Address to the Rotary Club of St. John's
By
Honourable J. Derek Green
Chief Justice of Newfoundland and Labrador
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Thank you, Bob, for that kind introduction. It's a far cry from the good-natured insults we used to hurl at each other from time t time across the partnership table in our old law firm. Anyway, I sympathize with you. The person who introduces a speaker often has a tough job. He has to let the audience know that the entertaining part of the event is already over.

Mr. President, members of Rotary and guests …

Thank you for inviting me, once again, to address your Club on aspects of the operation of the court system in this province. This is the third time I have spoken to you on this type of occasion. I appreciate very much having such an opportunity, since judges do not often have occasions where they can speak on such matters.

Codes of ethics governing conduct of judges talk in terms of judges being expected always to behave in a "reserved manner". They are in some respects like Trappist monks who are generally not allowed to speak publicly. The sole exception for the Trappists is the abbot, who speaks for the whole community but even he is expected only to speak when necessary, and idle talk is strongly discouraged. The Chief Justice is to his or her court as the abbot is to his monastery – the one who must from time to time speak for the whole outfit.

[And, while each monk is responsible for his daily devotions – as is each judge for the cases he or she decides – it is the abbot (or Chief Justice) who is responsible for the operation of the

institution as a whole. That burden is mine, even if, like the abbot, I would sometimes prefer to be about my daily devotions as well].

While on the subject of monasteries I heard the story of a monk who joined a Trappist community which had a rule that monks could only speak once every five years and then only could say three words. At the end of this monk's first five years, he was given the opportunity to utter his three words and said: "Food no good". At the end of the second five years, he said: "Mattress is hard". At the end of the third five years, he announced: "I am quitting!" The abbot responded by saying: "It's probably for the best. You've done nothing but complain since you got here."

In my case, I get the opportunity to speak out in this venue once a year (not every five years – for which I thank you) and, fortunately, I am not limited to three words (just 15 or 20 minutes). However, when I get the chance to speak – just like the dissatisfied monk – there is a tendency, when reporting on the state of the courts, to speak about what needs to be improved and what is said in that regard will often be interpreted as complaining and criticism – just like our monk friend. (Although, I have no present intention of quitting).

But it's not criticism itself that is my goal. Improvement of the system is what I am really after. Why improvement? Because of the principle of access to justice. If a court system is to have any real value, it must be regarded as everyone's court. It must be accessible to all, even if most people never have to use it. When there are barriers to access, people begin to lose confidence in the ability of the court system to do its fundamental job – which is to uphold the rule of law. And that's important to everyone.

As former U.S. president Jimmy Carter once said:

> The law is not the private property of lawyers nor is justice the exclusive provinces and juries. In the final analysis, true justice is not a matter of courts and law books but of a commitment of each of us to liberty and mutual respect.

Yet, criticism for the sake of criticism was perhaps the impression I left last year when I spoke about the difficulties the courts sometimes appear to have in competing with the claims of other branches of government when it comes to the expenditure of public funds. Those of you who heard what I said last year may recall that, amongst other things, I expressed concern over the inadequacies of the existing court facilities in St. John's and the need for the development of a long term plan for courthouse construction.

As an example of the deficiencies in the Duckworth Street courthouse and court of appeal building, I mentioned the problem of wheelchair inaccessibility and specifically referred to the case of a woman confined to a wheelchair who was prevented from gaining access to the court of appeal when her own case was to be heard. She had also previously experienced problems with the main courthouse as well, where amongst other things the public washrooms are on a floor which wheelchairs cannot reach. She subsequently wrote to the Minister of Justice and to the court expressing her concern about the inappropriateness of denial of access to disabled persons in the present facilities.

I am pleased to report that the government has since made some important improvements to the main courthouse by, amongst other things, installing a wheelchair-accessible washroom.

[As important as that is, however, other parts of the building still remain virtually inaccessible. As well, nothing has, as yet, been done to rectify the accessibility problems in the court of appeal building but the request for funds is in the court's current

budget proposal (as it has been, on previous years, I may add) and I am hopeful that our request will receive a favourable response from government.]

The real problem, of course, is that the buildings themselves are functionally obsolescent and really need to be replaced. That is a major financial undertaking but everyone recognizes that it has to be faced in the near future. Since last year, I am pleased to report that there have been a number of meetings with government officials, including the Minister of Justice, concerning this issue. I think it is fair to say that we all recognize the need to address the problem but the challenge is, as always, finding the necessary capital funds when we are competing with the capital demands of other government departments and agencies for other worthwhile projects. Nevertheless, the discussions are ongoing and I remain hopeful that, sometime within 2012, there may be a formal commitment to the development of a planning and construction program for a new court complex that is accessible to all, that is safe and functional; one that can house the Provincial Court, the Supreme Court General Division and Family Division and perhaps even the Court of Appeal as well. Hopefully, next year, I will be able to report on something more concrete in this regard.

