaceted message that emerged from that session might be summarized in a few words: the record of Canada on the matter of access to justice may not be as enviable as is usually believed. Another way of putting this central message (coming from two eminent jurists and an astute observer of the law/justice scene) is that the fortress of the formal justice establishment as defined by the traditional courts is not impregnable, that there even is \textit{péris de la demeure} when one examines carefully the house of justice in Canada.

This situation is ascribable in part to the challenges mentioned by Mark Kingwell (2000) in his essay prepared before the symposium: growing population diversity, globalization, changing political/cultural interface, new role of technology, and new forms of citizen action. But the core of the messages put forward during the introductory session went much beyond simple warnings that the world has become more complex.

Judge Turpel-Lafond (Saskatchewan) issued a \textit{message of anxiety}: the justice system may not serve the community well. What is in place for Aboriginal groups, for instance, is more akin to a prison condemned to a recycling of deviants. Even though there has been a certain high-brow intellectual interest in restorative justice, it has not translated into meaningful action on the front line. From the vantage point of a Western Canada judge, the fortress is seen as inadequate.

Roderick Macdonald (Law Commission of Canada) issued a \textit{message of disconnection}. He reflected on the chasm between the official system (the formal system of lawyers, courts and formal justice) and the real law of everyday human interaction. Acknowledging the Kingwell/Turpel-Lafond diagnosis that, as human interaction becomes more complex and takes different flavors, official justice disenfranchises more and more the ordinary person, he concluded with a plea for more opportunities for citizens to participate more fully in the justice system, or more precisely in the lawmaking process.

Jacques Dufresne had a \textit{message of denunciation}: for him, the formal justice system is the source of the problem. The formal judicial institution, the fortress, is preventing the normal carrying of justice. Instead of preventing problems, the official system is aggravating the problems and may even be the source of injustice. The lack of preventive justice to avoid recourse to the formal system is seen as a major gap that prevents citizens from having access to effective justice. This led Dufresne to suggest that a justice douce\textit{ in the sense that one talks about une médecine douce} might be in order and he illustrated the ways in which such a process would work by making reference to the preventive work of notaries in the Quebec justice system.

The message was loud and clear: the formal justice system is failing in providing adequate access to justice for Canadians. Whether the failure is mainly an upstream phenomenon (i.e. as a result of inadequate preventive justice), in the stream \textit{per se} (i.e., as a result of the disconnection between the official system and real-life human interaction) or downstream (i.e. as a result of a simple \textit{gotcha} approach of the formal justice system and the lack of any serious commitment to restorative justice), it is clear that the official system is failing the citizenry.

The first plenary session did not suggest that these three perspectives on the ways to improve access
to justice by more prevention, by better connection, and by more restorative work were the only ones. Indeed, sprinkled in the three papers, there were reference to parallel and alternative processes that were already providing justice outside the formal system. These broad-ranging and at times provocative statements set the stage very well for probing debates and imaginative inquiries. They launched a symposium that promised to live up to the expectations of the Deputy Minister, and could be expected to come up with creative ways in which access to justice might be improved.

**The Fortress, the Barbarians and the Plumbers**

Following the introductory plenary session, the symposium participants were spread out in four parallel workshops to pursue the search for alternative and improved ways to ensure better access to justice. These workshops were meant to bring together participants from all walks of life (from inside and outside the formal legal system). The final assemblage of participants turned out to be (not as a result of the pattern of invitations sent out but as a result of many persons being unable to attend because of previous commitments) permeated by officials of the formal justice system to a greater extent than had been anticipated. But there were still a significant group of non-lawyers representing a variety of non-formal-system perspectives in attendance at the symposium.

The first three workshops were constructed around the concerns of groups outside the fortress of the formal justice system: (1) the citizenry and communities, (2) the diversity of groups making up the Canadian social fabric and those concerned with their welfare, and (3) the economists who have a perspective on the justice system quite different from the lawyers. The fourth workshop was focused on the examination of alternative instruments and partnerships that might be used to improve access to justice.

