

News & Views

ON CIVIL JUSTICE REFORM

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Canadian
Forum
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Into the Future Conference *Special Edition*

In this issue

INTO THE FUTURE: THE AGENDA FOR CIVIL JUSTICE REFORM	3
A MOMENTOUS ANNIVERSARY	4
INTO THE FUTURE.	4
ACCA LEARNING EVENT - 2006	5
INTO THE FUTURE – USERS’ PERSPECTIVES ON ACCESS TO JUSTICE	5
A JOB FOR US ALL <i>Seymour B. Trachimovsky, Chief Legal Officer and Corporate Secretary, ZENON Environmental Inc.</i>	6
Court Technology SCAN - Canadian Centre for Court Technology <i>Justice Fran Kiteley, Ontario Superior Court of Justice and Professor Daniel Poulin, University of Montréal</i>	7
ONE COUNSEL’S EXPERIENCE WITH INTRODUCING ALTERNATIVE DISPUTE RESOLUTION (ADR) IN A CORPORATE SETTING <i>S. Noel Rea, QC, National ADR Co-ordinator, Fraser Milner Casgrain LLP formerly Senior Counsel, Imperial Oil Limited</i>	9
SOME INDUSTRY RESPONSES TO DISPUTE RESOLUTION <i>S. Noel Rea, QC.</i>	11
Small Business and the Civil Justice System <i>Peter Jefferson, President and CEO, N. Jefferson Ltd., Vancouver, BC</i>	13
“What does the public really want from their lawyers and from the justice system?” <i>Diana J. Lowe, Executive Director, Canadian Forum on Civil Justice</i>	14
Privatizing our Public Civil Justice System <i>Trevor C. W. Farrow</i>	16
Cross Country Snapshots - USERS’ PERSPECTIVES ON CIVIL JUSTICE REFORM	18
INTO THE FUTURE The Agenda for Civil Justice Reform.	26

We welcome your submission of articles (or topics of interest) for publication in *News & Views on Civil Justice Reform*. Tell us about an experience of civil justice reform in your jurisdiction. Provide us with a comparative analysis. Report on what is new in your civil justice system. Let us know what you would like to find out more about. Submissions may be made in French or English; however we ask that contributions be written in plain language. For more detailed information, please contact the editors: Kim Taylor & Diana Lowe.

News & Views is intended to serve as an information source on civil justice reform initiatives for lawyers, judges, legal educators, court administrators and members of the public.

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- British Columbia Ministry of the Attorney General
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- Saskatchewan Justice

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INTO THE FUTURE: THE AGENDA FOR CIVIL JUSTICE REFORM

In August 1996, the Report of the Canadian Bar Association Task Force on Systems of Civil Justice was published. The Report was an invitation to all participants in the civil justice systems across Canada to work together to preserve and enhance Canadian systems of civil justice and to achieve a new vision of those systems for the 21st century.

Into the Future: The Agenda for Civil Justice Reform, to be held in Montréal, April 30 – May 2, 2006, is our opportunity to review responses to that 1996 invitation. Those responses have been many and varied. We are all looking for civil justice systems that work – for litigants, for court administrators, for lawyers, for judges and for members of the public. *Into the Future* provides an important opportunity to evaluate reform measures and plan for the future. By focusing on what functions well, we can begin to plan next steps to overcome remaining barriers to effective reform.

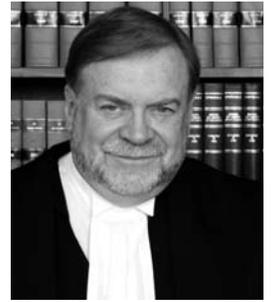
The emphasis at *Into the Future* will be on the various “users” of the civil justice system, including litigants, court administration staff, senior government officials, lawyers and judges. *Into the Future* is Part One of a two-part Conference format, allowing for generation of novel reform ideas and critical analyses of reform issues at Part One and specific reform recommendations at Part Two. The Canadian Forum on Civil Justice is hosting this Conference in partnership with the Association of Canadian Court Administrators, the Canadian Bar Association, and the Canadian Institute for the Administration of Justice. Each partner organization has contributed a unique perspective, bringing you an exceptional Conference created through the collaboration of some of the civil justice system’s “users”.

Experts from the United Kingdom, Australia, and Canada will speak on *Developing a Culture of Access: Overcoming barriers to effective reform*; *The Role of Lawyers in Managing Litigation and its Costs: Practices to curb costs, delay and abuse*; and *Challenging Assumptions: Civil Justice Reform in Australia, the UK and the US*, as well as many other topical issues. Participants from every facet of the civil justice system have been invited and the discussions are sure to be lively and interesting.

We are very pleased to be the Honourary Co-Chairs of *Into the Future: The Agenda for Civil Justice Reform*. We are excited about the program and the anticipated participants in the Conference. Mark your calendars and “come alive” in Montréal, April 30 – May 2, 2006. We look forward to seeing you at the Conference.

Chief Justice J. J. Michel Robert, Court of Appeal of Québec

Justice Eleanore A. Cronk, Court of Appeal for Ontario



Chief Justice
J. J. Michel Robert



Madame Justice
Eleanore A. Cronk

We gratefully acknowledge the contribution of our *Into the Future* Conference Corporate Sponsor, Peak Energy Services Trust. Their generous financial support has allowed for the publication of this Special Conference issue of *News & Views on Civil Justice Reform*, with its focus on users of the civil justice system.





Brian A. Tabor, QC

It is my great pleasure to contribute to this special issue of *News & Views* devoted to the 10th anniversary of the CBA's *Systems of Civil Justice* report and the landmark conference *Into the Future* that the Canadian Forum on Civil Justice will host this spring.

This report and this Conference are a credit to the value of cooperation and collaboration with our many allies in the civil justice reform fight. In particular,

I wish to single out the Association of Canadian Court Administrators, the Canadian Institute for the Administration of Justice, and the Canadian Forum on Civil Justice, our partners in this conference.

I urge each one of you to mark this 10th anniversary and consider its important implications. While much progress has been made in improving access to justice, especially with regard to alternative dispute resolution, much still remains to be done. As the law touches more and more lives and the costs of encountering the justice system keep rising, solutions must be found.

Into the Future builds on these themes and represents an unprecedented opportunity to bring Bar and judicial leaders together to identify those solutions. The fundamental topics are addressed: identifying remaining barriers to access to

INTO THE FUTURE



CANADIAN INSTITUTE FOR
THE ADMINISTRATION OF JUSTICE



Justice Bruce I. Cohen

The Canadian Institute for the Administration of Justice (CIAJ) has over thirty years of history in participating in the improvement and advancement of the administration of justice. We are strategically placed to identify emerging needs, and to promote research and educational endeavours likely to improve the administration of justice. We take a multi-disciplinary approach in identifying and addressing leading-edge issues.

Participating with our partners in hosting the Conference, *Into the Future: The Agenda for Civil Justice Reform*, provides us with an opportunity to support the objectives we as an Institute have identified as important. The Conference brings together the public, the judiciary, the Bar, government and courts administration to critically examine civil justice systems in Canada and their ability to respond to the current and future needs of their users. Rarely are there such opportunities for all users of the system to jointly consider and share perspectives on issues that affect them all. *Into the Future* also allows us to support the important research being

justice, dealing with funding shortfalls, keeping litigation costs in check.

But I am also heartened to see topics that expressly invite users of the civil justice system into the discussion. There is a panel devoted to meeting public expectations, another to airing the views and experiences of litigants, and a third responding to the growing issue of unrepresented litigants. If you are concerned about meaningful access to justice for all civil justice system users, I urge you to attend this conference and be part of the conversation.

The CBA, as you may know, has made legal aid reform the centerpiece of its civil justice reform efforts. By championing this cause for more than two decades, the CBA has led the way in putting legal aid funding squarely on the Canadian justice agenda. The CBA has now taken that message to the courts, with the launch of a test case in British Columbia that seeks a declaration of the government's obligation to provide adequate legal aid funding.

As you can see, these are momentous times for civil justice reform in Canada, and the timing of the 10th anniversary of *Systems of Civil Justice* could not be better. Let me conclude by encouraging each one of you to take up the fight for civil justice reform, as we continue towards a better and brighter day for access to justice.

Brian A. Tabor, QC
President
Canadian Bar Association

conducted on civil justice reform and, particularly, the release and dissemination of the findings of the *Civil Justice & the Public* study recently completed by our partner, the Canadian Forum on Civil Justice. Another partner, the Association of Canadian Court Administrators, is holding its annual Learning Event at this Conference, emphasizing the highly educational nature of this unique event.

The Conference program is packed with two full days of education sessions. There are keynote speakers from Canada and abroad who will provide expert advice on ways and means to make our civil justice system more accessible, effective, fair and efficient. In the ten years since the *Report of the Canadian Bar Association Task Force on Systems of Civil Justice*, we'll examine some effective reforms and map the future direction of civil justice reform in Canada. This is an important and timely Conference, and the CIAJ encourages anyone with an interest in the administration of justice in Canada to attend. See you there!

Justice Bruce I. Cohen
Supreme Court of British Columbia
President
Canadian Institute for the Administration of Justice

ACCA LEARNING EVENT - 2006



Joanne B. Spriet

As President of the Association of Canadian Court Administrators (ACCA), I am pleased to partner with other key constituent groups of the Canadian civil justice systems to present *Into the Future: The Agenda for Civil Justice Reform*, April 30 – May 2, 2006 in Montréal. For ACCA members, this Conference is our annual Learning Event, and I know we

are looking forward to learning from the international civil justice system experts, participating in discussions of timely issues with court administrators and others and, along with other participants, creating new ways of moving forward.

ACCA exists to foster collaboration, the sharing of knowledge and best practices, and the promotion of innovation in order to improve the Canadian court system and to enhance the administration of justice. This Conference will help raise the awareness of other groups within the civil justice system to the work of ACCA and will certainly assist with ACCA's collective objective to establish and nurture partnerships with other organizations involved in the administration of justice. *Into the Future* provides an opportunity for ACCA to again achieve one of our Strategic Plan goals, that of promoting collaboration among all jurisdictions and stakeholders to achieve our mission.

