THE CHALLENGES WE FACE

Remarks of the Right Honourable Beverley McLachlin, P.C.
Chief Justice of Canada
to the Empire Club of Canada

Toronto, Ontario
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CHECK AGAINST DELIVERY

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Mr. President, distinguished guests, thank you for that welcome. I am delighted to be here again to address the Empire Club.

More than a quarter century ago, a Canadian Justice Minister, Pierre Elliott Trudeau, challenged Canadians to build "the just society". To that end, he worked, over his time in Parliament, to establish his vision of a just society, most notably through the adoption of the *Charter of Rights and Freedoms* in 1982. Whatever our political persuasion or our particular conception of justice, there can be no doubt that Canadians today expect a just society. They expect just laws and practices. And they expect justice in their courts.

Today, I would like to share with you my perspective on justice in our courts and the challenges we face in assuring Canadian men, women and children a just and efficacious justice process.

Let me begin by asserting that Canada has a strong and healthy justice system. Indeed, our courts and justice system are looked to by many countries as exemplary. We have well-appointed courtrooms, presided over by highly qualified judges. Our judges are independent

and deliver impartial justice, free of fear and favour. The Canadian Judicial Council, which I head, recently issued an information note on the judicial appointments process in which it affirmed these long-standing principles on which our justice system is based. Canadians can have confidence that judges are committed to rendering judgment in accordance with the law and based on the evidence. Corruption and partisanship are non-issues. In all these things, we are fortunate indeed.

Yet, as in every other human institutional endeavour, justice is an ongoing process. It is never done, never fully achieved. Each decade, each year, each month, indeed each day, brings new challenges. Canadian society is changing more rapidly than ever before. So is the technology by which we manage these changes. Thus it should not come as a surprise that Canada's justice system, in 2007, faces challenges. Some represent familiar problems with which we have yet to come to grips. Others arise from new developments, and require new answers.

In my comments today I will touch on four such challenges:

- the challenge of access to justice,
- the challenge of long trials,
- the challenge of delays in the justice system, and
- the challenge of dealing with deeply rooted, endemic social problems.

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The Challenge of Access to Justice

The most advanced justice system in the world is a failure if it does not provide justice to the people it is meant to serve. Access to justice is therefore critical. Unfortunately, many Canadian men and women find themselves unable, mainly for financial reasons, to access the Canadian justice system. Some of them decide to become their own lawyers. Our courtrooms today are filled with litigants who are not represented by counsel, trying to navigate the sometimes complex demands of law and procedure. Others simply give up. Recently, the Chief Justice of Ontario stated that access to justice is the most important issue facing the legal system[1].

The Canadian legal system is sometimes said to be open to two groups – the wealthy and corporations at one end of the spectrum, and those charged with serious crimes at the other. The first have access to the courts and justice because they have deep pockets and can afford it. The second have access because, by and large, and with some notable deficiencies, legal aid is available to the poor who face serious charges that may lead to imprisonment. To the second group should be added people involved in serious family problems, where the welfare of

[1] Tracey Tyler, *"The dark side of justice"*, Toronto Star, March 3, 2007.

children is at stake; in such cases the Supreme Court has ruled that legal aid may be a constitutional requirement.[2]

It is obvious that these two groups leave out many Canadians. Hard hit are average middle-class Canadians. They have some income. They may have a few assets, perhaps a modest home. This makes them ineligible for legal aid. But at the same time, they quite reasonably may be unwilling to put a second mortgage on the house or gamble with their child's college education or their retirement savings to pursue justice in the courts. Their options are grim: use up the family assets in litigation; become their own lawyers; or give up.

The result may be injustice. A person injured by the wrongful act of another may decide not to pursue compensation. A parent seeking custody of or access to the children of a broken relationship may decide he or she cannot afford to carry on the struggle – sometimes to the detriment not only of the parent but the children. When couples split up, assets that should go to the care of the children are used up in litigation; the family's financial resources are dissipated. Such outcomes can only with great difficulty be called "just".

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[2] *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46.

To add to this, unrepresented litigants – or self-represented litigants as they are sometimes called – impose a burden on courts and work their own special forms of injustice. Trials and motions in court are conducted on the adversary system, under which each party presents its case and the judge acts as impartial decider. An unrepresented litigant may not know how to present his or her case. Putting the facts and the law before the court may be an insurmountable hurdle. The trial judge may try to assist, but this raises the possibility that the judge may be seen as "helping", or partial to, one of the parties. The proceedings adjourn or stretch out, adding to the public cost of running the court. In some courts, more than 44 per cent of cases involve a self-represented litigant.[3] Different, sometimes desperate, responses to the phenomenon of the self-represented litigant have emerged. Self-help clinics are set up. Legal services may be "unbundled", allowing people to hire lawyers for some of the work and do the rest themselves. The Associate Chief Justice of the British Columbia Provincial Court is quoted as saying this is "absurd", not unlike allowing a medical patient to administer their own anaesthetic[4].

