Advocates' Society Gala – Keynote Address
March 13, 2024
(Abridged Version)

Introduction

Limlempt. Thank you for the kind introduction. I am honoured to be here tonight, celebrating The Advocates' Society's commitment to improving advocacy within the justice system.

From my vantage point, the justice system, like the rest of the world, is at an inflection point. AI is emerging as an ostensible rival to sound legal advice. Misinformation and disinformation spread freely. Our institutions are under attack. Hard won victories to level playing fields are at risk. Public resources are limited and spread thin, perhaps too thin.

In the justice system, these threats have real implications for something that I hope we all hold dear to our hearts, access to justice.

In my new role as Chief Justice, I have been thinking about access to justice a lot. In particular, I have been thinking about three groups of people who have or create access to justice issues.

The first group is the group of people who are so marginalized that they do not turn to the justice system to address the issues they are facing, even though they should.

The second group is the group of people who would like to access the justice system but can't - either at all or fully - because of seemingly insurmountable barriers like complexity, cost and delay.

The third group is the group of people who use way more than their share of scarce public resources to resolve their legal disputes – which has the effect of denying other

worthy parties the court time they need and deserve to resolve their equally pressing legal disputes.

Tonight, I am going to speak with you about our collective obligation in these times of challenge, change and transition to do our parts to not just preserve but to advance access to justice.

I'm going to do that by sharing a few thoughts about the issues facing or created by each of the groups of people I mentioned – the disconnected, the precluded, and the folks who use more than their share. I'll then suggest some things you can do to address the issues. I'll conclude by calling on you to do your part.

The Disconnected

My views about disconnection are informed by my experiences as an Indigenous person and my work with and for Indigenous people.

It's no big secret that Indigenous people in Canada come into conflict with the law in negative ways in grossly disproportionate numbers. In particular, incarceration and child apprehension rates are astronomically higher for Indigenous people than for other people in Canada.

Yet, in other areas, Indigenous people with a legal issue do not turn to the justice system for help.

The reasons for both of these phenomena are deeply rooted in our colonial history of exclusion, mistreatment and discrimination.

Many Indigenous people see an adversarial justice system focused on correction and punishment that does not reflect their histories, cultures, customs and values. Many have historically experienced a system that is unjust and unfair, where they do not feel

respected or understood, and where they usually lose. As a result, even though we have taken a number of very positive strides, Indigenous people are less likely to exercise their rights or participate as a complainant, witness or juror. Why bother?

For example, why would an Indigenous person think to turn to a human rights tribunal when it's "normal" to face discrimination?[1] Why would an Indigenous person file a criminal complaint when they don't expect to be treated with respect? Why would an Indigenous witness attend court when they don't expect to be believed? Why would an Indigenous person show up to serve on a jury when they, their families and their communities have not had good experiences in the justice system?

The result is greater isolation, division and conflict, which isn't in anyone's interest.

As we know, there are other structurally disadvantaged groups who also do not turn to the justice system because they too do not view it as just.

Clearly, we have some heavy lifting to do to demonstrate that we have a justice system for all.

<u>The Precluded</u>

I'd like to think that everyone in this room shares a common understanding that the justice system is meant to play an essential role in preserving all that is good in our society and improving all that is not good. I also hope we all understand that the ability of the justice system to deliver on its promise turns on public trust and confidence in the system.

[1] "If I filed a complaint every time, I wouldn't have time to sleep or eat or live." → from a research participant in the BC Human Rights Tribunal paper by Justice Ardeth Walkem, *Expanding Our Vision*. Justice Walkem concluded, "Discrimination [against Indigenous people] is seen as so pervasive within Canada/British Columbia so as to be a way of life, and…filing a complaint is seen as futile."

Plainly, high costs, significant delays and increasing complexity of legal proceedings hurt everyone. By creating barriers to access to justice, they diminish public confidence in the justice system, damage the rule of law, undermine substantive results and risk the privatization of the civil justice system.

The courts, governments and the bar have all focused deserved attention on reducing barriers as a means to increase access to justice. And, we can take pride in our successes. To give just a few examples:

- the courts have simplified rules and forms, made good use of technology, increased the use of case management and endeavoured to provide streamlined processes for suitable cases;
- the Human Rights Tribunal is transforming itself to remove barriers facing Indigenous complainants;
- the provincial government has recently announced increased Legal Aid funding for women facing family violence;
- the federal government has a lot of catching up to do but has indicated that filling judicial vacancies across the country is a top priority; and
- many members of the bar work in the not-for-profit sector, or provide pro bono or low bono services to folks who lack the human or financial capacity to advance worthy legal claims.

But, clearly, we all need to do more.

The Folks Who Use More Than Their Share

We have all been frustrated by parties who use far more than their fair share of scarce judicial and court resources. They drive up the cost of litigation and prevent others from having their cases heard.

Dealing with vexatious litigants can be particularly difficult. It takes a lot of time, effort and patience to ultimately establish that a party is not just litigious but vexatious. Once

that has been done, the courts can make orders to control which of a vexatious litigant's matters, if any, get court attention.

