

Into the Future: Confirming Our Common Vision

Following Part I of the *Into the Future* conference in May of this year it was clear that the findings of the 1996 *Systems of Civil Justice Task Force Report* have been widely accepted, and that many of the recommendations made in that report have been implemented by various Canadian jurisdictions. It was equally clear however that the fundamental problems described in the Report - cost, delay and complexity inhibiting access to justice - have not been resolved, and they remain for virtually all jurisdictions, serious and pressing concerns.

This document is written in anticipation of Part II of the *Into the Future* conference, in order to provide a point of departure for a discussion about civil justice reform among representatives from all of the sectors and jurisdictions of our justice system. The Canadian Forum on Civil Justice (“the Forum”) hopes that Canadian jurisdictions can work together to articulate a common vision for the civil justice system and to create a stronger voice for reform within every province and territory.

1. VISION

We need to begin with a shared understanding of concepts and terms, if we are to be sure that we share a common vision for reforming the civil justice system.

“At the most basic level, the civil justice system exists to provide people with access to knowledge about their rights, and if necessary to a means of enforcing them.”¹ This two-fold purpose underlines that while the system includes the formal dispute resolution function available in our courts, it is also a source of information about rights and responsibilities of individuals, businesses and government. This knowledge gives individuals and businesses the confidence to enter into personal and business relationships, and informs their expectations when disputes arise. “[T]he backdrop of norms and principles developed through the courts allow people to resolve problems in what Mnookin and Kornhauser famously termed the ‘shadow of the law’.² In this way the system plays a fundamental role in our society, quite apart from when it is turned to for formal assistance in resolving disputes.

While many question whether the civil justice system is really a *system* in the way that we conceive of the criminal justice system³, we will use the term “civil justice system” broadly to include all of the institutions and processes,

¹ *The Civil Justice System in Scotland – A case for Review?* The Final Report of the Civil Justice Advisory Group, Scottish Consumer Council, November 2005 at page 21. Available online at www.scotconsumer.org.uk.

² As reported in *The Future of Civil Justice: Culture, Communication and Change*, Professor Pascoe Pleasence, Presentation Notes from *Into the Future, Part I*. Available online at: <http://www.cfcj-fcjc.org/IntoTheFuture-VersLeFutur/secureDocsE/secureDocsE.htm>.

judicial and extrajudicial, legal and extralegal that participate in handling civil disputes. This is consistent with the approach of *CBA Systems of Civil Justice Task Force Report*⁴, which considered the administration of the courts, rules of court, the legal profession, the judiciary, methods of dispute resolution, public legal education and information, legal education, continuing legal education, court technologies, and statistics. In communications with the public, the Canadian Forum on Civil Justice has defined the civil justice system as including “not only the court system, but those working in the court system and service providers outside of but integral to the court system.”⁵

“Reform” means to make changes for improvement. The improvements we seek were described in the *Systems of Civil Justice Task Force Report* as making the system more understandable, accessible, affordable and timely. The report further described its vision for the 21st century civil justice system as:

- responsive to the needs of users and encourages and values public involvement,
- providing many options to litigants for dispute resolution,
- resting within a framework managed by the courts, and
- providing an incentive structure that rewards early settlement and results in trials being a mechanism of valued but last resort for determining disputes.

The CBA made it clear that to attain this vision, civil justice systems must continue to be based on the foundational principles that have guided them for so long:

- the rule of law;
- the independence of the judiciary and the bar;
- substantive and procedural fairness.

³ For example, see Genn, Hazel “Solving Civil Justice Problems. What Might Be Best?”, a paper presented to the Scottish Consumer Council Seminar on Civil Justice, January 19, 2005 at page 1. Available online at www.scotconsumer.org.uk.

⁴ See: Task Force on Systems of Civil Justice, *Report of the Canadian Bar Association Task Force on Systems of Civil Justice* (Ottawa: The Association, 1996), online: Canadian Bar Association http://www.cba.org/CBA/cbaReports/pdf/systemscivil_tfreport.pdf.