It is not only the unrepresented litigants who are prejudiced. Lawyers on the other side may find the difficulty of their task greatly increased, driving up the costs to their clients. Judges

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[3] See André Gallant, "The Tax Court's Informal Procedure and Self-Represented Litigants: Problems and Solutions" (2005) 53 Canadian Tax Journal 2. In Anne-Marie Langan, "Threatening the Balance of the Scales of Justice: Unrepresented Litigants in the Family Courts of Ontario" (2005) 30 Queen's L.J. 825, the author cites data compiled by the Ontario Ministry of the Attorney General, which show that in 2003, 43.2 percent of applicants in the Family Court, Ontario Court of Justice Division were not represented by counsel when they first filed with the court. The average percentage of unrepresented litigants in Ontario family courts between 1998 and 2003 was 46 percent.

[4] Tracey Tyler, *"The dark side of justice"*, Toronto Star, March 3, 2007.

are stressed and burned out, putting further pressures on the justice system. And so it goes.

The bar and the bench are attempting to improve the situation. Some modest progress is being made. Lawyers are organizing themselves to give free, or *pro bono*, service to needy clients. Clinics have been set up by governments, NGOs and legal groups to help self-represented litigants. Rule changes to permit contingency fees – the lawyer is paid out of the proceeds of the litigation, if any – and class actions may be providing the means for people of modest means to litigate tort and consumer actions. Thought is being given to coverage for legal services within specified limits as an endorsement to home insurance policies. Justice groups are working to simplify procedures and thus reduce costs or assist the unrepresented litigant.

All this is good. Yet much more needs to be done if access to justice is to become a reality for ordinary Canadians.

The Challenge of Long Trials

A second challenge is the challenge of long trials, an increasingly urgent problem both in civil and criminal litigation. Not too many years ago, it was not uncommon for murder trials

to be over in five to seven days. Now, they last five to seven months. Some go on for years.[5] The length of civil trials is also increasing. For example, in 1996, the average length of a trial at the Vancouver Law Courts was 12.9 hours. Six years later, the average length of a trial had doubled, to 25.7 hours.[6] This trend is consistent with developments in other jurisdictions throughout Canada.

There are a number of reasons why trials seem to have taken on a life of their own. On the criminal side, the *Canadian Charter of Rights and Freedoms* has had a significant impact on the criminal trial process. *Charter* pre-trial motions regularly last two to three times longer than the trial itself.[7] Changes in the law of evidence have also increased litigation and lengthened trials.[8]

On the civil side, there are also a number of causes for reasons why trials have become longer. Although Canadian rules of procedure impose limits on examinations for discovery, some argue that they are still too broad, allowing parties to canvass issues that are not relevant

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[5] Hon. Justice Michael Moldaver, "Long Criminal Trials: Masters of a System They are Meant to Serve (2005), 32 C.R. (6th) 316.

[6] Supreme Court of British Columbia, *Annual Report 2005* (Vancouver, BECAUSE: Supreme Court of British Columbia, 2005).

[7] *Ibid.*

[8] The changes include the expanded scope of the principled exception to the hearsay rule, increased use of previous disreputable conduct evidence, third party record applications, and applications to determine the admissibility of previous sexual conduct of the complainant.

and material to the issues in the litigation. This results in longer, and more expensive discoveries, and a larger volume of evidence being placed before the trier of fact at trial. The expanded use of expert witnesses has also lengthened trials.

Efforts at reform are underway. On the criminal side, a recent report by the Ontario Superior Court of Justice makes a number of recommendations to improve the efficacy and effectiveness of judicial pre-trial conferences with a view to improving the efficiency of criminal trials.[9] The Ontario government recently launched a process to suggest reforms to the province's civil justice system.[10] A similar review is underway in British Columbia.[11]

The Challenge of Delays in the Justice System

A third and related challenge is the problem of delays in the processing of cases. Here again, the problem afflicts both criminal and civil cases. On the criminal side, delays in proceedings may result in serious cases being stayed, since the *Charter* guarantees a trial within a reasonable time. Delays may also result in lengthy periods of incarceration for the accused

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[9] Superior Court of Justice, "New Approaches to Criminal Trials: Report of the Chief Justice's Advisory Committee on Criminal Trials in the Superior Court of Justice" (May 2006), online: Superior Court of Justice <http://www.ontariocourts.on.ca/superior_court_justice/reports/CTR/CTReport.htm>

[10] Ministry of the Attorney General, News Release, "McGuinty Government Launches Civil Justice Reform" (June 28, 2006).