As ACCA's President, I have the pleasure of introducing Pascoe Pleasence, our first keynote speaker on Monday morning, May 1, 2006. Pascoe will be speaking on "The Future of Civil Justice: Culture, Communication and Change". Court Administrators can find themselves in multiple critical conversations on a daily basis. Often the stakes are high when results and the need to build and maintain relationships are crucial. Whatever the situation, the manner in which we respond and what we say has a profound impact on the public and their ultimate confidence in the justice system. I'm looking forward to this address since I expect it will give a more global framework to the issues that, as court administrators, we grapple with day to day.

Other sessions are going to be equally exciting and applicable to the skills and experiences necessary for court administrators to more effectively achieve their goals, both individually and for ACCA as an organization within the civil justice system. I look forward both to renewing old ACCA and partner organization acquaintances and to making new ones this spring at *Into the Future*.

April 30 – May 2, 2006, Montréal, Québec

Bienvenue!

Joanne B. Spriet
President

Association of Canadian Court Administrators

INTO THE FUTURE – USERS' PERSPECTIVES ON ACCESS TO JUSTICE



Mary Ellen Hodgins

The Canadian Forum on Civil Justice and our partners invite you to participate in the upcoming conference – *Into the Future: The Agenda for Civil Justice Reform in Canada*. The Conference will be held in Montréal from April 30th - May 2nd, 2006, marking the 10-year anniversary of the release of the *Report of the Canadian Bar Association Task Force on Systems of Civil Justice*.

This event is the result of the collaborative efforts of four organizations: the Canadian Forum on Civil Justice (the Forum), the Association of Canadian Court Administrators, the Canadian Bar Association (CBA) and the Canadian Institute for the Administration of Justice. We are honoured that **Mr. Justice J. J. Michel Robert**, Chief Justice of Québec, and **Madam Justice Eleanore Cronk** of the Court of Appeal for Ontario, have agreed to be the Honourary Co-Chairs for the Conference.

Conference objectives are twofold. First, it will provide an update on the status of civil justice reforms nationwide since the 1996 release of the CBA Task Force Report. Ten years have passed since the Report was published, without a national check-up on whether the recommendations have been implemented or whether they have been successful.

Secondly, the Conference will identify barriers that prevent civil justice reform from occurring and consider mechanisms to promote effective reform. This occasion represents a rare opportunity for all stakeholders in the civil justice system to come together to explore opportunities for the system to be more responsive for all Canadians.

Leaders in civil justice from across Canada and internationally, will speak about innovative approaches to reduce the cost of litigation, manage litigation, integrate ADR and create an overall culture of access to our civil justice system.

Speaking of “access” to our civil justice system helps to remind us that the purpose of reforms really must be to improve the system for the litigants who use it. In our research on the *Civil Justice System & the Public*, the Forum has been talking with members of the public for the last five years. We have learned a great deal about the needs, interests and concerns of litigants. We will share our findings and the final report of our research at the Conference, as part of a central focus on the public perspective running throughout the Conference.

This public or user perspective, which frames the Conference, begins with this issue of *News & Views on Civil Justice Reform*. Special Issue #9 contains articles from many different civil justice system users, from every jurisdiction across Canada and from every level of experience. As a consumer representative on the Board of the Forum, I’m

very excited to see the spotlight shining on those the system was created to assist.

I value the opportunity to participate in the dialogue that will form the basis for moving the agenda for civil justice reform forward and invite you to join us in these conversations. The discussion will go beyond an assessment of the current civil justice landscape, identifying areas still in need of reform, considering reform options from Canada and other jurisdictions, and ultimately leading to recommendations for future civil justice reform initiatives.

The Conference will be challenging and thought provoking. I look forward to meeting you there.

Mary Ellen Hodgins
Chair
Canadian Forum on Civil Justice

A JOB FOR US ALL

Seymour B. Trachimovsky, Chief Legal Officer and Corporate Secretary, ZENON Environmental Inc.

Not too long ago, I heard the general counsel of a large American multi-national manufacturing company assert that it was an objective of his office to reduce the number of law suits filed against his corporate employer.¹ When I heard this my jaw dropped. As a corporation with a history of scores of products manufactured over a century or more under long since obsolete environmental standards, I thought such an objective preposterous, to say the least. Indeed, so it has turned out to be as the number of lawsuits filed against this corporation continues to expand.

Beyond the inherent nature of this corporation’s products and processes, however, a deeper problem concerns the fundamental properties of the litigation system itself and, in this regard, the difference between Canada and the United States is merely a difference in degree, not in kind, and even there the gap is narrowing. One of my most oft-repeated monitions to clients in respect of our system of justice is that there is nothing easier to do in the western common law world than to start a lawsuit and it doesn’t matter if there are any grounds. I would not for a moment, as a general counsel, countenance an objective, against which my compensation may be measured, to reduce law suits against my employer. Defeating plaintiffs or resolving actions favourably are one

thing. But trimming the docket in this day and age in a culture of rights? Fugedaboutit!!

In a recent survey of United States General Counsel, a plurality of respondents identified litigation as the most challenging area they confront, higher in the pecking order than securities, environmental, intellectual property, employment issues and anything else you care to name. I would speculate that a survey of Canadian General Counsel would detect similar concerns. A crude Canadian survey undertaken ten years ago, the only data I have available, demonstrates that business corporations are easily the most significant users of the courts. Again it would be in the realm of speculation but it’s hardly likely to be any different today and this despite the auspicious growth in Alternative Dispute Resolution (ADR) impelled, as it’s been, by the work of the Systems of Civil Justice Task Force chaired by Justice Cronk prior to her appointment to the Ontario Court of Appeal. No doubt, court dockets would be even more crowded but for the relief afforded by private dispute resolution arrangements.

All the anecdotal evidence points to continuing growth in corporate litigation of all types: contracts, securities, intellectual property and product liability to name just a few. Disputes among neighbours are as old as man himself, or herself, and there’s no chance of seeing an end to that in our lifetimes. No self-respecting lawyer would think of preparing an agreement today, domestic or international, without addressing dispute resolution whether simply choice of law, or more thoroughly, choice of forum and provisions for ADR including negotiation, mediation, arbitration, and finally litigation. Much of in-house counsel’s work these days is directed at minimizing the transaction costs associated with resolving differences. We can do this directly by privatizing dispute resolution through the

mechanisms referred to above which have a number of benefits in terms of procedure and costs.

Sooner or later we inevitably do end up in court and, as I advise my non-lawyer clients, you are now on foreign turf and the process is not yours to control, but one mandated by rules of procedure that you have never heard about and will soon wish you had never heard about. It has been an objective of the Canadian Forum on Civil Justice to encourage private dispute resolution on one hand and to influence the evolution of judicial procedure on the other hand. Civil justice reform is the subject of the *Into the Future* Conference and is surely an appropriate target for a typical corporate program of “continuous improvement”.

In-house counsel and their corporate employers can have an impact on this program of improvement but must weigh in. Given the inexorable trend toward more and more disputes involving greater and greater stakes, I have recently been taken aback at the crabbed attitude of Canadian General Counsel as well as chief executives who evidently do not see civil justice reform as a priority. It seems incongruous at a time when costs of corporate litigation are spiraling out of control that business is failing to register present, to judge from the blasé responses of Canadian General Counsel when the subject of civil justice reform is raised with them as I have recently done. “It is a job for government”, say the

champions of free enterprise. For aficionados of Covey’s “seven effective habits” they are apparently stuck in the wrong quadrant (urgent and important tasks) and ignoring quadrant 2 (important but not urgent tasks). To use another metaphor popular in business, this is not “thinking outside the box”; it is not even thinking inside the box. Rather it is burying the head in the sand. Sorry, civil justice reform is a job for us all.

Seymour Trachimovsky is Chief Legal Officer and Corporate Secretary for ZENON Environmental, Inc. -“Water for the World” www.zenon.com

He may be contacted at: (905) 465-3030 ext. 3019

Endnote

- 1 At the time of this pronouncement his employer was confronting several thousand suits, certainly not atypical in the “smokestack” industries group of companies. Asbestos law suits alone for the typical large industrial employer probably number in the four figures and this company had its share. In addition to the asbestos law suits, many of the other suits against this corporation involved discontinued product lines whose potential harm to health has only recently come to light, the ghosts of the past returning to haunt the present occupants of the edifice. It would be a virtual certainty that other issues involving legacy operations would continue to bubble to the surface, pun intended.

Court Technology SCAN - Canadian Centre for Court Technology

Justice Fran Kiteley, Ontario Superior Court of Justice and Professor Daniel Poulin, University of Montréal

On August 17, 2005 in Vancouver, approximately 60 representatives of the justice sector participated in an exciting Forum to explore the prospects of establishing a Canadian Centre for Court Technology. After many years of attending at Court Technology Conferences (CTC’s) in the United States offered by the National Center for State Courts, there was a view that perhaps a “made in Canada” alternative ought to be explored.

The Forum was initiated by the Canadian Judicial Council in close collaboration with organizations and individuals involved or interested in the administration of justice: the Association of Canadian Court Administrators, the Canadian Bar Association, the Canadian Forum on Civil Justice, the Canadian Association of Provincial Court Judges, the

Canadian Institute for the Administration of Justice, the Canadian Superior Court Judges Association, the National Judicial Institute, and the Office of the Commissioner for Federal Judicial Affairs. Participants included deputy attorneys-general, assistant deputy ministers, court administrators, lawyers, academics and judges.

After an introduction by Chief Justice McLachlin, representatives of four communities identified the impact that such a centre would have. Rick Craig, Executive Director of the Law Courts Education Society of B.C. and Diana Lowe, Executive Director of the Canadian Forum on Civil Justice, collaborated with Nathalie Roy, Executive Director of Éducaloi, on the preparation of a discussion paper on the public perspective on a centre. Rick and Nathalie made the presentation.

Rick emphasized that the “public” is not homogenous; one must think about *publics* and the diverse needs those publics bring. He suggested that the current justice system was designed by judges and lawyers - for themselves. The centre must include representation on behalf of those publics to ensure that their needs are integrated with the needs of other stakeholders. Nathalie pointed out that a centre would

facilitate partnerships with those organizations familiar with the needs of users to improve access to the justice system.

On behalf of the Association of Canadian Court Administrators, Helen Pedneault, Assistant Deputy Minister, BC, used the British Columbia Integrated Justice system as an example of the sophisticated use of technology to increase accessibility to information. She observed that a centre ought not to be confined to technology issues in courts but ought to embrace a mission that would encompass improvement of the whole justice system. She suggested that a technology-only approach would be analogous to “paving a cow path”.