⁵ As explained at page 10 of *Learning from Experiences to Find Practices that Work*, May 2006, Barbara Billingsley, Diana Lowe and Mary Stratton, our researchers in the *Civil Justice System & the Public* project explained to public participants that by ‘civil justice’ we don’t mean the criminal courts. We mean the courts that deal with cases like family law, child welfare, injuries from accidents, property disputes and wills and estates. By ‘system’ we include everyone who has a role in civil court proceedings, such as judges, lawyers, other people who work at the courthouse, native and other support workers, services such as Legal Aid, government and public legal education groups. Available online at www.cfcj-fcjc.org/docs/CJSPLearningFromExperiences.pdf.

2. DIRECTION FOR REFORM

The primary Canadian study on reform of the civil justice systems was conducted by the Canadian Bar Association in 1995-1996 and their Systems of Civil Justice Task Force.⁶ That Report included recommendations for improving the civil justice systems, and continues to guide civil justice reform initiatives in Canada. The Canadian Forum on Civil Justice has conducted a series of surveys in the spring and summer of 2006 to both follow-up on the progress of reform initiatives since the CBA Task Force Report was released, and to seek input on whether the recommendations in the Task Force Report continue to be relevant in 2006 and beyond. The results of these surveys will be released at the *Into the Future* conference in December 2006 and will confirm that there is continued and wide support for the direction that was originally set by the CBA Task Force.

a) Progress to date

Relying upon the recommendations of the 1996 *Systems of Civil Justice Task Force Report* and other similar reports, Canadian jurisdictions have responded to these concerns by developing a variety of innovative policies, procedures and programs:

- dispute prevention and pre-action protocols: using planning to either avoid disputes entirely or resolve or narrow disputes through pre-litigation procedures including planning, plain language, legal education, preventive law and systems design;
- mediation and ADR: expanding the use of nonbinding, consensual, dispute resolution processes as early as possible in the life of a dispute;
- procedural reform: streamlining court rules and making court forms and court processes simpler and more efficient. Principles employed here include matching (ensuring that the particular process employed will be designed to fit the needs of the particular case and the particular parties) and proportionality (the amount of process used will be proportional to the value, complexity and importance of the case);
- increased judicial intervention: judges taking more control over the progress and settlement of civil cases through mechanisms like case management, case flow management and judicial dispute resolution;
- public legal education and information: making the law more accessible by making it more understandable (e.g. plain

⁶ See note 3 above.

language, self help centres and internet information). The emphasis on these programs is often on front-end “point of entry” education, information, orientation and advice.

- technological innovation: using technology to contribute to the affordability and efficiency of the courts.

b) Continuing Problems with Access

On the 10-year anniversary of the CBA Task Force Report, we need to ask ourselves not only about the progress we have made, but the more pressing question of why it is that notwithstanding the sometimes considerable success of individual innovations, accessibility continues to be a very serious problem? ⁷

Just as the civil justice system is complex, so is the process of reform. There are many possible explanations of the difficulty we have in making real change happen:

- Our traditional ways of thinking and our habits and biases about how to manage conflict are deep-seated and hard to change.

As with many systems, the civil justice system is subject to the inertia of operating ‘the way we have always done things’, even in the face of clear evidence of unwanted effects such as delay, costs and lack of understanding ... the desire to preserve the status quo creates barriers to substantial change in many aspects of the system. (Systems of Civil Justice Task Force Report)

- Over the last two or three decades court rules have grown significantly in length and complexity. Although there have been some efforts to contain it, civil process remains extremely complex and unduly expensive.

I wonder whether on the whole, the expansion of discovery, the use of multiple experts, the length of cross-examination, the level of detail and the number of issues that now characterize the trial process have really improved the fairness of our hearings or of our justice system generally. The expense and length of litigation are being constantly decried by lawyers and by the public. Macpherson v. Czaban, 2002 BCCA 518(BC Court of Appeal)

- Too often our efforts at reform are not comprehensive enough and not sufficiently fundamental. They are limited to tinkering with existing formats or making minor modifications to long established procedures. The reform literature in England says that the inaccessibility of the courts stems from a “lack of

⁷ See Appendix A for a discussion of the continuing evidence of problems in cost, delay and complexity.

effective control of the worst excesses of litigants, and procedural rules that facilitated aggressive adversarialism”.