But, leaving vexatious litigants aside, over the years, I have witnessed lots of other examples of parties using more than their share of scarce resources with no apparent regard for the impact their proceeding has on others and the justice system as a whole.

Of course, there are complex cases that need and deserve plenty of court time. Complex criminal prosecutions, high stakes commercial litigation, and Indigenous rights and title cases are examples that come immediately to mind.

The cases that concern me are the ones where not only is the litigation gobbling up scarce judicial and court resources but it also appears to be counter-productive in the sense of being completely out of proportion to what is at stake.

For example, the courts are full of cases where there is a fixed amount at issue, such as in family, estate, bankruptcy and certain kinds of commercial cases. In these cases, and others, every dollar spent on legal proceedings is a dollar less that will be available to the parties at the end of the day.

When these cases take on a life of their own, no one's interests are served. When I see these cases, I resist pointing the finger at counsel because of course it is the client who gives instructions - but I do wonder about the conversations counsel had with the client…and the conversations that didn't but perhaps should have taken place.

What Can We Do?

It's not hard to identify the issues. It is harder to find the solutions. But let me offer a few thoughts.

I will start with the disconnected and focus on an area that I know best, namely the plight of Indigenous people in Canada. By choosing this focus, I do not intend to minimize the circumstances of other marginalized groups.

How can we make the justice system more welcoming to the folks who are so disconnected that they do not look to us when they should?

Here's an example to demonstrate what is possible.

I began working for residential school survivors in the late 1990s. At the time, standard civil litigation was the only real recourse available.

I worked very hard to advance claims against Canada and churches in a timely way. I travelled to my clients' communities and really got to know them. I interviewed them extensively before drafting pleadings. I gathered and reviewed all sorts of documents about them and the schools they had attended. I helped my clients respond to very lengthy interrogatories. And eventually I got them ready for discoveries.

Typically, they were shredded by the process, especially by the discovery process.

Despite testifying with honesty, dignity and integrity they often felt disbelieved and disrespected. Nothing personal against the lawyers who were asking the questions, but I often felt the same.

The questioning was always polite, but it was obvious that some of the lawyers asking the questions were from a different world and just did not believe what they were hearing. I don't blame those lawyers. What person from their background and life experience could believe the hideous things that happened to the Indigenous children who attended IRSs?

But to make matters worse, it was obvious from common lines of questioning that Canada and the churches were gathering evidence to ultimately argue that survivors would have had all sorts of struggles in their lives even if they had not been abused at residential schools. In other words, as Indigenous people in Canada, life was going to be pretty crappy for them anyway.

It was hard for my clients to understand why Canada and the churches tried to blame the hardships they endured after residential school on other negative experiences they had within their families, communities and Canadian society. They thought their discoveries were supposed to help Canada and the churches understand what they had gone through and how that had affected them.

Canada and Indigenous people have a forever relationship. Sadly, the litigation experience of survivors was only driving an even bigger wedge between them. Not good.

Early on I knew there had to be a better way and, fortunately, I was not alone. To its credit, Canada invited me, like-minded claimant's counsel and churches to work with them to find a more proportionate, supportive and less adversarial way to resolve the claims of survivors. That is something that we eventually achieved with the Independent Assessment Process, or IAP, that was created as part of the Indian Residential Schools Settlement Agreement.

The IAP was not perfect but the support, respect, treatment, apologies, compensation, recognition and validation survivors received established the IAP as a trustworthy place to turn for justice.

As a result of creating a credible process, over 30,000 survivors advanced claims within the IAP, with the vast majority being validated by independent adjudicators. These numbers absolutely smashed the expectations of the parties who negotiated the Settlement Agreement and demonstrated what is possible when justice is done "right".

Looking forward, the TRC's Calls to Action provide a number of concrete steps we can take to achieve the types of transformative changes that are necessary to right past wrongs and connect or reconnect us all in good ways.

Ironically, the greatest number of Calls to Action are in the areas of education and law. I say ironically because education and law were historically the primary tools of oppression but today they are seen as holding the most promise for the future.

TRC Call to Action 27 calls on the Federation of Law Societies of Canada:

> to ensure that lawyers receive appropriate cultural competency training, which includes the history and legacy of residential schools, the United Nations Declaration on the Rights of Indigenous Peoples, Treaties and Aboriginal rights, Indigenous law, and Aboriginal–Crown relations. This will require skills-based training in intercultural competency, conflict resolution, human rights, and anti-racism.

More than ten years after its release, the TRC's report and Calls to Action remain relevant and critically important. That said, I have to say I only like, but do not love, the term "cultural competence". I like the term "culture competence" in the sense that it promotes the ideal of providing culturally informed and culturally appropriate legal services but, to me, the term also suggests there is an end-point to understanding and that it is possible to master someone else's culture. And, it can lead to one-size-fits-all stereotypical thinking.

I prefer the term "cultural humility" because it encourages us to be open to listening and learning, to recognize that we can never be fully competent in someone else's culture and to understand that we have an ongoing duty to develop the skills we need to connect with those who are different from us. For lawyers, it goes to the core of being

able to connect with clients and respond to their individual legal needs, regardless of differences in backgrounds.