On behalf of the judiciary, Justice Tom Granger of the Ontario Superior Court observed that over 95% of all documents are created and stored in an electronic format and over 35% of those are never printed. That is having a profound impact on the work of courts in all areas of the law. Litigants and counsel increasingly demand access to electronic technology in the courtroom and in data collection, retrieval and storage. He observed that the designer of an information technology system will make key decisions about what information is made available, to whom and how it is accessed. He encouraged the judiciary to participate at the ground level in the design of an information technology system, rather than acquiesce in the design by others. He was enthusiastic that a centre could create an opportunity for the judiciary to perform such a function.

Representing the views of lawyers who participate in the justice sector, Gordon R. Kelly of Blois, Nickerson & Bryson, Halifax, enthusiastically endorsed a centre. He suggested that a centre would maximize the efficient and effective use of technology by encouraging the development of consistent guidelines across jurisdictions in relation to the use of technology and by accelerating the adoption of new technologies in Canadian courts. He observed that a centre would provide leadership to develop standards that would contribute to a more efficient and accessible court system. The centre would facilitate collaboration amongst all stakeholders in addressing issues such as courts and the Internet, privacy issues arising from electronic access to court records, electronic appeals, electronic filing and electronic evidence, case management systems, digital recording systems and digital evidence, and legal XML. He suggested that a centre could play an important function as

a clearinghouse for information on court technology. He emphasized the need for facilities that would enable interoperability. He observed that in most cases lawyers and courts have the hardware; the problem is the absence of protocols to talk to one another.

Jim McMillan, one of the experts from the National Center for State Courts presented the history, funding structure and governance of the NCSC and he identified the benefits it offers to the U.S. court system. The NCSC provides the U.S. court system with a unique national think tank that anticipates new developments, identifies best practices, promotes experimentation and establishes standards. It is also a national forum for discussing issues affecting the administration of justice. It serves as a national voice in the U.S. for the needs and interests of state courts. It also promotes collaboration among the various national court associations in the U.S. He encouraged us to explore a “made in Canada solution” while maintaining important connections with the NCSC.

After the plenary sessions, each participant was assigned to one of five workshops. By the end of the day, there was consensus that a centre would respond to many of the needs identified. There was also broad consensus on the role, mandate, governance, board of directors and funding of such a centre.

In early October 2005, Professor Daniel Poulin completed a Report on the Forum that was distributed to all participants. After considering that Report with their organizations, many of the Forum participants indicated that they strongly supported the next steps towards the creation of a centre.

In December 2005, a small group met to develop an action plan. There is considerable momentum. The Federal – Provincial – Territorial Deputy Ministers of Justice will consider a proposal by which resources might be made available to further examine the establishment of a centre. We hope to have more to report in the near future.

In 2004, to launch this project, the Canadian Judicial Council commissioned Professor Poulin to prepare a Feasibility Study. As indicated, Professor Poulin prepared a Report in October. For more information about the Feasibility Study or the Report, contact Justice Fran Kiteley at fkiteley@judicom.gc.ca

Update:

The Federal – Provincial – Territorial Deputy Ministers of Justice have recently approved interim funding for the CCCT project to further examine the governance model and the benefits and costs of implementation. We are looking forward to updating the justice community on our progress.

ONE COUNSEL’S EXPERIENCE WITH INTRODUCING ALTERNATIVE DISPUTE RESOLUTION (ADR) IN A CORPORATE SETTING

S. Noel Rea, QC, National ADR Co-ordinator, Fraser Milner Casgrain LLP formerly Senior Counsel, Imperial Oil Limited

Until last year (2004)*, I was a Senior Counsel with Imperial Oil Limited, for which corporation I was employed for over 27 years. My involvement with Imperial and Exxon Mobil Canada Ltd. has given me significant, almost exclusive, exposure to litigation and its alternatives for some 15 years. Through one significant piece of litigation, I became involved with one of the forms of Alternative Dispute Resolution (ADR) - Mediation. That involvement led to my participation in the development of an ADR policy within Imperial Oil, which was adopted by the company in July 1995 and has been followed since then.

Imperial’s commitment to this policy was such that in September 1995, I was seconded by Imperial to be Executive Director of the Canadian Foundation for Dispute Resolution. I remained in that role until March 1998, when I returned full time to the Imperial Law Department.

Why is this commitment to dispute resolution by Imperial Oil important? It goes to the heart of the concerns corporations have with regard to their ability to control their expenses. In his letter to shareholders in the *Annual Report to Shareholders* for 2004, Tim J. Hearn, Chairman, President and CEO of Imperial Oil said, “Imperial’s business model remains focused on sound financial management, a disciplined investment strategy and improving those things we can control.”

Imperial has four ongoing priorities. They are:

1. Flawless execution.
2. Grow profitable sales volumes.
3. Best in class cost structure.
4. Improve the productivity of its asset mix.

It is the third priority, the achievement and maintaining of a “best in class cost structure” which provides the basis for Imperial’s seeking alternatives to litigation in the resolution of its disputes. At page 4 of the Annual Report the issue of company expenses is addressed as follows:

Relentless pursuit of lower costs continued to be a priority. All key Imperial business units have either achieved industry-leading unit costs or are within first-quartile ranking in their cost structures.

In the environment of 2005, the rigour that is engaged in implementing Imperial’s corporate priorities applies equally stringently to each of Imperial’s departments and divisions. These departments and divisions, referred to as client business units, apply these priorities even in relation to the expenses (costs) incurred with respect to legal disputes.

The Law Department is required to obtain approval in advance from each client business unit for expenses in relation to litigation, including possible legal costs, arising from matters falling within the responsibilities of that business unit. For example, if the Land Department or the Oil Sands Division or Production Department of Imperial is suing or being sued by someone, the Law Department must have authority from that specific Department for any expenses it is going to incur on behalf of that Department in dealing with the litigation. The Law Department is required to get that permission annually (or whenever otherwise necessary), and the authority must be in place before expenses can be paid. In this way, litigation and the manner in which disputes are handled is clearly a responsibility of the business unit manager involved.

It is trite to say that litigation is expensive in terms of both direct and indirect costs. It is also trite to say that indirect costs are difficult to measure, though it is recognized that they include overhead, lost opportunity, diversion from productive activity, and damaged business relations. As part of its efforts in controlling the conduct of litigation, and specifically, controlling the incurring of legal expenses, Imperial and Exxon Mobil Canada have *Outside Counsel Management Procedures* which include:

1. A Retainer Letter;
2. A Guide - *Outside Counsel and Imperial Oil: a Guide to the Requirements of Imperial Oil in the Provision of Legal Services*;

3. A Confirmation Letter; and
4. Evaluation and Re-evaluation Forms.

The Guide defines the terms of engagement of outside counsel and includes the requirements of an Initial Evaluation Report. A key element to be addressed by outside counsel in that Report is “the potential use of ADR as a means of resolving disputes”. A separate provision within that Guide entitled *Alternative Dispute Resolution (ADR)* reads:

We are committed to ADR processes and believe that ADR should be assessed for possible use in every dispute involving Imperial. Our goal is the quick and cost effective resolution of Imperial Oil’s disputes. We require outside counsel to be fully committed to this goal and to the use of ADR, where appropriate. We expect outside counsel to be knowledgeable in the use of ADR and to actively develop options for its appropriate use.

This emphasis on ADR is one of the direct consequences of the adoption by Imperial of its ADR policy.

Adoption of ADR Policy

As with any significant initiative within a large organization, and consistent with the ADR literature available at the time, Imperial engaged in an assessment of the need for an ADR Policy. Imperial conducted an audit of its dispute profile, including the number and stage of disputes, and the existing dispute resolution processes. Following that audit, a colleague (Wayne S. Shalagan LLB, LLM) and I were given the responsibility of developing, seeking endorsement of, promoting, obtaining implementation of, and generally stewarding a Dispute Resolution Policy (the Policy).

The Policy, whose objective is to obtain “quicker, better, cheaper” resolution of disputes, was submitted to Law Management. It was then presented to Imperial’s most senior management, including its then President and CEO, who endorsed the Policy. The Policy addressed increasing the awareness of ADR throughout the company; developing knowledge and use of ADR; saving dispute resolution time and legal costs; preserving ongoing business relationships; and increasing satisfaction with dispute resolution processes and outcomes. Presentations were made to all Senior Management within the corporation, with the objective of explaining and obtaining support for the Policy.

Institutionalizing ADR

Recognizing the need to develop specific means of institutionalizing the Policy so that it would be used, the following activities were undertaken:

- People were designated to promote and steward the Policy;
- An *ADR Contract Provision Manual* was developed to assist in-house counsel in the development of customized dispute resolution clauses for inclusion, where

appropriate, in Imperial’s agreements. This Manual was updated from time to time;

- An Initial Evaluation Process was adopted. The process included an investigation, a report and a conference. The conference participants might include outside counsel (if retained), appropriate business contacts, and in-house counsel. In addition to engaging in a litigation risk analysis, the conference normally involved a comprehensive ADR suitability analysis. Tools are available to assist in screening disputes for ADR and the factors to consider for the appropriate use of ADR, including the process to be used. The purpose is to ensure that disputes are assessed informally on an objective basis, as early as possible. It also ensures that an early assessment is made of Imperial’s position on liability and damages;
- Stages for periodic review of ADR suitability were specified. These provisions addressed recommended time periods for and events triggering a review of the case to determine if the dispute should then be submitted to ADR. The Policy recognizes that a dispute, which earlier may have been considered unsuitable for ADR, by virtue of a change in circumstances, may have become suitable. The specified stages for review are:
 - upon Initial Evaluation;
 - before engagement of outside counsel;
 - before commencement of proceedings;
 - before closure of pleadings;
 - if discovery is ineffective;
 - at budget review periods;
 - where there is a breakdown in communications; and
 - where there is a material decrease in assessment of risk.

Building Support for ADR

Imperial was a Founding Member of The Canadian Foundation for Dispute Resolution (CFDR) and signed the Foundation’s Protocol in October 1995. It continues as a member of the ADR Institute of Canada, Inc., the Foundation’s successor organization. CFDR is now a wholly owned subsidiary of the Institute. The Protocol commits the signatory to willingly consider the use of ADR and to suggest ADR in appropriate cases prior to resorting to the courts. In addition, the Protocol requires signatories to consider ADR as a factor in the selection of lawyers to handle disputes. It is not a restriction in proceeding with litigation in appropriate circumstances, but it supports the role of ADR in quickly resolving disputes.