The experience in England prior to the fundamental review conducted by the Woolf Inquiry 1994-1996 was of the limited impact of piecemeal changes to civil justice. (Hazel Genn)

- Resource limitations mean that justice systems often lack the resources they would like to have in order to make needed improvements. Historical funding shortages have resulted in lost capacity in the civil justice system, so that new funding must be apportioned not only to improving the efficiency but also to regaining lost capacity.

c) Public Centered Reform

While there is certainly truth in each of these suggestions, there is another fundamental truth to which we must give serious consideration. It is that while we speak about involving the public in the process of reform and about creating a civil justice system that is accessible for the public, the public still tends not to be present at the table. This means that their voices are not heard; that we are at best presenting our interpretation of what the public expects from our justice system, and at worst paying lip service to involving the public while continuing to do the business of civil justice and civil justice reform, just as we always have.

Research out of the Canadian Forum on Civil Justice has found that the public finds the civil justice system alienating, intimidating and very removed from their lives. When a dispute arises, the public does not know where to begin. Once they are involved in litigation, whether self-representing litigants, individuals, small businesses or corporations, users of our justice system express concern about not knowing what is happening with their case.⁸

The Forum also found that the public wants alternatives to litigation; they turn to the civil justice system for assistance in the resolution of their disputes, not necessarily to go to court.⁹ In the words of Chief Justice Roy McMurtry of the Ontario Court of Appeal:

Parties attend lawyers with problems they want solved, not with problems they want litigated. A trial is only one way to resolve a case, yet trial is the only option offered by the court administered legal system. Lawyers and their clients deserve better.

This will require changes on three fronts: to procedure, to structure and to legal culture.

⁸ *News & Views on Civil Justice Reform*, Issue 9, “What does the public really want from their lawyers and from the justice system?”, Diana Lowe, Executive Director of the Canadian Forum on Civil Justice at p.14 & 15. Reprinted with permission from *BarTalk* - a publication of the Canadian Bar Association, BC Branch (October 2005). Available online at <http://www.cfcj-fcjc.org/publications-newsAndViews.htm#issue9> .

⁹ *Ibid* at p.15.

Procedurally, access to justice should not mean only access to courts; it should mean access, preferably at a very early stage, to whatever process that will most efficiently and fairly resolve their problem. We can not take a 'one size fits all' approach to access to justice. We must continue to expand our repertoire of procedural options to support early, consensual dispute resolution. This means that when new cases come into the system we do not manage them "as if" they will go to trial; we manage them "as if" they will settle (as in fact all but a very small percentage will).

In considering reforms, we will inevitably need to ask ourselves whether we have the best structures in place. If we were to begin to design the system now, what would it look like? Should dispute resolution alternatives fall within the court structure or are they better in the private realm? Should we consider specialized courts in order to best serve the needs of our litigants? These are real questions which are being asked by the users of our courts, and which the system needs to listen and respond to with the public interest at the forefront.¹⁰

Culturally, it means thinking differently about conflict. In addition to completing a rights analysis and considering adversarial procedural for each dispute, an "interest" analysis and cooperative approaches should also be considered early in the life of the file, before a commitment is made to the court process. This "problem solving" approach requires that lawyers and judges and court administrators be truly conversant not only with the adversarial analysis and adversarial processes but also with other theories and models of conflict management.

We need to seek out and include in our research, reform initiatives, consultations and court user committees, members of the public who have had experience in our civil justice system and who can inform us about what needs to be changed from their perspective. While that perspective is only one of many that will be heard – it has been missing from the conversation until now.

d) Will this make a difference?