[11] BECAUSE Justice Review Task Force, "Effective and Affordable Civil Justice: Report of the Civil Justice Reform Working Group to the Justice Review Task Force" (November 2006), online: BECAUSE Justice Review Task Force <http://www.bcjusticereview.org/working_groups/civil_justice/cjrwg_report_11_06.pdf>

person prior to trial. Even where the accused in out on bail, the stress of the ongoing proceedings and the upcoming, ever-deferred trial may be considerable. Witnesses are less likely to be reliable when testifying to events that transpired many months, or even years, before trial. Not only is there an erosion of the witnesses' memory with the passage of time, but there is an increased risk that a witness may not be available to testify through ordinary occurrences of sickness or death. As the delay increases, swift, predictable justice, which is the most powerful deterrent of crime, vanishes. These personal and social costs are incalculable.

On the civil side, different but similar problems arise. Whether the litigation has to do with a business dispute or a family matter, people need prompt resolution so they can get on with their lives. Often, they cannot wait for years for an answer. When delay becomes too great, the courts are no longer an option. People look for other alternatives. Or they simply give up on justice.

Courts have been promoting various forms of out-of-court mediation and arbitration as a more effective way of achieving settlement and dealing with many cases. But the fact is, some cases should go to court. They raise legal issues that should be considered by the courts for the good of the litigants and the development of the law.

I do not want to give the impression that all is bleak. Ten years ago, in Ontario, civil appeals were taking two to three years from the date of perfection to be heard. Criminal appeals

were not much better. They were being heard one and a half to two years from the date of perfection.[12] Today, the times required for bringing appeals on for hearing have been greatly reduced.

In a recent speech, Ontario Court of Appeal Justice Michael Moldaver noted that the solution to delays in the justice system was not to hire more judges, but for the court to take control of the process from the litigants and put it back in the hands of the judges. This is what happened in Ontario. Within a space of 18 months, the backlog was gone. Civil appeals in Ontario are now being heard within nine to 12 months of perfection. Criminal appeals are being heard within six to nine months.

The Challenge presented by Endemic Social Problems

The final justice challenge I wish to discuss is the challenge presented by intractable, endemic social problems, including drug addiction and mental illness.

A few years ago, I found myself at a dinner at government house. Next to me sat the Chief of one of Toronto's downtown precincts. I asked him what his biggest problem was. I thought he would say the *Charter* and "all those judges who pronounce on rights". But he

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[12] The Hon. Justice Michael Moldaver, "The State of the Criminal Justice System in 2006, An Appellate Judge's Perspective" (Remarks to the Justice Summit 2006, November 15, 2006).

surprised me. "Mental illness", was his reply. He then told me a sad story, one I have heard throughout the country in the years since. Every night, his jails would fill up with minor offenders or persons who had created a nuisance – not because they are criminals, but because they are mentally ill. They would be kept overnight or for a few days, only to be released – the cycle inevitably to repeat itself.

Such people are not true criminals, not real wrong-doers in the traditional sense of those words. They become involved with the law because they are mentally ill, addicted or both. Today, a growing awareness of the extent and nature of mental illness and addiction is helping sensitize the public and those involved in the justice system. This sensitization and knowledge is leading to new, more appropriate responses to the problem.

One response has been the development of specialized courts – such as mental health courts and drug courts. As Brian Lennox, Chief Justice of the Ontario Court of Justice said recently at the opening of the Mental Health Court in Ottawa:

> The Ottawa Mental Health Court is an example of a progressive movement within criminal justice systems in North America and elsewhere in the world to create "problem-solving courts". These courts, with collaborative interdisciplinary teams of professionals and community agencies, attempt to identify and to deal with some of the underlying factors contributing to criminal

activity, which have often not been very well-addressed by the conventional criminal justice process. The goal is to satisfy the traditional criminal law function of protection of the public by addressing in individual cases the real rather than the apparent causes that lead to conflict with the law.

Mental health courts have opened in Ontario, New Brunswick and Newfoundland.[13] Many other jurisdictions , including British Columbia, Manitoba, Nunavut and Yukon, are in various stages of development of mental health courts. These courts can do much to alleviate the problems.

Other problem-solving courts within the Ontario Court of Justice include our Drug Treatment Courts and *Gladue* Courts, the latter dealing with aboriginal offenders. Such courts are also being used in other Canadian jurisdictions.

Conclusion

I have shared with you four challenges faced by Canada's justice system in 2007 – challenges close to my heart, and that of justice workers, including judges, throughout Canada.

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[13] "Court for Mentally Ill to Open"*Kitchener-Waterloo Record* (June 15, 2005), online: Canadian Mental Health Association <http://www.ontario.cmha.ca/content/mental_health_system/public_issues.asp?cID=5834>.

I have also described the efforts which are being made to alleviate the problems and ultimately, with luck, perhaps solve them.

Let me close on this note. Nothing is more important than justice and the just society. It is essential to flourishing of men, women and children and to maintaining social stability and security. You need only open your newspaper to the international section to read about countries where the rule of law does not prevail, where the justice system is failing or non-existent.

In this country, we realize that without justice, we have no rights, no peace, no prosperity. We realize that, once lost, justice is difficult to reinstate. We in Canada are the inheritors of a good justice system, one that is the envy of the world. Let us face our challenges squarely and thus ensure that our justice system remains strong and effective.

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