The previously referred to *Outside Counsel Management Procedures* set out in-house counsel’s responsibility regarding

the use, activities and expectations of outside counsel, including those regarding the use of dispute resolution and ADR. These expectations play a part in the selection of outside counsel, the engagement of and relationship with such counsel and remuneration of and ultimate evaluation by, Imperial.

ADR Training and Communication

Imperial, as already noted, was a Founding Member of the Foundation, an ADR resource organization. As a demonstration of its commitment to the Foundation, Imperial seconded me to be Executive Director of the Foundation in September 1995 where I remained in that role until March 1998. At that time I returned on a full-time basis to the Imperial Law Department. I remain a Director of the Foundation, and a Vice-President of the ADR Institute of Canada.

Imperial developed training modules for in-house lawyers and select business people so they could develop expertise in the use of ADR and the development of ADR contract provisions. My colleague and I made about 20 group presentations to employees in Calgary, Toronto and Montreal. The training adopted an interactive approach, using case studies and the experience of the participants, in explaining the policy and its implementations and provided an introduction to ADR processes.

An Imperial Oil Limited ADR Booklet and a Manager's Guide were developed and translated into French. These information booklets were written to explain ADR to non-lawyer employees throughout the company. All employees who participated in the ADR Training received them, and they are available on an ongoing basis to employees engaged

in negotiations on behalf of Imperial or who become involved in disputes to which Imperial is a party. The Law Department of Imperial Oil Limited possesses a significant body of ADR resource materials, accessible to lawyers in both Toronto and Calgary.

Measurement and Evaluation

Evaluation of any major change in approach within a corporation is necessary in order to determine the effectiveness of the change. The literature on ADR is replete with claims of significant savings in terms of time and costs. While much is apocryphal, there is wide acceptance of the view that savings are greater the earlier in the litigation process that ADR is used. Imperial was involved in an ongoing assessment of the effectiveness of its Policy, for which purposes it maintained information ranging from data regarding the number of disputes, the use of early case assessment, the cases suitable for ADR, the cases submitted to ADR, and the outcomes of the ADR processes.

Continued Corporate Use of ADR

I have attempted to provide, by reference to the experience of one corporation, an illustration of the adoption of a corporate policy which requires early and ongoing consideration of Alternative Dispute Resolution and its use in appropriate circumstances. I believe that in doing so I have provided sufficient evidence to sustain the claim that not only do corporations use ADR, but that they do so increasingly. In turn, they are sending clear signals to their lawyers that they expect them to consider the appropriate use of ADR methods to achieve less costly and less time consuming means of resolving disputes.

Restructuring Justice Panel, June 2005

SOME INDUSTRY RESPONSES TO DISPUTE RESOLUTION

S. Noel Rea, QC

The Canadian Foundation For Dispute Resolution

The Canadian Foundation for Dispute Resolution began in early 1994 as an initiative of the Association of General Counsel of Alberta and several large law firms in Calgary. At the time, it was difficult for lawyers and their corporate clients to identify mediators and arbitrators with the necessary experience to assist in the resolution of commercial disputes. As well, there was not a widespread understanding of the benefits of alternative dispute resolution within the corporate community.

The economic climate was a significant incentive to consider looking at alternatives to litigation that might just be a

“better way” than expensive, time-consuming litigation with uncertain outcomes. The Steering Committee recommended that its constituents become founding members of the Canadian Foundation for Dispute Resolution.

Its primary objectives are:

1. Promoting awareness of the full range of alternative dispute resolution techniques for commercial disputes;
2. Encouraging corporations and law firms to take a leadership role in demonstrating the value of alternative dispute resolution and integrating it into the mainstream of business practices;
3. Promoting the adoption of a corporate policy statement

which commits signatory corporations to willingly consider alternative dispute resolution processes in appropriate cases prior to commencing litigation;

4. Promoting the adoption of a law firm policy statement - to encourage signatory law firms to demonstrate a commitment to alternative dispute resolution capability in advising clients and assisting them in reaching cost-effective resolution of business disputes.

The ADR Institute Of Canada, Inc.

In 2000, the Foundation (<http://www.cfdp.org/contact.htm>) and the Arbitration and Mediation Institute of Canada merged and became the ADR Institute of Canada, Inc. The Foundation was, and the Institute is, an organization whose primary focus is the promotion of the use of alternative dispute resolution. The Foundation is now a wholly owned subsidiary of the Institute and the Institute administers the Mediation and Arbitration Rules of the Foundation. In addition, the Institute has its own National Arbitration Rules, a set of National Mediation Rules and a Code of Conduct for Mediators. The Institute's website is: <http://www.amic.org>

The Foundation Protocols are similar in concept to a corporate Policy Statement on Alternatives to Litigation developed in the early 1980's by the CPR International Institute for Conflict Prevention & Resolution (CPR) in New York (<http://www.cpradr.org>). CPR's corporate policy statement – known as “The Pledge” – has been signed by over 4,000 operating companies in the U.S. Over 1,500 U.S. law firms, including 400 of the 500 largest firms, have signed a corresponding law firm policy statement. A former President of the Canadian Foundation and a senior corporate counsel commented:

A primary value for a corporation to sign the dispute resolution protocol is that it enables it to suggest alternatives to litigation in a particular dispute while minimizing the likelihood of the other party believing that the suggestion arose because of a perception of weakness in its case. That is because the signature of the company's chief executive officer and general counsel – if the company has one – show that the commitment is company policy, and that suggestions to consider alternative dispute resolution will be made in all appropriate situations. And the fact that the protocol has the force of corporate policy also encourages greater acceptance of alternative dispute resolution within the corporation itself.

The Company to Company (C2C) ADR Council

Another initiative of the last few years is the C2C ADR (Appropriate Dispute Resolution) Council. It is an oil

and gas industry attempt to manage conflict and improve productivity, profitability and corporate relationships. The venture started out as the Company against Company Task force. It has now become known as the Company2Company ADR Council and is made up of the major industry associations such as:

- Canadian Association of Petroleum Producers;
- Small Explorers and Producers Association of Canada;
- Petroleum Joint Venture Association;
- Petroleum Accountants Society of Canada, and others;
- National Energy Board;
- Alberta Energy and Utilities Board;
- The Calgary Chamber of Commerce;
- ADR Institute of Canada; and
- Alberta Arbitration and Mediation Society.

The Task force, with participation of up to 90 participants from many of the industry disciplines, developed a handbook entitled “Let's Talk”, which provides information, tools and options for dealing with conflict. Industry employees are encouraged to enhance their negotiations by starting earlier to talk to one another and thus obtain better results.

The Handbook outlines tips for improving negotiations:

1. Communication is a key: ask good questions and listen to the answers.
2. Use a Situation Assessment or pre-ADR Meeting.
3. Consider costs/benefits of different resolution processes (negotiation, facilitation, mediation, arbitrations, regulatory process, and litigation).

The Handbook provides both a Situation Assessment instrument and a Cost / Benefit Analysis instrument for parties to use in the context of a dispute in which they may be involved. In addition, the Handbook lists available ADR resources, such as the Alberta Arbitration and Mediation Society and the ADR Institute of Canada and training bodies such as Mount Royal College, the Justice Institute of BC, and the Alberta Arbitration and Mediation Society. It also provides pointers to service providers, mediators, facilitators and arbitrators. C2C ADR Council website: http://www.webstart.ca/alberta_web_design/c2c/index.htm

The C2C initiative suggests to industry participants: “Let's talk and get on with business”.

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Mr. Rea has also written “Some Observations about Alternative Dispute Resolution (ADR) by a Corporate User”. It is available full text on the Forum's website at <http://www.fcfcj-fcjc.org/publications> and click on *News and Views*.

Small Business and the Civil Justice System

Peter Jefferson, President and CEO, N. Jefferson Ltd., Vancouver, BC

It was surprisingly easy to find numerous examples of the effect the civil justice system has on small business. To illustrate some of these effects, I have chosen two of my own experiences and one from a colleague.

Control of Legal Issues

The first issue concerns the difficulty small business can have maintaining control over their own legal issues. One of my own examples occurred when I was considering whether or not to obtain legal advice with regard to a business decision. I was looking to rent 1200 square feet of show room in a Toronto industrial complex. The landlord gave me a five-year lease document that was 30 pages long!

I read the lease and I knew that my lawyer would advise me, quite rightly, that several conditions would have to be changed in order to protect my interests. If, however, I chose to have a lawyer review the document, I would no longer have control over the situation. The lawyer would take time to review the document while the landlord and I waited, perhaps for several days. I would be charged for the lawyer's time in 1/10ths of an hour, as though it is impossible to do anything useful in less than six minutes. The landlord was in a position of strength due to the demand for space at that time, it would probably be difficult to convince him to make some of the recommended changes and I could lose the space I needed to someone else.

I signed the lease without legal advice, based on my own assessment of costs vs. risks vs. consequences. As a small businessperson, I feel I would have been better served if a lawyer could or would have been willing to answer my general concerns about the lease. It is situations like this that lead me to sometimes make business decisions without first obtaining legal advice in order to remain in control of my business situation. Is it not possible for lawyers to provide fixed-cost estimates for more routine matters or to answer general questions? Other small business people do so regularly when they provide quotes for work to be done and to do this would seem to encourage greater efficiency. The concept of "unbundling" that is being talked about may allow for this kind of action and seems to be worth exploring in more detail.

My second example of losing control over a legal issue relates to the use of Small Claims Courts by small businesses. In our industry, it is a fairly easy to use process and raising the small claims limit from \$10,000 to \$25,000 sounds like a step in the right direction. But, quite frankly, there are no teeth to enforce a judgment when you get one. Even when a judge has ordered a judgment on behalf of the plaintiff, if the defendant does not want to comply, the system then breaks

down for the small business owner. We find the enforcement function of the court system to be unproductive. Again, once we turn our legal matter over to the civil justice system, we are no longer in control. It is no wonder that a small businessperson feels there is very little reason to have gone to the trouble of using the courts in the first place. These two examples show that even when small business tries to use the civil justice system, it fails to meet their needs in an effective way.

Cost of Litigation

My third example relates to the cost of litigation. A small business owner in the engineering and contracting business tells me that he finds using legal means to protect a business or an individual are not economical. He says that parties in his industry use mediators for dispute resolution because the civil justice system is too costly. He advises that mediation is not perfect, but at least it is affordable.

