

**Sir Francis Forbes Annual Law Lecture**

**Memorial University of Newfoundland**

***Re-Imagining Justice: Finding Local Solutions to the Access Crisis***

**By**

**Hon. J. Derek Green**

**January 25, 2016**

Mr. President, Minister Parsons, Dean Phillips, Dr. Dunn, Ladies and Gentlemen ...

Thank you, Mr. President, for that kind introduction. I am a proud graduate of Memorial University and am glad to have an opportunity to return to this very important institution which contributes so much to the public life of the province, indeed, to the whole country.

I am honoured to have been asked to deliver this inaugural Sir Francis Forbes lecture which, we are told, is to be an annual event that will provide an opportunity for the intersection of the university with the community on matters of public legal importance. It can be regarded as an aspect of the University fulfilling its mission of public engagement. It is all the more important, I believe, for the academy to interact with the legal system in ways such as this in light of the fact that we do not *yet* have a law school at the university. For those (hopefully few) law-school-deniers in the audience, let me assure you this lecture will not in any sense focus on the case for a law school (although I may find it hard to resist a passing reference to it one or two times!).

Since graduating from Memorial in 1968 and serving as a part-time lecturer in Commercial law in the Business school in the 1970s and 1980s, I have not been seen on campus very much (despite the fact that I

have worked as a lawyer and sat as a judge no more than a kilometer from here for virtually the whole of my career). Perhaps that is a good thing. Sometimes one can be “seen” too much. I am reminded of an incident that occurred early on in my judicial career when I was a trial judge filling in at the Family Court. I had come off the bench after a busy day and was in the process of removing my court clothes to put on my business suit. I was standing in my office and had just stripped to the waist when a knock came to the door and a female court clerk entered to speak to me about a bunch of files she was carrying. She saw me standing there, said “excuse me”, hastily backed out and closed the door. I finished dressing and then went out to the secretarial area and noticed that the court clerk was still waiting. So I said, Ms. X, “do you still want to see me?” To which she immediately replied, “No, Justice Green, I’ve seen enough of you already!”

Let’s hope that by the time I finish this lecture, unlike the court clerk, you will not conclude that you have seen enough of me.

I start with three caveats. Although the title of the Lecture is “Re-imagining Justice: Finding Local Solutions to the Access Crisis”, it may be perceived as misleading in three respects. First, for those philosophers who may be in the audience, you will be disappointed if you have come to hear some major new philosophical formulation of the nature of law and justice. John Rawls<sup>1</sup>, Herbert Hart<sup>2</sup> and all those who have come after them<sup>3</sup> can rest easy; there will be no assault on them tonight. My approach is much more mundane and practical (and, frankly, much more within my limited capabilities). It is to examine the problems of access to justice in the 21<sup>st</sup> century in the context of our

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<sup>1</sup> John Rawls, *A Theory of Justice* (Cambridge, Mass.: Harvard University Press, 1971); John Rawls, *Justice as Fairness: A Restatement* (Cambridge, Mass.: Harvard University Press, 2001)

<sup>2</sup> H.L.A. Hart, *The Concept of Law* (Oxford: Oxford University Press, 1961)

<sup>3</sup> E.g. Ronald Dworkin, *Justice in Robes* (Cambridge, Mass.: Harvard University Press, 2006)

local community and to make some observations about how our justice system must evolve and what can be done to improve the unacceptable situation we now face. The second potentially misleading aspect of the lecture title is that I am proposing to speak primarily about access to justice in the civil, not the criminal, context.

The third caveat is that I would like to take a few minutes, before launching into my views on the current access crisis, to speak about Sir Francis Forbes himself, in view of the fact that the lecture series is named after him. This is the first opportunity to speak about a man who is arguably one of the greatest chief justices this province – and before that, dominion and colony - has had. So, that is where I will start.

## **The Forbes Legacy**

The naming of the lecture series after Francis Forbes is, it seems to me, very appropriate.

As Newfoundland's seventh Chief Justice, he served in that office from August 4, 1816, the day he received his commission<sup>4</sup>, until September 30, 1822 when he resigned for health reasons, having departed for England earlier that year.<sup>5</sup> During his relatively short tenure as Chief Justice, all of which was spent as a resident of the colony, he laid the foundation of the rule of law in the colony by asserting the power of the Supreme Court to review and control executive power and administrative decision-making, reformed property law and other civil legal principles, promoted access to justice and by the way he conducted himself and applied the law generally, elevated the level of respect of the

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<sup>4</sup> He was actually sworn in on July 15, 1817 and started work at that time: Patrick O'Flaherty, "FORBES, Sir Francis" in *Canadian Dictionary of Canadian Biography*, vol 7, (University of Toronto/Universite Laval, 2003) – online at [http://www.biographi.ca/en/bio/forbes\\_francis\\_7E.html](http://www.biographi.ca/en/bio/forbes_francis_7E.html) [hereinafter, O'Flaherty, *Forbes*]

<sup>5</sup> Memorandum in R.A. Tucker, *Select Cases of Newfoundland 1817-1828* (reprinted, Toronto: The Carswell Company Limited, 1979), p. 319 [hereinafter *Tucker's Cases*]

community for the judicial process. In the words of Dr. Patrick O’Flaherty, his influence on the future development of the colony was “profound.”<sup>6</sup> He was venerated and respected by the local community (though perhaps not the Governor with whom he clashed on a number of legal matters) to the point that for many years after he left the colony, at every public dinner there was proposed a toast to “the departed Francis Forbes.”<sup>7</sup>

Although much has been written about Francis Forbes, the in depth biographies relate primarily to his subsequent career as the first chief justice of New South Wales.<sup>8</sup> Certainly, more needs to be written about the significance of his Newfoundland decisions as a comprehensive and coherent body of jurisprudence. Perhaps this lecture series will be a stimulus to doing just that.