I refer, somewhat lightly but not unkindly, to these groups outside the fortress of the official justice system involved in the first three workshops as the Barbarians because of the fact that the insiders in the formal justice system (very much like the Romans vis-à-vis the Ostrogoths and the Visigoths) are very much in the habit of regarding the outsiders as being different in kind.

The first three workshops were designed on the assumption that the best way to expand the horizons of the inhabitants of the fortress is to invite these different groups of outsiders to comment on the rationale for the existence of the fortress, on the work of the fortress, on ways to invade the fortress, on its relative importance, on the reasons to want to be inside, etc.

The lay community (whatever it might be) often feels a strong sense of exclusion and feels at times that it is regarded by many in the official system as somewhat irrelevant, or tediously tiresome. Yet, there is also a strong feeling that the lay community and the citizenry in general should participate not only in the process of lawmaking but in the process of production of justice. So, one could have expected major challenges to be mounted by the Barbarians when invited to visit the fortress.

However, this outburst of passion and denunciation did not materialize. Tact and civility prevailed, to
the point that passion did not appear strongly in the debates in the workshops, at least not visible or audible to the external observer migrating from session to session. Debates were informative and informed, but one did not see emerging from these debates emotional attempts to put forward major proposals designed to reframe the access to justice. What evolved was a serene discussion of many aspects of the complex questions of how citizens and communities might get involved, of how the new Canadian diversity can be taken into account, and how economic dimensions of justice should be handled.

The fourth workshop was dedicated to at least from a preliminary look at the program to more mundane matters of fine-tuning of the existing system. Plumbing issues one might say lightly but not unkindly even though it mentioned partners and alternative delivery mechanisms. This fourth group took the mandate it was given to heart and was surprisingly subversive. It is as if this work within the confines of the official system (or at its immediate periphery and within the logic of the fortress) allowed participants to explore less self-consciously the boundaries beyond which one might want to go.

Echoes from the workshops

It is difficult to reconstruct the full texture of intelligent, rich and informed conversations for someone who hopped from session to session. It is not unlike trying to reconstruct a snowstorm from the dew of the few flakes that melt on our face (John Updike). One is bound to be selective and therefore partial of necessity in such circumstances. However, since the reports of careful note-takers will be available, my idiosyncratic summaries might be easily corrected if they turn out to be misleading, would therefore do little harm, and yet might help to underline some basic themes deserving special attention.

(1) Citizens and communities

It was clearly agreed to by participants that there is a role for citizens and communities in the justice system. The debate centered on the difficulty in defining community, in operationalizing the roles of citizens and communities, and in ensuring that the requisite infrastructure needed for the citizens and communities to operate effectively in a world (1) where the courts are not the only forums the citizens need to access and (2) where circumstances are such that a one size fits all strategy is not usable. This process of inclusion was perceived as being particularly difficult to engineer by citizens and communities: it is not easy to use the system. It was perceived largely as a problem of power sharing in which the formal justice system is not willing to share much.

The discussion was focused on civic engagement and the possibility of building bridges enabling communities to play a greater role within the institutional order. Obstacles in the form of inter-
jurisdictional squabbles and professional turf-defense were discussed. The focus was mainly on ways to open and reshape the existing formal system to accommodate some input from citizens and communities.

(2) Diversity

The formal system has given recognition with particular force to the argument of access to justice through equal treatment. There has been some judicial progress on this front. But it was found that the formal system has not been very successful in developing delivery mechanisms to meet the promise of substantive growth in the right to equality. Indeed, the processes of privatization of the adjudication of claims (by arbitrators) and of the collectivization of the processes (dealing with groups not individuals) have been seen as an erosion of the public rights basis of human rights. Moreover, the argument that these initiatives have efficiency costs has led many to call for some measurement of the impact of these initiatives if one wishes to ensure that the substantive equality rights strategy is maintained.

The challenge of diversity has been posed almost entirely in terms of substantive equality rights, and of some sort of accountability to implementation to the minority groups. Surprisingly, in the discussion, diversity was not used in utilitarian terms as connoting a source of dynamic efficiency in modern socio-economies and polities. This is an argument one often hears about pluralism. Rather the term diversity was used almost exclusively as a public value standing in contradiction with efficiency. This was surprising and (together with the focus on substantive rights) limited considerably the scope of the inquiry.