Although the private sector is the largest segment of taxpayers supporting the legal system, many small business owners feel that the civil justice system is not for their use. Government, large corporations, unions, and the poor are seen as having better access to the civil justice system. In discussions with other small business owners and others in the private sector, there appears to be very little willingness to continue to fund a legal system, which does not, or cannot, operate for those who pay the bill.

Duration of Litigation:

Is there any way to speed up the litigation process itself? From starting a claim to settlement takes several years, in most instances. Not only lawyers, but the judiciary as well, have roles to play in speeding up this process. For example, it appears to me that there is far too much time spent on evidence presented by each party to the litigation. Surely both sides could be made to agree on evidence that is obvious, ahead of the trial? Judges should, or, if necessary, could be given the powers to sanction those who failed to cooperate. This would apply to every level of the litigation process.

Appeals process:

Defenders of the system point to the appeals process in answer to the criticisms of litigants who believe they have not had a fair hearing. Unfortunately, the cost of an appeal is prohibitive in all but the largest of cases. As well, it seems that appeal court judges are isolated and far removed from the times and society of small businesspersons or ordinary people. A small businessperson often believes that such a judge will not understand their situation and that an appeal

to such a decision maker would be a waste of time and money. Their apprehension is also fuelled by the fact that the system has become impossible for them to afford, both in terms of time and resources.

Judiciary:

Ordinary citizens most often look into the justice system through the windows of the lower courts: small claims courts, in the case of civil matters, and provincial courts, in the case of criminal matters. As such, our system should ensure that our lower court judges are the best suited to projecting a sense of fairness, empathy, and understanding. Just as I think good universities ensure that first year students get more than their fair share of the most experienced professors, the judicial system should do the same.

I think that judges today have lost the support of small business. Unfortunately, the reporting of what seem to inexperienced eyes to be inappropriate decisions in criminal trials creates the impression for small business that the judiciary will make decisions that seem equally inappropriate for civil cases. Judges may make fair and honest decisions, yet most taxpayers will never get such a decision because it is not affordable for them to do so.

Our social systems - healthcare, education and others - are

all under a great deal of pressure. Civil justice is one of those systems. It is going to be difficult to justify paying for a system that is too expensive for those who need to use it, and unable to achieve results - a system that has failed the public's expectations.

Conclusion:

We are all aware of the cost of litigation, the needless formalities and complexities of the process, and the disenchantment suffered by litigants. Since after twenty years of recognizing that there is a problem, the system still does not provide adequately, surely the system is the culprit.

If this were my business, I would restructure it completely. Once the structure is dismantled and reconstructed, then the lawyers, judges, administrators and litigants will adjust accordingly. The system as it is structured today is bleeding badly and it seems that we are still trying to fix it with a few band-aids. It is time to do major surgery so the patient may live.

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Restructuring Justice Panel, June 2005

"What does the public really want from their lawyers and from the justice system?"

Diana J. Lowe, Executive Director, Canadian Forum on Civil Justice

I was asked to address this question for the recent *Restructuring Justice* Conference in British Columbia, and my response was drawn from our five-year national empirical research project, the *Civil Justice System & the Public*¹. This project focuses on communication within the civil justice system and between the civil justice system and the public. We have interviewed more than 300 individuals: those working within the system as well as litigants and witnesses in different types of civil and family justice processes at various court levels. These have been lengthy conversations about their experiences, including what they expect from their lawyers and from the justice system.

There are four key points that we heard from public participants, which are best illustrated using their own words.

1. INDIVIDUAL USERS AND SMALL BUSINESS REPRESENTATIVES, WHETHER REPRESENTED OR UNREPRESENTED, WANT TO UNDERSTAND WHAT IS GOING ON IN THEIR CASE.

It would have been very nice if I could just go to court and type in somewhere or ask somebody what to expect based on what happened to me. Give me ten sheets of examples of this happening to someone else and I can just read through it. In month three this happens, in month four this happens. Just so you're not sitting around and getting random phone calls at random times giving you updates, but you have no idea what the process is. [202, Represented Litigant in an MVA action]

The language used is problematic for most litigants, as is a lack of transparency:

There is so much pomp and ceremony and ritual that it is hard to sort through the issues in plain English. You have lawyers on both sides... when they communicate to the judge or anybody else about the issue it seems to be a bunch of 52 letter words strung together. 'Your Honour', 'My Friend', 'The opposition here', 'we would like to request' and 'I'd like to respond to this request'. It is so convoluted. You can't

understand what they are saying for one thing. The average person can't seem to make heads or tails of what is going on. Even in my own divorce case when the judge handed down an interim order, I had to get my lawyer to translate what the judge said. Basically the judge said I got the kids and the house but my lawyer had to say it in English... I am educated, I've been in the business of supervising social workers for nine years now, and I can't figure out some of the words they are using. So how could someone with a low education and less functional than the average person and possibly illiterate, understand their way through court?

[285, Represented Applicant in a Divorce action]

2. THE PUBLIC WANTS TO AVOID GOING TO COURT. THEY ARE LOOKING FOR LITIGATION ALTERNATIVES.

We heard this repeatedly from unrepresented and represented litigants, including corporate counsel.

One of the things that we learned was that there had to be a better way than going to court, whether small claims or higher courts. And so we worked as an industry and set up a motor vehicle arbitration program. We offer this as an alternative to customers, and it has worked well for us and for customers so we have expanded it across the country. It has meant that at least 2/3's of the warranty litigation cases that would have gone to court now go through this arbitration process in a much more efficient and expeditious way. [815, Corporate Counsel]

3. THE PUBLIC FINDS THE CIVIL JUSTICE SYSTEM ALIENATING, INTIMIDATING AND SOMETHING VERY REMOVED FROM THEIR LIVES.

Too often members of the public are made to feel that they are passive participants in the justice system. Even worse, participants often overhear disrespectful comments from those within the justice system.

I was in that courtroom from start to finish, you know until my thing came up and I had listened to the lawyers joke about this case or that case or whatever else and then they get to mine and they say, "Oh well, you know, he really has it in for her doesn't he and blab, blab, blab", and I'm just sitting back there listening to these clowns talk about my case and my life. I let them talk for a few minutes and then I said, "That's me! – You're talking about me now." A certain sense of respect for the humanity of people involved in the whole situation is just knocked out the window. You are just so – not alive – you know what I mean? You're just this number or this file or this docket or this whatever and it's really, really shameful. [523, Represented Applicant in a family matter. Also experienced with criminal system as a victim of domestic abuse.]

4. THE PUBLIC KNOWS WHAT THE ISSUES ARE. WE NEED TO LISTEN.

It is encouraging that those working within the justice system want to learn what the public needs and expects. The individuals we spoke to were willing to share their views and expressed interest in being involved in reform initiatives, but were concerned that their perspectives might not be taken seriously. As the following quote illustrates, the public experience and insight is valuable even on questions of process:

I've been into court 25 times in the last year and a half, and it's all because my ex has broken every court order that we've ever had. But one of the things that I find extremely frustrating is that you're never ever seeing the same judge... For every little thing you're going to a different judge, which is absolutely ludicrous. You go into a court and have a trial, you vary an order and then if it's not followed through you're seeing a different judge and they're making some different ruling. It was absolutely ridiculous. [607, Applicant in a custody matter. Originally represented, then self-represented for more than a year because unable to afford to continue representation.]

This is really a discussion about case management and it is important for those within the justice system to hear that the public has a view on this and other issues. If we remind ourselves that the civil justice system exists for the public (rather than for lawyers, judges and court administrators) it becomes clear that we must not only be receptive to the public's questions and observations, but that we must both seek their input and respond effectively. That may mean changing the way we do things. And from what we hear, that is what the public really wants.

Endnote

1. The Civil Justice System and the Public is a collaborative research project funded by the Alberta Law Foundation and the Social Sciences and Humanities Research Council of Canada. Details of the project are available at <http://www.cfcj-fcjc.org/research.htm> I wish to thank all of the members of our research team for their contributions to the development of this project - our project partners (who include the CBA), research participants, field research team, Research Coordinator Mary Stratton and co-Research Directors Barbara Billingsley, Lois Gander, and Teresa Rose.

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Papers from "Restructuring Justice" will be available from The Continuing Legal Education Society of British Columbia. See <http://www.cle.bc.ca/CLE/Publications/Individual+Publications/2005/Print/5067905> for contents and ordering information.

Privatizing our Public Civil Justice System

Trevor C. W. Farrow¹

At every level of the system – starting with the federal government itself² – a strong preference is being voiced for getting cases out of the public stream and into a typically private, or at least confidential, alternative stream. Small claims courts³, provincial superior courts⁴, the Federal Court⁵, and provincial and federal administrative tribunals⁶ have all developed alternatives to traditional, more formal investigation and hearing processes. These are in addition to the already available informal private tools of negotiation, mediation and arbitration typically available outside of a formal court or tribunal setting.⁷

There are many stated benefits to this trend of privatization. In terms of the formal court or tribunal-connected tools, the overwhelming justification for their promotion is system efficiency: backlog reduction and savings of time, money and other resources. In terms of Alternative Dispute Resolution (ADR) tools generally, proponents point to advantages including reduced costs and delays,⁸ the ability to choose laws, procedures and judges and the potential to maintain relationships. Typically the most important advantage, however, is the ability to avoid public scrutiny. When a dispute involves the private rights of A v. B, and further, when two “consenting adults” (including corporations) have chosen to move their dispute off the busy docket of our public court system and into the private boardroom of an arbitrator or mediator, current views suggest that justice is being served. The argument is that the resolution of disputes – like other goods and services – should not be deprived of the benefits of freedom of movement and contract in an efficiency-seeking, innovative and expanding market economy.

These purported benefits, however, do not come without costs. Without public scrutiny – through open court processes, the publication of precedents and the application of case law to the facts to be adjudicated – there is a real danger that parties, particularly those with power, will increasingly use this privatizing system in order to circumvent public policies, accountability and notions of basic procedural fairness.

These procedural concerns are clearly significant. In addition, however, there is a more fundamental concern at issue: democracy – and in particular, the way in which we regulate ourselves in democratic, common law communities.