The Forum advises us that, "the public knows what the issues are. We need to listen."¹¹ By involving the users of our justice system in the process of reform, we will be taking a significant step toward creating an accountable and responsive system: one that is designed around the needs and

¹⁰ In his keynote address at Part I of the *Into the Future* conference, Associate Chief Justice O'Connor suggested that the market can be an indicator of what the public is seeking in our civil justice system, and that the public civil justice system can learn from the private market: *Messages from the Market: What the Public Civil Justice System Can Learn from the Private System*. At pages 14-15 ACJ O'Connor suggests that specialization already exists in some courts and needs to be given further consideration. He closes at page 25 with the observation: "The market is sending us clear messages. The challenge is to listen."

Available online at: <http://www.cfcj-fcjc.org/IntoTheFuture-VersLeFutur/secureDocsE/acjoconnor-eng.pdf>

¹¹ *Supra* note 8 at p.15.

convenience of clients, not the needs and convenience of judges, lawyers and court administrators.

If we can learn to truly involve the public in the process of reform and commit ourselves to responding to the concerns that they express, it will make a difference. By being reminded of the importance of paying attention to the first purpose of the civil justice system – that of providing the backdrop of norms and principles of a civil and just society – we will pay attention to this fundamental role that the civil justice system plays in our society. We will take steps to make the system more understandable, to ensure that the public knows what their rights and responsibilities are, and knows how to access the formal civil justice system when they are unable to resolve disputes on their own. We will feel the urgency in moving forward quickly to achieve the critical objectives set out in the CBA Task Force Report, and underlined every day in the concerns expressed by users and those who work in the civil justice systems alike:

- Enhanced access: the system must become easier to get into and easier to use. Solving a legal problem must be simple and understandable, fast and affordable.
- A multi-option justice system: enhanced access does not just mean access to court, it includes access to other dispute resolution processes. In the words of the 1996 Task Force report “while a trial judge should remain the ultimate arbiter, the civil justice system must facilitate dispute resolution outside the trial context”.
- Increased public confidence: the public must trust that the system will be there when they need it and that it will effectively manage their conflicts.

3. WORKING TOGETHER

The Canadian Forum on Civil Justice hopes to support justice reform by helping the public and the many sectors of the justice system in every Canadian jurisdiction work together to endorse a common vision for the civil justice system. The Forum believes that the jurisdictions working together can create a stronger national force for reform by:

- presenting a common front and speaking with a single voice for civil justice reform. This has the potential to clarify reform objectives across the country, to put more weight behind achieving these objectives, and to create more public profile (and with that, support) for a reform agenda;
- sharing the costs and benefits of research, reform strategies, evaluations, policy development, and program design. Enhanced communication and coordination of information between jurisdictions

has the potential to eliminate duplicative research, reduce costs, increase efficiency, and identify good ideas and best practices sooner;

Generally, the Forum can play a central role in achieving the shared vision for the civil justice systems in Canada by working collaboratively with all of the sectors and jurisdictions in the justice community. The Forum will help to create new knowledge to address gaps in knowledge and understanding about the civil justice system, serve as a clearinghouse, coordinator and facilitator to share knowledge between jurisdictions in Canada and internationally, to help transform this knowledge into successful reforms, and to encourage evaluation of reforms.

4. MAKING THE BUSINESS CASE FOR CIVIL JUSTICE REFORM

We need to be able to make the business case for civil justice reform, and we need to be able to describe the justice system in a language that will be more meaningful to the public, decision-makers and funders. Increasingly, treasury boards require justice ministries to take a business approach in their budget process and are compelling ministries to justify funding requests with evidence of productivity. It will be advantageous for us to put collective effort into this and there are a number of specific tasks on which we can work collectively, that will help us to develop a business case for civil justice reform:

- confirming that there is a common vision for civil justice reform;
- assembling more and better information about the workings of the civil justice systems in order to achieve *information based* policy creation and decision-making. Part I of the *Into the Future* conference identified the current lack of management data in the civil justice system. Historically, analysis and reform of the civil justice system has been based almost entirely on anecdotal evidence. We need hard data and better evidence:
 - to understand what happens to cases after they enter the justice system. We know how many cases enter the system and we have a rough idea that 3% to 5% proceed to trial, but we understand very little of what happens to the other 95% in between.
 - to be able to articulate more clearly the impact that management of cases in the civil justice systems has on physical and health services, police services, the education system and the workforce.¹²