Reference to Aboriginal groups and to minority groups underlined the new forms of accountability to minorities generated by the formal system of justice, and led to explorations of the impact and import of the effectiveness of the measures to promote access to the formal justice system.

(3) Economics

Economists and lawyers are often at odds when dealing with justice. Economists have a rational model of the world and a central concern for efficiency. Moreover, the profession has a strong taste for measurement. In dealing with the justice process, economists have therefore applied their rational model, have celebrated the primacy of efficiency, and urged all concerned to quantify outcomes.

The study of legal aid programs has been used to illustrate the unfortunate consequences of a world without outcome measurements, but the focus of discussion was the process of resource allocation within the justice system. The argument made by economists is that outcome and impact measurements and evaluation studies can help to determine where the resources would have a more potent impact, and therefore should determine where the resources are allocated.

The case for the importance of research and measurement in determining resource allocation within the justice system is obviously strong. Moreover, the suggestion that outcome measurements may serve as surrogate numbers for what the price mechanism reveals in the private sector is reasonable. However, the temptation to ascribe too much potency to the rational model or to lionize quantophrenic exercises
was not always altogether avoided in the debates.

(4) New mechanisms and partners

The richness of the debates around the exploration for new mechanisms and partnerships in the delivery of justice was both surprising and yet predictable. The relatively secure boundaries of the debate that was deeply rooted in efforts to improve the existing system (not challenge it) led in fact to interesting probings much beyond the original mandate.

It all started with the need to define some rationale for the need to improve the justice system and some benchmarks by which it might be said to have been improved. This led to an exploration of the type of society Canadians want, and consequently of the type of justice it may wish to have.

It was recognized from the very beginning that the diversity of the Canadian population, and the unequal distribution of income and wealth but also of access to power, made it impossible to accept that a one-size-fits-all system would work. It was felt therefore that there is a need (1) for an agreement upstream on some basic principles a sort of Magna Carta that would guide the exploration, and (2) for an acceptation that it would be through local justice i.e. an effort to work at the level of the different groups, disputes, issues, etc.) that one can expect to fine-tune better practices, and not through broad-ranging accords (Elster 1992).

The whole notion of culture of justice was debated, the difference between criminal and social justice, the pros and cons of a strict and simple reliance of the rule of law, the tyranny of majority rule, etc. New partnerships and new mechanisms were defined as having to be sought within this dual set of constraints of broad principles and local settings (Foblets 1996).

A few roads less traveled but...

A few points were mentioned in each workshop like the need for more resources, even though some insisted that what might be required is also different types of resources. A case in point had to do with the new type of resources that restorative justice might require. The Elders, imposed upon by the community in the context of restorative justice, may very well develop a certain fatigue when the same persons are time and time again used by the process. This can only lead to the initiative falling out of grace.

But many points made forcefully at one moment or another in the discussions fell like a lead balloon, for one reason or another. Some of those would appear to deserve at least some mention in the proceedings of the symposium.

(1) The first one has to do with the basic inertia of the formal justice system. In the same manner that economists accept to speculate on a world without a Bank of Canada, it should be possible to speculate on the impact of some drastic reform or reduction of the formal justice apparatus. It is not in good currency to do so. This entails that many aspects of the formal justice system avoids serious scrutiny. For instance, the inflation of formal laws and regulations has generated an increase in courts activities galore. It might be worth exploring whether this expansion of the formal justice
system has in fact increased or decreased the production of true justice in this country. Some have argued that the invasion of society by the rule of law as interpreted by courts may indeed have reduced the access to justice for Canadian citizens. The case made by Jacques Dufresne for a justice douce would call for a much reduced role for the courts.

(b) The second point pertains to the importance of the financial aspects of the formal justice system. A system is made of a structure (a set of roles), a technology (some instrumentalities), and a theory (a sense of what the system is there for). The most effective way to destabilize the system and transform it may indeed be to modify its technology (Schon 1971). One may therefore ask whether it would not be important to tinker with the financial technology of the formal legal system.

