

CIVIL JUSTICE REFORM CONFERENCE: PHASE II

INTO THE FUTURE

REMARKS BY

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Ministers, Mr. Treasurer, Honourable Co-Chairs, Chief Justice Robert and Justice Cronk, Judicial and Legal colleagues, ladies and gentlemen, I am delighted to have the opportunity of welcoming you all to this important conference, *Into the Future - Vers le Futur*. This program for the next two days is, of course, Phase II of the National Civil Justice Reform review initiated by the Canadian Forum on Civil Justice.

The sponsoring organizations of this Conference are to be commended for the considerable work thus far undertaken and for their foresight in, once again, bringing these issues into focus as a national justice priority.

I am delighted to have the opportunity to participate, however briefly, in this important conference. I commend the honourable co-chairs, Chief Justice Robert and Justice Cronk, Conference Coordinator Chantal Duguay-Hyatt as well as all the other members of the Conference Planning Committee. They have prepared a truly remarkable program.

We share a common goal: to ensure that the civil justice system serves the public interest as best as it can.

We are all encouraged by the fact that every province is represented which is particularly important as it will assist in the goals of furthering the process of uniform sharing of information and assessing the reliability of civil justice information across Canada.

These goals can be quite complicated as I learned during my ten years as a provincial Attorney General two decades ago. I am therefore pleased to note that two of the major sessions tomorrow concern that sharing of knowledge about the civil justice system and the creation of a Civil Justice Index.

In Ontario, it has been recognized for some years that our civil justice system is in a crisis. That recognition led to the Blair Lang Task Force Reports of 1995 and 1996 as well as the Dickson Cronk Systems of Civil Justice Report.

I became a judge in 1991 and very quickly learned that the issue of access to civil justice would be the principal justice challenge for the foreseeable future. In 1995, as the Chief Justice of the Superior Court, I referred to the crisis and stated publicly that:

As well as the increasing cost, the system is labouring under the tremendous weight of a growing backlog of cases and a serious lack of adequate resources. Litigants must wait an inordinate length of time to resolve their civil disputes. Significant initiatives are absolutely essential if our court is to be able to provide timely and affordable justice to the citizens of this province.

Well, almost twelve years later, the crisis has deepened despite the best efforts of a lot of people, judges, lawyers and officials in the Ministry of the Attorney General.

In some areas of Ontario, the lengthy civil trial delays are exacerbated by the demands of the criminal justice system. The growing phenomenon of the mega criminal trial has drained badly needed judicial resources from the civil justice system with the result that in Peel Region, for example, civil trials are now being set for 2010.

My colleague Associate Chief Justice Dennis O'Connor identified the issues when he addressed the *Into the Future Conference* in Montreal last Spring stating, and I quote:

There is no doubt that the provision of civil justice is integral to a viable democratic society. As you know, our system of civil justice is premised on the maintenance of the rule of law, the independence of the judiciary and the openness of the courts, and it

can be described as having two overarching objectives: (1) to provide Canadians with a means by which they can resolve their disputes peacefully and in a timely way before an independent and impartial decision-maker; and (2) to ensure that this public dispute resolution “machinery” is accessible to all Canadians, both in terms of cost and complexity.

The problems related to excessive cost and delay in resolving civil disputes have existed for centuries. Many of us will recall Roscoe Pound’s observation almost one hundred years ago in reflecting on the main causes of dissatisfaction with the judicial system:

Uncertainty, delay and expense are direct results of the backwardness of our procedure. The effect of our exaggerated contentious procedure is not only to irritate parties, witnesses and jurors in particular cases, but to give to the whole community a false

notion of the purpose and end of law.

Fifty years ago, the Evershed Report in England stated that the expense of civil litigation in that country was “speedily making it a luxury beyond the reach of most individuals”, a sentiment that has, of course, been repeated many times in Canada.

The challenges faced by litigators today have significantly increased since my early years of practice. Not so many years ago it was unusual to bill a client before the litigation had been concluded. There was therefore a greater incentive to move the action along. At the same time, trial delays were less of a problem and the end of a lawsuit was usually within view. When a matter reached trial, one seldom heard of complaints about unnecessarily long trials. There was not a shortage of courtrooms or judges. However, today we recognize that the civil justice infrastructure has failed to keep pace with increasing demands.

As the same time, the public interest in the justice system requires a wise and ethical use of the available justice resources. Traditionally the use of

resources has been in the hands of the advocates who appear in the courts. If unreasonable demands are placed on the administration of justice, then the goal of justice itself can be imperilled. Given our inadequate resources, the justice system would not be able to bear the additional burden of a form of advocacy which, although ethical by current standards, lacks any real concern about the conservation of scarce judicial and court resources.

However, our challenge is not to look for another system but to dedicate ourselves to improving the existing system so as to make it more accessible to our fellow citizens. At the same time, we recognize that ADR is now firmly entrenched.

The search for truth is generally the goal of our civil justice system. However, it should also be noted that the search for truth can also be enormously costly and often impractical. Often the search for an honourable compromise and a quick and timely resolution will better serve the interests of the parties as well as the public interest. In this context one should be reminded of the advice of Abraham Lincoln:

Discourage litigation. Persuade your neighbours to compromise whenever you can. Point out to them how the nominal winner is often the real loser - in fees, expenses and waste of time. As a peacemaker the lawyer has a superior opportunity of being a good man. There will still be business enough.

While much has been written about the ethical conduct or otherwise of advocates, very little has been written about any ethical obligation in relation to the use of publicly funded resources, that is, the judiciary and the courtrooms.

With the emphasis of greater judicial intervention before trial, I would not want to suggest that the judiciary are opposed to counsel taking cases to trial. Indeed, there are some cases that can only be resolved in a courtroom. The right to a trial is one of the cornerstones of our free and democratic society, but like most rights it is not cloaked with absolutism.

One of former Justice Jim Farley's favourite cases is the House of Lords decision of *Ashmore v. Corp. of Lloyds*, and I quote from the judgment of Lord Roskill:

The Court of Appeal appears to have taken the view that the plaintiffs were entitled as a right to have their case tried to conclusion in such manner as they thought fit and if necessary after all the evidence on both sides had been adduced. With great respect, like my noble and learned friend, I emphatically disagree. In the Commercial Court and indeed in any Trial Court it is the trial judge who has control of the proceedings. It is part of his duty to identify the crucial issues and to see they are tried as expeditiously and as inexpensively as possible. It is the duty of the advisers of the parties to assist the trial judge in carrying out his duty. Litigants are not entitled to the uncontrolled use of a trial judge's time. Other litigants await their turn.

Litigants are only entitled to so much of the trial judge's time as is necessary for the proper determination of the relevant issues.

There is no magic bullet which will bring about the needed reforms to the civil justice system. It has often been said that reforms are not for the faint of heart or short of wind. And as Mark Twain commented, we all like progress but not necessarily change. However, the bottom line is that if the public is not better served, governments of the future may be very tempted to impose draconian procedures in the name of reform, which would seriously undermine traditional rights and safeguards.

The profession of law has never before included such a breadth and depth of talent. Let us therefore take advantage of the available human resources, work together and get on with the job.