Happily, Call to Action 27 has been addressed to some degree. The Law Society of British Columbia has mandated online cultural competency training for all lawyers. I also see the obligation to work towards cultural competence in every lawyer's ethical obligation not to discriminate against colleagues, employees, clients or any other person.

Forgive me for stating the obvious but properly trained and culturally competent lawyers will help Indigenous clients achieve better legal and human outcomes.

Being culturally competent in this system that we share can manifest in different ways. It might be as simple as anticipating that your Indigenous client may have experienced trauma, and taking a considerate approach in your interactions with them. It might look like being mindful of how opposing counsel interacts with your client or how you interact with opposing counsel. Or, it might involve being attentive to how the law and legal procedure affect your client. No matter the circumstance, you should choose to advocate for your client's best interest, relying on the cultural competence learning you have done.

Further, properly trained and culturally competent lawyers will achieve better outcomes for their non-Indigenous clients as well. I say this because properly trained and culturally informed/sensitive/humble lawyers are the kind of lawyers who will be aware of a greater range of options and may be able to find a more creative and superior solution to the problems facing their non-Indigenous clients. These types of lawyers will be better able to avoid conflict and find a more cost-effective and perhaps more restorative solution for all involved.

Cultural competence is not only a necessity for ensuring ethical practice, but over time it breeds inclusivity. It works towards a sense that the legal system belongs to everyone; that it is ours—all of ours.

Along these lines, one important step you can take is to adopt an equity, diversity and inclusion policy within your firms or organizations. It's really important to ensure we have and support all kinds of different faces in all kinds of different spaces and all kinds of different places.

If you adopt an EDI policy, please go beyond just taking steps to merely look different. You'll need to actually be different. Take the time to listen and learn as you meaningfully incorporate the input of others. By doing so, I'm confident you'll find better solutions to your clients' legal issues.

Next, let me share a few thoughts about both the folks who are effectively precluded from accessing the justice system and the folks who consume more than their share of scarce resources. The concerns and the solutions for these groups overlap.

The key concept here is proportionality. And "proportionality' can't mean that the more dough your client has or the more dough that is at stake, the more court time you get; "proportionality" has to come with a good measure of "rationality". Your clients want, need and deserve your help in pursuing the most time- and cost-effective process to resolve their disputes fairly. Of course, they also want, need and deserve your diligence and honesty, including your honest advice about accepting a reasonable settlement.

Sometimes, clients and lawyers lean towards lengthier civil proceedings, driving costs up and forcing the other party to abandon their claim or accept an unreasonable settlement. Cost and delay become weapons in wars of attrition. Such tactics not only get in the way of access to justice, but undermine trust in the justice system.

There are also other ways in which increasing complexity, costs and delays can overlap, namely the use of scarce and publicly funded judicial and court resources. Courts are limited in the number of judges, courtrooms, and staff they have available. As you are likely all aware, judges, sheriffs and other court staff are currently in short supply in many courts across Canada. For access to justice and public trust in the justice system to be maximized, lawyers need to be judicious about how much time they really need to fairly try their cases.

Takeaways

When I think about the justice system, I can't help but think about how it sits at a point of inflection. Each of us has choices to make that can have long-term effects on costs, delays and trust in the legal system. With such high stakes, it's not enough to hope for better. We, all of us, need to be and do better.

Let's be cognizant of the harms to the justice system and society as a whole that flow from insensitivity, exclusion, conflict, cost and delay.

Let's be open to using all available means to minimize these drags on the justice system.

Let's continue to use court resources efficiently by treating one another with courtesy, kindness and respect, reducing pre-trial delay, focusing on the issues that matter, and refusing to enable complacency or unreasonableness from clients.

Let's stay up to date on new technology and best practices.

And let's practice cultural humility and commit to continuously improving our cultural competency.

Returning to my personal story, I'd like to think the experiences I have had as an Indigenous person in Canada help me perform my duties well, not just for Indigenous people but for all people. No one, least of all me, is perfect, but I do my best to listen carefully and respectfully, to empathize, to be fair, to be timely, to look for restorative solutions whenever possible, to make the hard decisions whenever necessary and to express myself in accessible language that the parties can understand. These may be small steps but I hope and believe they are examples of relatively easy steps that I have personally taken to build public trust in the justice system in a way that also advances access to justice.

Obviously, we cannot rewind the clock and correct past mistakes. But can we be and do better? Can we be mindful of the role our choices play in the lives and interests of others? Can we learn from our mistakes and make every effort not to repeat them? As we face points of inflection in the coming days, weeks, months and years, I believe we can.

Though some big changes are necessary, it is mostly going to be a brick by brick, step by step, person by person, family by family, community by community process.

In these times of transition, lawyers will continue to be central players. You can be agents of change. Together and individually you have the ability to tip the scales of justice in a positive direction. Towards progress. Towards inclusion. Towards access to justice. Towards reconciliation.

Please, let's all do our part.