The fee-per-act remuneration in the health care system has had dramatic consequences on the structure of the sector. In the same way, the manner in which one remunerates lawyers can only have an impact on the practice of law and on the way in which citizens access to law via them. Consequently, any attempt to reform the formal justice system might require a modification of the financial infrastructure on which it is built. In the case of medicine, it is felt that only when one is seriously exploring the possibility of repealing the fee-per-act system can the industry be transformed. Comparisons between the Blue Cross system and the Kaiser systems in New York have revealed that the mode of remuneration may impact dramatically on the efficiency (doing the thing right) and the effectiveness (doing the right thing) of the industry. Indeed, the refusal to focus on wordily aspects of the justice system like remuneration may indeed prevent real change (Paquet 1994).

(3) The third point deals with the rights and entitlements focus of the justice system as it exists in the formal legal structures. This stands in sharp contrast with the needs-based claims of the citizens: the need to ensure that one can walk safely at night in our cities, the need for a divorce that will not cost $100,000., etc. It may be argued that the focus on rights has led the system either to ignore needs, or to regard rights as the only way to ensure that the needs for justice are met.

In fact, there are all sorts of other legitimate problem solving mechanisms that come to mind and all sorts of new actors that appear useful when needs are becoming the focus of attention. Indeed, the purpose of the real justice system is to eliminate servitudes, to attenuate unfreedoms. A needs-based approach may contribute significantly to eliminating the pro-courts or pro-formal justice system bias of the rights approach. The very creation of many wickets where citizens could find alternative ways to resolve their problems or satisfy their needs would do much to increase their freedom.

A few paradoxes

The many pressures being brought to bear on the justice system and the call to arms to ensure access to justice have compounded in ways that have led to some paradoxical situations. A paradox is a statement apparently self-contradictory. It is often the most important source of renewal since it calls for issues to be reframed in order to avoid the contradiction.

(1) The first paradox that struck observers at the symposium emerged, on the one hand,
from the central recognition by most of the participants that in the carrying of justice there is no one-size-fits-all and that therefore issues must be resolved locally. On the other hand, the whole philosophy of rights has its basis in substantive equality. It is difficult to see how this call for substantive equality and sameness can be reconciled with local justice or different standards being applied according to circumstances.

This paradox strikes at the heart of the formal justice system and challenges its present incapacity to provide the requisite amount of casuistry. Indeed, this is a paradox that is ever present in the Canadian context. Quebec has found it impossible to get the rest of the country to allow it to be equal but different, because as soon as one invokes droit à la différence, this always strikes the opponent as tantamount to requesting a favorable or preferred treatment. Equal but different is however exactly what would appear to be the foundation of the new flexible system based on local justice, or the acceptance that there might be various windows to give access to justice.

The meta-level at which a paradox like this one can be resolved is one in which the equal but different is transformed into something like different but united. It suggests that there are ways to secure compromise and flexibility so as to have broadly agreed general principles (Magna Carta) and decentralized adjudication through different mechanisms and via different channels (local justice). The challenge of generating such meta-solutions will be an important one for jurists. Indeed, one of the value-adding contribution of the symposium has been to put such a paradox front-and-center and to suggest that it must be resolved if one is to be able to define workable conditions for an improved system of justice that would allow a requisite variety of access points and avenues or channels through or around the Fortress.

(2) The second paradox is equally daunting. It suggest that the call for inclusion and participation in the justice process may challenge some fundamental features of representative democracy. Indeed, this sort of intervention in the judicial process (upstream in the case of preventive law, in the stream more directly or through alternative legal avenues, and downstream in the case of restorative law) challenges the usual democratic method of electing representatives or choosing officials, and then allowing them to take the decision for the collectivity.

The very participation in the justice process that is requested would appear to challenge the validity of the process of representative democracy that has generated and support the existing legal order (Hermet 1997). Indeed, participation and inclusion are often seen as short-circuiting due process, as potentially derailing the normal ways.