Law Making in a Democracy

Law in a democratic society is primarily made through the tools of legislation and adjudication. Recognizing that adjudication plays an ordering role in society both in terms

... [T]here is a real danger that parties, particularly those with power, will increasingly use this privatizing system in order to circumvent public policies, accountability and notions of basic procedural fairness.

of resolving individual disputes and, more broadly, modifying societal behaviour, both public and private processes of adjudication count as lawmaking tools.⁹

There is normally no issue as to the democratic legitimacy of the typical legislative process. Further, in terms of adjudication, contrary to the concerns of “judicial activism” critics, decisions made in open court, by appointed judges, pursuant to fair procedural regimes, also, in my view, usually accord with constitutional principles characterized by democratic notions of transparency, accountability and the rule of law. Where a democracy deficit comes into play, however, is not in open court with “activist” judges, but rather when the important societal ordering tool of adjudication goes

underground to private arenas, without the guarantee of the rule of law badges of procedural fairness, transparency and independence of the decision maker. When decisions are made in these private circumstances, we often do not know what they are. And in any event, to the extent that we do know, (which knowledge brings the broader behaviour modification element of adjudication into play) we typically have no record or guarantee of the fairness of the procedural or substantive legal regimes that were employed to reach a given result. What we are doing with our increasing reliance on ADR, then, is privatizing a significant way in which we make law and order our public and private affairs.

So why are we so acquiescent and even seemingly disinterested in the current move to privatize the adjudicative aspects of our law-making tools? That, in my view, is the democracy deficit with which we should be concerned. With limited exceptions, we expect public hearings, precedent and transparency in traditional court proceedings. Why then – other than for efficiency and privacy interest preferences – are we so deferential to the concern of privacy when it comes to the use of alternative dispute resolution tools?

Reclaiming The Rule Of Law In Dispute Resolution Practices

In opposition to those who relegate public procedures honouring basic rule of law values to the background in favour of modern, consensually-based private dispute resolution regimes, I argue for increased transparency and accountability in current and emerging approaches to dispute resolution. The potential strengths of dispute resolution alternatives, particularly in free market economies must, of course, be recognized. When carefully crafted, however, such mechanisms can effectively secure rule of law values,

while still facilitating many of the efficiency and accessibility goals of more privatized dispute resolution processes. But when it comes to a conflict between cost saving and efficiency on the one hand and transparent procedural justice on the other – particularly in cases involving issues of public interest – the latter must always trump.¹⁰

There is no more important topic in law than the procedural rules by which our democratic system operates. Important parts of that system are the processes by which disputes are resolved. Without sound, accountable, yet creative dispute resolution processes, we potentially jeopardize individual rights, together with underlying collective democratic values. In my view, current trends of privatization in the context of dispute resolution processes, are potentially putting those rights and values at risk. As such, we need to question our current trend of privileging the private over the public. And in any event, if we are going to continue experimenting with privatized civil justice – and it is likely that we will (and in some cases should) – we should only do so with full disclosure to the public regarding the rationalizations for, and implications of, these tools. To date, the public is largely unaware of the aggressive and systematic privatization of its public civil justice system. The resulting democratic deficit jeopardizes one of the foundational tenets of our civil justice system and our common law system of governance as a whole.

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Endnotes

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This article is an edited, condensed version of a longer paper on the same topic. I am grateful to Kim Taylor, Program Director of the Canadian Forum on Civil Justice for helpful substantive comments and significant editing assistance.
- 2 See for example the Dispute Resolution Centre for Excellence (“DRCE”) established by the Department of Justice in 1992. The DRCE – “devoted to the prevention and management of disputes” in Canada – has a mandate “to serve as a leading centre of DR excellence in Canada.” DRCE, “DRS Programs and Services”, online: Government of Canada http://canada.justice.gc.ca/en/ps/drs/drs_programs.html. The DRCE’s stated role is “to promote a greater understanding of DR and assist in the integration of DR into the policies, operations and practices of departments and agencies of the Government of Canada, Crown Corporations, federal tribunals and administrative agencies, and federally constituted courts.”
- 3 For example, the mediation program in Alberta’s Provincial Court: “Mediation and the Provincial Court”, online: Alberta Courts http://www.albertacourts.ab.ca/pc/civil/publication/mediation_and_the_provincial_court.htm.
- 4 See, for example, Ontario’s mandatory mediation programs: Rules of Civil Procedure, R.R.O. 1990, Reg. 194, as amended, R. 24.1; Superior Court of Justice, Toronto Region, “Practice Direction – Backlog Reduction/Best Practices Initiative” (in effect 31 December 2004), online: Ontario Courts http://www.ontariocourts.on.ca/superior_court_justice/notices/casemanagement.htm. In Alberta, see Court of Queen’s Bench of Alberta, Civil Practice Note No. 11, “Court Annexed Mediation” (effective 1 September 2004), online: Alberta Courts <http://www.albertacourts.ab.ca/qb/practicenotes/civil/pn11CourtAnnexedMediation.pdf>. For a discussion of the Judicial Dispute Resolution program in Alberta’s Court of Queen’s Bench, see, for example, The Honourable Justice John A. Agrios, “A Handbook on Judicial Dispute Resolution for Canadian Lawyers”, Version 1.1 (January 2004), online: Canadian Bar Association – Alberta <http://www.cba.org/alberta/PDF/JDR%20Handbook.pdf>.
- 5 See Federal Court Rules, 1998, SOR/98-106, pt. 9, rules 386-391, online: Government of Canada <http://laws.justice.gc.ca/en/F-7/SOR-98-106/105374.html>.
- 6 See for example Alberta Energy and Utilities Board (“AEUB”), “What about Appropriate Dispute Resolution?” online: AEUB <http://www.eub.gov.ab.ca/bbs/public/adr/ADRPamphlet.pdf>. See also the Canadian Human Rights Commission (“CHRC”), “Alternative Dispute Resolution”, online: CHRC http://www.chrc-ccdp.ca/adr/what_is_it-en.asp.
- 7 For a general discussion of some of these ADR trends, see Trevor C.W. Farrow, “Dispute Resolution, Access to Civil Justice, and Legal Education” (2005) 42 Alta. L. Rev. 741-754.
- 8 There is a lack empirical research, however, supporting the existence of these purported time and cost saving benefits.
- 9 Here I am defining “adjudication” broadly to include court-based, tribunal-based, arbitration-based and potentially mediation-based dispute resolution processes, particularly – with respect to the latter – when such traditionally non-adjudicative processes are directly connected with the results of otherwise adjudicative procedures (like mandatory court-annexed mediation or mediation through judicial dispute resolution).
- 10 An attempt at this balance – although still very problematic from the perspectives of transparency and procedural fairness – is the ADR process that is being used by the Immigration Appeal Division of the Immigration and Refugee Board of Canada. Under that process, while allowing for confidentiality at pre-hearing ADR sessions, an “agreement to resolve is not confidential”. Allowing for the public knowledge of outcomes is certainly better than blanket confidentiality on both process and result. Immigration and Refugee Board of Canada, Immigration Appeal Division, “Alternative Dispute Resolution (ADR) Program Protocols” (amended 13 January 2003), online: Government of Canada http://www.irb-cisr.gc.ca/en/about/tribunals/iad/adr/protoc_e.htm.

CROSS COUNTRY SNAPSHOTS - USERS' PERSPECTIVES ON CIVIL JUSTICE REFORM

One of the themes running through all of our discussions is the promotion of a “user” or “litigant” friendly civil justice system. “Users” can mean represented, self-represented, unrepresented, small businesses or large corporations involved with the civil justice system. We invited snapshots, from a variety of perspectives and from across Canada, on the two key priorities for change in the civil justice system today to make it more responsive to the needs and expectations of litigants. These are the responses.

If I had one wish for the reform of the civil justice system, it would be to make it really accessible by the average Canadian. The costs and delays in the present system are too great to allow the average Canadian to use it.

Too little has been done to ensure that litigants can get a cost-effective result from the justice system. Litigants should be entitled to resolve their disputes within a budget that has some reasonable relationship to the amount in dispute. So, we need to draft rules which allow disputes to be resolved within such a budget, instead of focusing on rules which achieve the maximum degree of procedural fairness.

The solution may involve rethinking some of the sacred cows of the common law system of civil justice: the “loser pay” rule, the summary judgment rule and the use of discovery. Because, above all, Canadians deserve a system which they can afford to use.

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Canada

To listen and learn

Lawyers and judges often forget one crucial truth about our country's justice system: it does not exist solely for our benefit. Our majestic courthouses, the laws of our land, our intricate rules of procedure, the ideals and principle of the rule of law - these were not created simply to give lawyers and judges something to do.

Very simply, our justice system exists to help Canadians: the laws of the land protect them and govern their dealings with each other and with the state. Our laws and courthouses, important as they are, merely enshrine a more important and even sacred relationship that exists between citizens and their society - much like a house of worship enshrines, but does not dictate, the relationship between congregants and their deity. Lawyers and judges are the door wardens and tour guides to these sacred places - we are the employees, not the owners.

When we reflect on these truths, we come to appreciate that our role in the civil justice is not to preside, but to serve; not to lecture, but to listen; not to control, but to facilitate. We are stewards of a great power vested in all members of our society - our duty is to exercise that stewardship respectfully

and responsibly.

Accordingly, the key priority for change in the civil justice system today is meaningful access to justice. But we must understand that “access to justice” is not what lawyers and judges say it is, but what *Canadians* say it is. Our job is not to tell Canadians what the justice system entitles them to; it is to listen as Canadians tell *us* what “access to justice” really means, and then to help make that a reality.

This, then, is the challenge for judges and lawyers: we must step down from the podium and yield the microphone to our fellow Canadians. This is their show - we are simply the stagehands.

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British Columbia

Vancouver Supreme Court Self-Help Information Centre: public perspectives

Evaluation of the Self-Help Information Centre (SHC) project at the Vancouver location of BC Supreme Court is yielding a rich picture of user perspectives on the service.

The SHC provides information on court process, documents, and resources to members of the public dealing with Supreme Court civil matters. The service is drop-in, free; with no means test.

- Users are coming to the SHC because they have legal needs they would otherwise be unable to address.
- The majority report they cannot afford to hire a lawyer.
- Users come from lower-income backgrounds – more than 60 per cent report gross monthly income of \$2,000 or less.
- Users talk about “shuttling back and forth” between the SHC and legal advice services such as pro bono clinics and family duty counsel. Users report they are willing to go “back and forth” because it helps them deal with the legal problem. However, they are also mindful of the time demands this arrangement makes.

The following are typical comments from members of the public who have used SHC services:

“I’ve found the service to be very helpful and, overall, excellent. There needs to be a place where people can go. Lots of people cannot afford a lawyer.”