Another initiative undertaken over this past year has been directed to the improvement of security in the Provincial Court. Late last year, through funding provided through the Department of Justice, a screening process, similar to that used at airports, was installed in the Provincial Court at Atlantic Place. This system will clearly enhance the safety of the public and other users of the court, which is the busiest in the province. Recently, you may have seen pictures in *The Telegram* of the knives, mace and other potential weapons that have been confiscated over just the past six weeks, demonstrating in a dramatic way, the need for this security improvement, to ensure that user of the court feel safe and that, therefore, the court is accessible to them.

Quite apart from the need to improve the physical plant, as it were, there is also a need to improve the administrative and management structure of the courts, especially the Supreme Court, Trial Division and Court of Appeal. The Court has been very thinly resourced, both from a managerial and technological point of view. We struggle to manage the reams of paper that litigation seems to generate. We have not made sufficient use of electronic technology to store documents, to facilitate their filing in the court by litigants and to access them in the courtroom, amongst other things. One of the impediments to development of new systems has been the absence of sufficient staffing, especially at the managerial end, to enable longer term planning and policy development to occur. It is only by focusing on the longer term that we can break out of the cycle of lurching from day to day just to keep the system functioning. Every day we face more cases to be processed and that has, of course, to be our first priority because without that the system would just back up and crash under its own weight. Again, without proper operational functionality, access to the court would be compromised.

I am again pleased to report that progress has been made on this front also. The government has created a new position of chief administrative officer of the Supreme Court and is in the process of making funding available for two other senior management positions. This should improve the management of the court significantly. But more needs to be done. Ultimately, a full restructuring will be needed, with new legislation to provide a proper courts administration service, as has been done in many of the other courts in Canada. We have submitted draft legislation to the Minister in this regard and I continue to be hopeful that we may see introduction of legislation later this year.

On the operations side of things, a number of disturbing developments have occurred. Since the middle of 2011, we have

seen a precipitous drop in the number of both criminal and civil appeals filed in the court, despite the fact that in the previous two and a half years, the number has been steadily increasing. The number of filings has now nearly reached the lowest number in the last 15 years. (Some of the judges being appealed might of course say, "we're so good, and get it right all the time, there is no need to appeal us" – but I think there might be other reasons as well) Coincidental with this development, we have seen an increase in the proportion of appeals filed by unrepresented litigants, i.e. persons who do not have a lawyer to assist them. In 2011, fully 51% of the appeals filed had at least one party unrepresented by a lawyer. The proportion for 2010 was 36%.

Fortunately, by the time a case reaches a hearing, some (but not all) of these people get legal aid – especially for criminal cases – but there still remain a significant number of cases which end up being argued without the benefit of a lawyer. Make no mistake, this is a very important access to justice issue. It is important to realize that the absence of a lawyer is not only concerning for the litigant who may feel his or her case will not be properly and fully presented but it is also of considerable concern to the court itself. Our system is based on the adversarial approach to litigation. That assumes that each party will be represented by a legal professional familiar with the law and legal procedure who will put forward all appropriate arguments in favour of his or her client's position. In theory it should guarantee that all relevant case law and legislation will be researched by the lawyers involved and brought to the attention of the court. From this full canvassing of the legal landscape and out of a clash of differing arguments, a proper fully reasoned decision should result.

When one side is not represented by a lawyer, the court is deprived of the benefit of important research and what is placed before the court may therefore be unbalanced. This requires the judges to engage in their own research. There is a danger in this,

however, because it requires the judges to focus on the deficiencies in one side's presentation to see if there may be other material available that may support the unrepresented litigant's point of view. In so doing, it may be perceived that the judges are "descending into the arena" and becoming advocates for a particular side.

In my view, the presence of so many unrepresented litigants in our system has the potential of undermining the very basis of our adversarial system and transforming it into more of an inquisitorial system of justice that is foreign to our legal tradition. This may have major implications for the operation of our system in the future.

Both of these events – the reduction in the number of appeals and the increase in cases involving unrepresented litigants – raise the question as to whether it is becoming too expensive for people to involve themselves in the justice system. Perhaps, having exhausted resources in a trial, they don't have any money left to fund an appeal and therefore choose not to do so or, alternatively, feel that the only way they can proceed is to try to do it themselves.

It behooves us, I think, to consider very carefully, whether our court system, especially on the civil trial side, with its lengthy, time-consuming and expensive pre-trial procedures can continue to operate as it has in the past. I hear anecdotally, that more and more disputes, especially in the commercial area, are being resolved by private arbitration rather than by court action. There may be reasons for this, other than cost, but to the extent that it may be an increasing trend, it is a matter for concern. Most of the law in the commercial area is determined by the principles developed in previous cases, rather than strictly by legislation. Arbitration decisions do not create authoritative binding precedent. That is left to the appellate courts, especially the Supreme Court of Canada.

The fewer the number of cases brought to court, the smaller is the opportunity for the creation of new precedents adapting the law to changing social and commercial conditions. In the long run that is not a good thing, as the law may become more and more out of touch with the needs of society.

The Trial Division of the Supreme Court has recently amended its procedural rules of court to allow for expedited hearings in some cases on request of the litigants. Somewhat surprisingly, there has not been much take-up on this procedure. The bar seems still content to utilize the older, more cumbersome procedures. Yet it is the slavish following of those procedures in circumstances where they may not all be necessary in a given case which may be driving up costs.