¹² For example, research done by the Canadian Forum on Civil Justice in the *Civil Justice System & the Public* project furthers our understanding about the social consequences arising from both unresolved legal problems and the process of attempting to resolve such problems through the courts: *Social, Economic and Health Problems Associated with a Lack of Access to the Courts*, Final Report to Ab Currie, Principal Researcher, Research and Statistics Division, Department of Justice Canada, March 2006 (unpublished).

By working together to develop the information and by sharing that information, the depth and quality of the insight into the system could be that much greater.

- developing a Civil Justice Index, which will be both a research tool to help us improve our understanding of the civil justice systems, a communication tool, and a catalyst for change. The index will promote a long overdue dialogue - throughout the country - on the importance of the civil justice systems in Canada.¹³
- evaluation of innovative projects has become increasingly important when vying for funding within government and with private and public funding organizations. It will be advantageous to develop criteria against which system changes can be measured and to set a standard against which to gauge the progress of reform efforts. In this way research and evaluation from one jurisdiction may be more useful in others.
- promoting stakeholder "legal literacy" - the public simply does not understand the civil justice system. The system is seen by the public almost exclusively through the narrow lens of the media and further, public impressions of the criminal justice system tend to spill over and be applied to the civil systems. We need to provide the public with a map of our civil justice system which will help them to better understand what their rights and responsibilities are, to access the system when they encounter disputes that they are unable to resolve themselves, and provide them with confidence that the system is there to serve their needs. This is especially important to address to the extent that treasury boards tend to be surrogates for public opinion. Not only is better public education and understanding necessary to enable the public to know their rights and responsibilities and to better use the justice system, but enhanced public understanding will serve as a foundation for public, political and, ultimately, financial support.

As a result we will be more able to provide evidence of the impact of civil justice reforms and respond more readily to future pressures on the system. Following these strategies will allow us to articulate and implement our common vision for reform to the civil justice systems as we go into the future.

¹³ Drawn from parallel discussions about the Composite Learning Index which was created by the Canadian Council on Learning in May 2006. Information about the Composite Learning Index is available on the CCL website at: www.ccl-cca.ca

Appendix A

a) The importance of an accessible civil justice system

- There is much to be proud of about our civil justice system. It has served us well for many decades, and in many respects it continues to function effectively.
- However, it has become clear that a large segment of the public cannot afford to litigate, and that those who can frequently find that the cost of litigating is disproportionate to the value of the issues involved.
- It is axiomatic that a fair, effective and accessible civil justice system is essential to the peaceful ordering and the social and economic well being of our society.

"In well functioning liberal democracies accessible institutions of both public and private governance are the foundation of civil society. In the public sphere, the underlying rationale for universal suffrage and democratic practice is, ultimately, an access to justice rationale." Professor Rod Macdonald (2003)

b) Inaccessibility: cost, delay and complexity

- Over the last 10 or 15 years problems of accessibility in the civil justice system have been well documented and the need for change has been well articulated. Reports out of several Canadian jurisdictions tell us that:
 - citizens cannot access the civil justice system because it is too expensive, takes too long, and is too complicated;
 - as a consequence of the growing inaccessibility of the civil courts, the credibility of the system and public confidence in the system are in decline.
- Evidence of problems in the civil justice systems includes:
 - decrease in civil filings;
 - decrease in trials;
 - increase in the length of trials;
 - increase in self represented litigants; and
 - increase in levels of public dissatisfaction.
- These problems are common to civil justice systems everywhere:

"The issues of cost, timeliness, efficiency and accessibility have been analyzed and considered by a growing number of law reform bodies here and overseas. Judging from this literature these are problems which bedevil civil justice systems around the world." Australian Law Reform Commission 1999.