“I don’t qualify for pro bono assistance because I make too

much money. However I have a lot of debt and I cannot hire a lawyer.”

“It is very helpful. ... The staff here can direct the person but there’s a limit to what they can do because they are not lawyers.”

“...Here they made a referral and I have an appointment at a pro bono clinic. I’m going to go to the registry now and then I want to come in again. I have to fill out an affidavit. I will need more information about the process.”

“The Centre works well if you’re also going to a clinic. You can go to the pro bono clinic and get some advice. Then you come back here for the forms. Then you go back to the clinic....then you come back here.....if you had a job there’s no way you’d be able to do it.”

Editor’s Note: These findings support those of the Forum’s *Civil Justice System & the Public* research that found that lack of access to legal advice is an issue facing users of the civil justice system.

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BC Supreme Court Self-Help Information Centre
274 – 800 Hornby Street
Vancouver BC V6Z 2C5

Use the Smithe Street entrance
at the corner of Smithe and Hornby.

Drop-in hours: Monday–Friday,
9:00 AM – 12:00 PM and 1:30 PM – 4:00 PM

Web site: <http://www.supremecourtselhelp.bc.ca/>



Alberta

Top Priority for Change

The Alberta Law Reform Institute has undertaken a major review of the Alberta Rules of Court. This project has involved extensive province-wide consultation with the public, the legal profession, and judges from all court levels. The majority of the research and analysis required by the project has now been completed and a draft set of rules will soon be circulated to stakeholders for final review.

In this context, the Institute’s top priority for civil justice reform will be the implementation of a new set of Rules of Court that will reflect the objectives adopted for this project. Those objectives are:

1. Maximise the clarity of the Rules;
2. Maximise the use-ability of the Rules;
3. Maximise the effectiveness of the Rules; and
4. Maximise the Rules’ advancement of justice system objectives.

Each of these objectives supports the general goal of making

the civil justice system more accessible and comprehensible for all users. In particular, the new Rules are intended to help users to identify the real issues in dispute and to facilitate the quickest means of resolving a claim at the least expense. Litigants are encouraged to resolve claims themselves, by agreement, with or without court assistance, and as early in the process as practicable. Open, honest, and timely communication will be key to achieving these results. By these means it is hoped that claims can be fairly and justly resolved in a timely and cost effective way.

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Saskatchewan

Breaking down the barriers: providing access to legal information at Saskatoon Public Library

To have a basic understanding of our laws and legal system is important for all Canadians and helps build a society where everyone is included. Yet how does the lay public gain this level of legal literacy? Ease of access to legal information is a crucial part of the process and is being addressed by public legal education organizations. Another institution also plays a key role in the delivery of legal information: the public library.

Public libraries provide barrier-free access to information by providing a place where everyone is welcome, where the individual can search for information in privacy or ask trained staff for help and where services are free.

Since 1980, Saskatoon Public Library has partnered with the Public Legal Education Association of Saskatchewan (PLEA), developing a law collection specifically designed for the layperson, supplemented by pamphlets and booklets published by PLEA.

Staff experience first-hand the public's need for legal information. They answer approximately 50-60 questions per month on every area of the law. Those areas of greatest interest are family and labour law, followed by information on the court system, wills and estates, landlord and tenant law, consumer law, personal injury and human rights. The federal and provincial statutes are consulted frequently, as are

the Queen's Bench Rules of Court.

Although much legal information is available on-line, our patrons often need help in finding it or prefer to use print resources. Plain language publications from PLEA and the various levels of government are in constant demand. We are using our library's website to improve access to on-line information; however, we believe it is important that print material continues to be available, especially for those with limited computer skills or no computer access at home. These are often the most needy and vulnerable among us.

For the layperson, the justice system can be intimidating. Some understanding of the law, however, can ease the interaction. In cooperation with PLEI organizations, public libraries are well placed to provide access to legal information and so contribute to such increased legal literacy.

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Manitoba

Responding to Litigant Needs - Two Key Priorities for Change in the Civil Justice System, Views from the Manitoba Court of Queen's Bench

Two key priorities for change in the civil justice system arise from the increased cost and length of civil litigation and, perhaps as a result of that, the increased presence of the self-represented litigant.

Firstly, civil courts must continue to consider, review and implement court procedures that will streamline and hopefully reduce the cost of civil litigation to all litigants. Civil court processes, such as judicially assisted dispute resolution, expedited action rules and case management, must all be made accessible and litigants encouraged to pursue them where appropriate. However, courts need to be alive to the fact that some of these processes may not be as effective, or in fact, feasible where there is self-representation. Modifications to these processes may be required to ensure their desired effectiveness where a self-represented litigant is involved.

Secondly, civil courts must recognize that some form of plain language legal education will be necessary to enhance litigants' understanding of civil court procedure. This will hopefully lead to better use of court processes in an effort to resolve disputes in a cost-effective manner. For the self-represented litigant, this is of crucial importance.

A significant amount of time and money expended by the self-represented litigant is spent on learning court processes when it ought to be incurred in the advancement of one's case before the Court. Similarly, court staff and the judiciary expend a considerable amount of time interpreting legalese and explaining court procedure so that the self-represented litigant can properly pursue access to civil court remedies. Courts need to develop and provide litigants with appropriate information about court process and general information about the Canadian legal system, including its limitations. For example, litigants should be informed that the civil justice process is one which is driven by the litigants, that it is an adversarial process, and that simply filing a claim does not mean that redress will follow.

In short, accessibility to streamlined procedures and effective information dissemination are two key priorities.

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Ontario

Ontario moves forward

Ontario continues to explore new civil justice reform initiatives, directed toward the ultimate goal of enhancing access to justice for all Ontarians. The Civil Rules Committee has recently approved two significant packages of rule amendments that are intended to improve timely access to the civil justice system at reduced cost to litigants. It is hoped that these reforms will make the system more responsive to the needs and expectations of litigants.

Last spring, Ontario amended the *Rules of Civil Procedure* to include Rule 78. Rule 78 is a 3-year pilot project, set to expire in May 2008, which significantly alters the operation of case management (Rule 77) and mandatory mediation (Rule 24.1) in Toronto. The purpose of Rule 78 is to give parties greater responsibility for managing actions and moving them to trial or other resolution; the court will provide partial or full case management only where the need for the court's intervention is demonstrated. However, outside time limits for the final disposition of the proceeding will continue to apply. At a recent Advocates' Society conference on Rule 78, judges and masters reported a significant reduction in wait times for trial dates in Toronto since the pilot was launched. A committee comprised of judicial, Ministry and Bar representatives will be evaluating the effectiveness of Rule 78. The results of this evaluation will be used to assess how best to provide fair and speedy access to courts across the province in the future.

More recently, the Civil Rules Committee approved proposed amendments to the *Rules of the Small Claims Court*. A sub-committee of the Civil Rules Committee developed the proposals for amendments. The sub-committee was broadly representative of stakeholders, including members of the judiciary and the private bar, and its work included a public consultation in 2003. The proposed amendments would put into place a case management framework including mandatory settlement conferences. The amendments are expected to facilitate the timely processing of cases and to encourage settlement prior to trial. As well, new forms will be more user-friendly for the public and will be available on-line. Publications will be updated and provided in a plain language format, and will be accessible at new, prominent pamphlet stands at each Small Claims Court location and on-line. The Ministry is also developing a pilot project in select Small Claims Court locations to provide legal assistance to self-represented litigants in association with Pro Bono Law Ontario.

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Quebec

The Right to Justice: findings, the future and avenues to follow

A recent article published in the newspaper *La Presse*, on January 6, 2006, revealed that less than 50% of the citizens of Quebec consider the Quebec justice system to be "accessible" and less than 50% of them believe that the system is "fair". These percentages were even lower among those citizens who had had personal experiences with the judicial system. Forty-three per cent of the participants in the same study stated that, in case of a problem, they would have more confidence in the major media outlets than in the courts, in order to obtain justice.

These figures are not so much surprisingly new, but rather surprisingly stable. In fact, successive studies carried out in 1993, 1998, 2000 and 2004 revealed practically the same trends. The question of access to justice has also been the subject of numerous recommendations over the past thirty years. As early as 1975, a white paper which was made public by Quebec's Minister of Justice, raised the problem of access to the justice system. The report prepared by the MacDonald Taskforce, published in 1990, reported the same issues and arrived at the same conclusions as the 1992 *Justice Summit*. The contemplated solutions highlight a recent report from the Bordeaux École nationale de la Magistrature, are often of the same type and always seem to be up-to-

date: "legal aid for those who feel excluded from society, recognition of new collective interests, efficiency in the legal process, non-confrontational dispute settlement, etc."

These avenues should be explored once again, but an inventory must be taken and two other investigations must be carried out immediately:

- 1) an empirical assessment of judicial activities from the perspective of those involved with the justice system, on the path of matters that are subject to judicial disposition, on how the judicial system is used in actual practice, on the continued public disaffection with the courts, on the gradual institutionalization and formalization of administrative justice and other proceedings previously established to make justice more accessible;
- 2) an important social inquiry into the public perception of justice, the judicial response to social problems, notably in the case of "clustering" of legal problems and on the experience of litigants with our justice system: feelings of being distanced from the proceedings, segmented management of personal and family problems, concern about the financial costs and personal costs.

To this end, a research commission or a taskforce should be undertaken, mandated by the Quebec public authorities and provided with the resources to carry out this much needed assessment and to put forward concrete findings.

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New Brunswick

Corporate Counsel: Costs & Delays

I continue to find that the costs associated with access to justice for all parties are simply out of control. I often tell others that I do not know of any lawyer out there who can afford his or her own hourly rate. There has truly been a two-tier civil justice system for a number of years now, which is severely limiting access to justice. We have a system where plaintiffs resolve matters for much less than their entitlement simply based on the consideration of legal fees and costs involved in litigating their claims. Even when a litigant is successful, in most provinces, the legal fees and disbursements awarded by the Courts are a mere pittance compared to the actual costs of litigation. The ability to afford a lawyer should not be the principal deciding factor as to whether a plaintiff is prepared to litigate a claim or not. When dollars and cents decide who has access to justice, I do not think that, as a country, we can say that we truly have a justice system that is accessible to everyone.