Regardless of the reason why we are seeing more unrepresented litigants in court, and regardless of the problems this phenomenon presents, it is nevertheless a reality and we have to deal with it. Let me tell you of two initiatives underway in the Court of Appeal to try to improve the accessibility of the Court to persons without lawyers.

The first initiative involved the preparation of a detailed layman's description of how to conduct your own appeal in the Court of Appeal. The Court of Appeal can be an intimidating place, even for lawyers, and is especially so for those who do not understand legal terminology and procedure. With the help, initially, of the Public Information Association of Newfoundland and Labrador, funded by the Department of Justice, and latterly by the senior law clerk in the Court of Appeal, a set of written materials was prepared describing the various steps a person has to go through to process his or her appeal from the time of filing to the actual hearing. The material contains practical information about how to access further information from court staff, how to do basic legal research, how to write a legal argument and provides

procedural information about how an appeal hearing is actually conducted. The material has gone through a number of revisions and will shortly be available on the Court's website and over the counter at the Registry.

Still, written material, even in a non-technical format, is no substitute for a lawyer. This brings me to the second – and more important - initiative, which is the brainchild of the Newfoundland and Labrador Branch of the Canadian Bar Association. Last year, they approached me with a proposal to provide *pro bono* – or free – legal services to unrepresented litigants in the Court of Appeal for persons with potentially meritorious cases and who otherwise are unable to utilize the services of a lawyer. I jumped at this offer. They called for volunteers from the local bar to donate so many hours of their time to provide legal services and advice in various areas of the law to those unrepresented litigants who are identified by the court as needing help. A number of lawyers responded.

The CBA now has a roster of names of lawyers who will annually donate their time to helping unrepresented litigants prepare and present their appeals to the court. The roster is still small and we are going to proceed slowly. We may not initially be able to accommodate every case involving an unrepresented litigant but for those we do deem appropriate for assistance, they will be referred to the CBA office who will then try to match them up with lawyers on the roster who have an expertise in the area of law engaged on the appeal. The litigant will still have to pay for disbursements, such as filing fees in the court, but they will not be charged any legal fees. Initially, the services will be limited to providing an assessment of the merits of the grounds of appeal, providing information on procedural aspects of the case (i.e. helping the litigant to navigate through the system), doing legal research and writing some of the legal argument. The litigant will still have to appear in the court alone but at least they will be a lot better prepared. (The hope is that the lawyer, once he or she gets

involved in the case, will find the issue interesting or challenging that they will perhaps undertake to do the oral argument as well.)

This *pro bono* program is due to start within the next month. This is the first opportunity I have had publicly to thank the CBA, NL Branch for this very significant initiative. It speaks highly of those lawyers who have agreed to participate in the program. It is being done in the finest traditions of the Bar, exemplifying a real concern that everyone with a meritorious case ought to have access to justice.

Now, I have to say that I had originally intended at this point in my remarks to launch into a discussion of sentencing policy, to explain a little about how judges reach a decision as to how much to sentence a convicted offender in a given case. The sentences judges hand out are often the subject of criticism in the media and other public discourse. At some point you may be interested in why judges come up with the dispositions they do.

But I am mindful of the speaker's maxim that "it is best to leave your audience before your audience leaves you." It's been said that most speakers don't need an introduction. What they do need is a conclusion. And if I start into a discussion of the principles of sentencing today I fear that my conclusion may be pushed far into the afternoon. So, I have decided to leave that for another day. Instead let me conclude by making a few comments about why the law and our legal system should matter to all of us.

I have taken some time to talk about a lot of mundane things relating to how the courts are actually operating and the challenges they face. To most people on a day to day basis, I am sure, these matters are of little interest and perhaps are even regarded as irrelevant to their lives. The plain fact is that the vast majority of citizens rarely have any interaction with the court system. It is there, after all, to resolve disputes only when social and

commercial relations break down. Fortunately, most people don't have to resort to the courts to enforce their rights and don't face criminal charges. So, it is perhaps understandable that the details of the functioning of the courts will not be foremost in the minds of the average citizen.

Yet, there is a comfort, I would suggest, that we all should take if we have a properly-functioning court system that will resolve disputes in a dispassionate and impartial manner whenever it is called upon to do so. The courts are the visual symbols of that abstract concept known as the rule of law. They provide the means for social stability by allowing for peaceful and rational settlement of disputes instead of with violence and taking the law into one's own hands. Cicero underscored the irony inherent in the importance of law:

We are in bondage to the law so that we might be free

In that sense, we all have an important stake in the system. Promoting and supporting a properly-functioning court system benefits us all because you never know when you may be called upon to use it. In the end, the courts only have legitimacy if they have the confidence of the public that they are accessible when needed and that once accessed they will deliver fair, impartial and expeditious justice. Once that confidence is lost, one of the bedrocks of our society will be severely damaged and very difficult to repair. Each of us needs to be concerned, therefore, with the state of our legal system and to ensure its continuance and its accessibility to all. That's why we constantly need to improve it. As mundane as a discussion of the minutiae of court administration may sound, we all need to be involved in the dialogue.

Thank you.