It is unlikely that this can be resolved without a very serious reinterpretation of the very notion of representative democracy and of its legal institutions. Again, this is a challenge that the symposium has raised for the jurists to tackle, and one that calls for much creativity.

Conclusion

It is unwise for a rapporteur (however much freedom he has been granted in the despatch of his
functions) to use more air time than the palavers he is supposed to report on. So allow me in closing to mention some conclusions from the symposium deliberations. These conclusions are of necessity idiosyncratic since I could not be everywhere, but they should serve as a set of hypotheses that might be used to validate one’s own experience or in reading the detailed reports of the workshops notetakers.

It would appear that in order to improve access to justice, one might very usefully do a number of things in the short run.

First, it was clear that the development of an improved justice system (that would go much beyond the formal one and that would provide improve access to justice for the citizens) depends on an agreement about the sort of society we want and the sort of justice we want. It is important to bring forth such a Magna Carta defining loosely these values for only such a statement can serve as a sextant in the exploration of the different ways in which citizens should gain access to justice, and in the definition also of what is and is not acceptable.

Second, it was also clear that one cannot explore the different possible alternative mechanisms or alliances with other groups in defining an improved system of access to justice without a better knowledge of what experiments have been conducted, and with what degree of success, in Canada or elsewhere. Such a catalogue does not exist. It would appear crucial to ensure that it is prepared forthwith.

Third, there must be an explicit effort to encourage the maximum amount of experimentation and innovation in the development of better access to justice. This can be done however only if there is a change in the culture of the justice system. This in turn can only be effected as a result of explicit effort to pro-actively promote, foster and support innovation by the senior officials of the Law Commission and of the different departments of justice acting in concert. In a way, the symposium might be seen as Phase I in the process of development of the necessary cultural support for the exploration and search for better ways to continue.

These shortcuts may appear of limited import, but they are meant to prepare the way for more fundamental changes in the long run.

First, the combination of a loose statement of the Canadian philosophy of justice, a more complete catalogue of what works and does not work, and a pro-active support of innovation will tend to generate the emergence of basic national principles that may be of greater use in the development of a new architecture of more accessible justice institutions than a vague Magna Carta.

One could do worse in the definition of these national principles than to start with the suggestions of Amartya Sen who has put at the center of the whole process of social, economic and political development the freedom from different servitudes or the elimination of unfreedoms due to lack of political margins of maneuverability, of social opportunities, of economic possibilities, and of transparency and security guarantees (Sen 1999).

Second, one has to strive for the establishment of a distributed justice system—a system where justice is available in a variety of forms, from a variety of sources, and through a variety of channels, so as to
ensure that the citizen has a true access to justice. This is truly Phase II in the process of development of a new culture of access to justice. Already, the road to distributed governance has been explored (Paquet 1999) and it has been shown that it generates higher performance. The governance of the justice system needs to follow the same path.

But this drift toward a different justice system that is more distributed is unlikely to be smooth. The reason for this is simple: such a road is likely to be fraught with difficult times, but also with setbacks and mishaps. So, in the long run, one must also be able to ensure the requisite negative capacity (as Keats would call it), i.e., the capacity to keep going when things are going wrong. A third long-run initiative therefore entails the construction of the necessary support systems to help the reformers both in taking a creative part in this multilogue with the citizenry and in withstanding the chilling effect generated by setbacks in any change venture of this sort. For without such support system, reform is doomed.

Roy Lewis has analysed this sort of situation in a satirical mode in his famous What We Did to Father (1960) in which he portrays the experience of evolution of a community of tree-dwelling apes discovering fire, inventing tools and being carried forward by progress away from the security of their trees. In such a transitional world, every unfortunate turn of events is always an occasion for reluctant participants to denounce progress and to seek to launch a back to the trees movement.

One may reasonably anticipate that every setback in this massive transformation of the justice system will trigger another version of the back to the tree movement. It is therefore crucial that there be ways to immunize the justice system against such setbacks. This is one dossier where the justice system may have to turn to non-jurists for help.

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