The other issue of concern to me is delay and, to a certain extent, this is tied to my first concern on costs. In some

provinces, there are simplified procedure rules in place to reduce delays and costs associated with access to justice for claims that are below a certain amount. Unfortunately, in a number of other provinces including my own province of New Brunswick, these simplified procedure rules do not exist and, whether litigation is over \$20,000.00 or \$1.0 million, the same procedures and rules have to be followed. This is simply not an efficient way of handling the claims that are above the Small Claims Court limit but below a certain amount, say \$50,000.00 or less. Most of the claims for these amounts should be fast-tracked through a system under simplified procedure rules, with reduced discovery requirements on the parties, strict timelines, limited trial times, etc. so that they are quickly dealt with by the Courts.

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Nova Scotia

Culture of Service

What does the civil justice system need to make it more litigant friendly? It needs to adopt a culture of service that at present seems to be missing. A culture of service would recognize that the users of the system are litigants with problems to be solved. A commitment to problem solving, accompanied by the resources and skills to achieve that goal, is what is missing from the justice system.

A culture of service also requires that lawyers play a different role. As important as advocacy is, lawyers often fail to fully play their role as “ministers of justice”. Lawyers must advise and counsel their clients with a goal to achieving timely and effective resolution of conflicts, with the resulting efficiency that will flow from that. When a system is lawyer-centered rather than party focused, it tends to minimize the significance of the interests that litigants have in their own matter.

A culture of service would also adopt a different language for our processes. Rather than continuing the images created

by the language that flows from a pugilistic approach to dispute resolution, we would create a language that is more conducive to resolving problems and finding solutions rather than fighting about interests, rights and remedies.

Judges, lawyers, court administrators and government need to act differently if we are to change culture. Imagine a world where peoples’ disputes are resolved quickly and effectively once they get into the justice system and you will see a system that acts and behaves differently than the one we have right now.

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Prince Edward Island

More Civil Legal Aid Coverage

The Prince Edward Island Women's Coalition project, "Social Justice for Legal Aid for Family Law on PEI" (funded by Status of Women Canada) began in 1999 and is now completing Phase IV, an environmental scan of PEI legal aid coverage.

Phase I research proved there was a need for civil law legal aid coverage. At that time, only cases of child welfare and extreme emergencies were covered by legal aid. Our research also showed that PEI was providing the lowest percentage of civil law coverage. It was the joke here that a man could assault his partner and be represented in court by legal aid (as criminal charges are always covered); yet, if the assaulted woman partner wanted a separation, she did not qualify for legal aid. What does that say for all the women (86%) or men (14%) requiring civil law assistance?

Women's access to justice for civil law matters was inequitable, especially for the most vulnerable and marginalized in our society.¹ The stories we heard through the focus groups and personal interviews were shocking. Women stayed in situations that escalated to violence because they felt they could not afford to leave. Many women, without proper representation and most representing themselves, lost out on receiving what was rightfully theirs.

Phases II and III of the project included presentations to the Attorney General's Office, showing the need for more civil

legal aid funding and promoting implementation of new policies providing more services to women for civil matters. A Provincial Government "Access to Justice" Task Force headed by Chief Justice Norman Carruthers acknowledged, "...access to justice is the right of every citizen and should be considered as a pillar of our Judicial System. All Islanders deserve a Civil Justice System in which the doors to justice open equally wide to all and is consistently available to everyone who needs access to the system."

With three Attorneys General and two Deputy Ministers of Justice over the past two years, there have been many changes within the PEI civil justice system, so Phase IV's soon to be completed environmental scan on legal aid is timely. Hopefully, we will then be able to get back to work advocating for more funding for legal aid civil law coverage.

1. Our research showed that the biggest gaps in service affected senior women and the working poor. The Best Practices Comparative Study and Interviews, presented at a LEAF Access to Justice conference in Toronto in May 2003, are available on-line at: <http://www.wnpei.org/>

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Newfoundland

Public Legal Information Agencies

Newfoundland and Labrador has a small, sparsely spread population, with a considerable portion of citizenry living in smaller towns and outport communities. But, as with most professional services, lawyers tend to locate themselves in the larger centers throughout the province. Similarly, our permanent courts are only found in the cities and larger towns, with scheduled circuit courts traveling to the harder to reach communities. Consequently, many people in rural communities have difficulty accessing legal services and legal information.

Often, the Public Legal Information Association of Newfoundland (PLIAN) and others have difficulty reaching individuals in the smaller communities and can only provide legal information to service providers and not to those who need it the most - the general public. As a result, there is a lack of understanding of the civil justice system.

This lack of understanding can result in two problems. One problem is that people often choose to not pursue a valid legal matter because they are uncertain of their legal rights. The second problem is the opposite side of the coin. A lack of understanding of the civil justice system can result in claims, which have little merit and should not be

in the system, causing a strain on resources and clogging the judicial systems. These claims can often be more adequately resolved through avenues outside the courts. Only by increased funding and a commitment to providing legal information to the public through groups such as the provincial Legal Education and Information Associations can the civil justice system be more accessible to the people.

PLIAN is dedicated to informing and engaging the public and the legal community about the law and legal system and works diligently at reaching all parts of our diverse province. We recognize the importance of access to the law and are committed to ensuring that all Newfoundlanders and Labradorians have equal access to legal information.

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Nunavut

One View from a Legal Aid Office

The Nunavut Legal Services Board (NLSB) is an independent, statutory organization that provides legal aid services to all citizens in the territory. The NLSB currently provides no coverage for civil law matters outside of basic family law. Its two-year Civil and Poverty law project will end in March 2006. The results of that project will not be known for some time, but the increased need for civil law services was evident from the outset. The territory has a very small private Bar that deals with mainly criminal and family law, but several of these lawyers are beginning to expand their practices to include civil matters outside of family law.

The administration of civil justice in Nunavut faces many difficulties. Geography is the most obvious with over 30,000 people spread out over nearly 2 million square kilometers in isolated communities accessible only by air travel. Cultural and language barriers compound this problem in many situations as 85% of the population is of Inuit descent, speaking Inuktitut as their mother tongue. For them, even if they speak English, it is often only as a second language.

In addition, a fair number of non-Inuit litigants request services in French. Citizens with disabilities that impede communication such as hearing impairment, Fetal Alcohol Syndrome and mental illness, face almost insurmountable barriers within the system due to the lack of resources to assist them with even the most minor civil law matters.

As the population grows and people's awareness of their legal rights increases, unmet needs in the areas of estate law, landlord/tenant matters, real estate, employment standards and civil litigation will continue to grow.

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Northwest Territories

Small Business in the North

In my work as a telecommunications consultant throughout the Northwest Territories, my biggest challenge is to bridge the cultural gap between the aboriginal and non-aboriginal cultures, and to do so in a fashion that legally protects my business. Up here, there is a small but diverse population in 33 communities, broken into six aboriginal claimant groups and speaking 11 official languages.

Business here is done because of relationships, not contracts. The requirement for contracts and detailed documentation in business dealings is a very non-aboriginal concept and it meets a certain resistance and skepticism with most aboriginal customers. As well, contracts and documentation commonly need a University level of literacy to be understood and generally, community literacy levels are low. If such contracts and documentation are difficult to understand, it can lead to a level of mistrust of me, as the contractor. That mistrust can make it difficult to get and keep business.

It is also a culture of consensus, not confrontation. In the event of a contract or other dispute with an aboriginal organization, it rarely goes to civil litigation. Civil litigation is a non-aboriginal process for dispute resolution and

therefore many Northern residents discount it. There is also limited access to legal services outside the five larger communities and a perceived high cost for these services. In my experience, disputes involving aboriginal groups are resolved through a consensus-based approach of meeting with all parties and discussing the issues. There is a risk involved in not wanting to participate in such a process to solve a dispute. The population in the Territory is not large, and word of mouth is a powerful tool. If a small business gains a reputation of being difficult to deal with, the competition will certainly attempt to use that to their advantage.

Should the situation be changed? I would have to say in my experience no changes are needed, unless other civil justice systems choose to adopt some of these 'northern' methods. The people of the North have found ways to resolve disputes to everyone's satisfaction. It is a process that allows us to live together and prosper. And isn't that what it's all about?

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A Lawyer's Perspective

In my estimation the two key priorities for change in the civil justice system today to make it more responsive to the needs and expectations of litigants are:

1. to enhance the role of mediation in the litigation process; and,
2. to expand the jurisdiction of the Small Claims Courts.

Enhancing the Role of Mediation

Enhancing the role of mediation will provide litigants with a venue through which they can achieve resolution of their claims while at the same time resolving the emotional turmoil which often accompanies those claims.

Mediation allows the litigants to achieve an understanding of both sides of the case, usually resulting in a compromise which allows all parties to achieve some measure of satisfaction with the knowledge that the matter was dealt with appropriately.

Expanding the Jurisdiction of the Small Claims Courts

Expanding the jurisdiction of the Small Claims Courts will allow individuals to advance claims on their own behalf in an expeditious and cost-effective manner. Technical legal arguments advanced in superior courts combined with complicated rules of procedure act as an effective barrier to many individuals with legitimate claims who do not have the financial means to retain legal counsel. By making the system more accessible and user friendly, the needs and expectations of litigants will be better served and overall satisfaction with the legal system will improve.

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Into the Future: The Agenda for Civil Justice Reform marks the release of the *Civil Justice System & the Public* project report. This national, five-year, collaborative action research project has been coordinated by the Canadian Forum on Civil Justice. The study looks at communication within the civil justice system and between the civil justice system and the public.

We have already released a number of reports that discuss different issues in communication and access to justice, which can be accessed on our website at: <http://www.cfcj-fcjc.org/publications-cjsp.htm> .

At *Into the Future*, we will also present a sample of our research findings and recommendations. The data gained from this study are extremely rich and we will be releasing additional reports on relevant topics for some time to come. The research findings create a foundation for future research by the Forum and others concerned with civil justice reform. Already some of our partners have asked us to use the *Civil Justice System and the Public* data to create reports about access to justice issues they are addressing, and we welcome further inquiries.

The *Civil Justice System & the Public* has afforded the Canadian Forum on Civil Justice the opportunity to partner with some outstanding agencies and individuals involved with the Canadian civil justice systems. We wish to thank them for their support, knowledge, wisdom and fortitude in undertaking a project of this scale with us. We look forward to continuing to work together in the future.

We want the content of *News & Views* to answer your questions, respond to your concerns, or include your article or comments. Please write to us and contribute your ideas to future issues of *News and Views on Civil Justice Reform*: cjforum@law.ualberta.ca

INTO THE FUTURE

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