### **(a) Community Engagement**

Insofar as this lecture series is designed to foster the university’s connections with the community, the naming of the series after Forbes is also appropriate because Forbes represents a judge who was very much involved in the larger community. He involved himself in a number of extra-judicial community events, like chairing public meetings to discuss the social problems of the Beothuks,<sup>9</sup> and was known as “one of the

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<sup>6</sup> O’Flaherty, FORBES

<sup>7</sup> J.M.Bennett, *Sir Francis Forbes: First Chief Justice Of New South Wales, 1824-1837* (Sydney: The Federation Press, 2001), p. 42. [hereinafter, Bennett, *Forbes*]

<sup>8</sup> See, Bennett, *Forbes*; C.H. Curry, *Sir Francis Forbes: The First Chief Justice of the Supreme Court of New South Wales* (Sydney: Angus & Robertson Ltd, 1968) [hereinafter, Curry, *Forbes*]. Material covering some of Forbes’ jurisprudence both during his Newfoundland tenure and afterwards, includes: Bruce Kercher & Jodie Young, “Formal and Informal Law in Two New Lands: Land Law in Newfoundland and New South Wales under Francis Forbes” in Christopher English (ed.), *Essays in the History of English Law: Volume IX: Two Islands, Newfoundland and Prince Edward Island* (Toronto: University of Toronto Press, 2005), pp. 147-191; Ian Holloway, Simon Bronitt & John Williams, “Rhetoric, Reason and the Rule of Law in Early Colonial New South Wales in Hamar Foster, Benjamin L. Berger & A.R. Buck, *The Grand Experiment: Law and Leal Culture in British Settler Societies* (Toronto: The Osgoode Society and the University of British Columbia Press, 2008), pp. 78-100; O’Flaherty, FORBES; Bruce Kercher, “Law Reports from a Non-Colony and a Penal Colony: The Australian Manuscript Decisions of Sir Francis Forbes as Chief Justice of Newfoundland” (1996), 19 Dal L. J. 417.

<sup>9</sup> O’Flaherty, FORBES

most popular toastmasters of his time.”<sup>10</sup> He is also credited with composing the “The Banks of Newfoundland”, the official regimental march of the Royal Newfoundland Regiment and the song most associated with the Royal St. John’s Regatta.<sup>11</sup>

I would like, however, to concentrate for a few minutes on the significance of some aspects of Forbes’ jurisprudence, which I believe is the most important of his contributions to Newfoundland society. Specifically, I will focus on only three areas: (i) how he related his enunciation of legal principle to the needs of the local community; (ii) how he laid a solid foundation for the rule of law in the colony; and (iii) how, in his judicial writings, he emphasized the importance of access to justice which, of course, this lecture is supposed to be all about.

### **(b) Recognition of Local Custom**

In many of his judgments, Forbes recognized and tried to incorporate local customs into his development of the court’s jurisprudence. In that sense he saw the value of keeping the law responsive to the needs and expectations of the community it served. Custom as a source of law, unlike the two most important legal sources, statute and case law, is not, in the Austinian sense, authoritarian or top-down in its impact; rather it arises out of community practices and social understandings of how civil relationships should be conducted<sup>12</sup>. Regardless of the doctrinal debate as to whether a custom can exist as law before its formal recognition by a court<sup>13</sup> – which I am going to step

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<sup>10</sup> G.W.L.Nicholson, *The Fighting Newfoundlander* (1964) republished (Montreal & Kingston: McGill-Queen’s University Press, 2006), p. 336.

<sup>11</sup> *Ibid.*

<sup>12</sup> See David J. Bederman, *Custom as a Source of Law* (Cambridge: Cambridge University Press, 2010), pp.7, 25; Leonard Bernard Murphy, “Habit and Convention at the Foundation of Custom” in Perreau-Saussine & Murphy, *The Nature of Customary Law* (Cambridge: Cambridge University Press, 2007), p. 53, fn 2.

<sup>13</sup> If anything, Forbes’s reference to “custom having the force of law” in *Meagher & Sons v. Hunt, Stabb, Preston & Co.* (1818), 1 Nfld. L.R. 142 at 143; *Tucker’s Cases*, p. 161 could be taken as support for a view that the role of the court is to recognize a pre-existing custom as having legal force, rather than to convert it into a legal obligation.

past – it is clear that he was concerned to ensure that local customs, if generally recognized and relied on by the populace in the ordering of their affairs, were recognized and applied as the rule of decision in a number of his cases, and he did this even if it meant that the result would have been different from what English law would have dictated.

A very good example of this is found in Forbes' jurisprudence regarding frustration of leases. For the non-lawyers present, let me explain that there is a doctrine in the law of contract that allows one party to treat the contract as discharged if an event occurs subsequent to the making of the contract, for which neither party is responsible, that renders the underlying purpose of the parties in entering into the contract no longer capable of being achieved. In other words, there is a frustration of the common venture. Common examples are situations where the subject matter of the contract is destroyed<sup>14</sup> or performance is subsequently rendered illegal by a change in the law.<sup>15</sup>

One would think therefore that if two parties enter into a lease of property and the property is subsequently destroyed by fire, the obligation to continue to rent the property would be regarded as frustrated and therefore discharged. However, for a long time in English law, the doctrine of frustration was regarded as not applying to leases.<sup>16</sup> As a result, if leased premises were destroyed by fire, the tenant continued to remain liable for the rent until the end of the term even though the house no longer existed. The reason for this is that a lease is regarded not only as a contract but also a conveyance of an interest in land that just happens to have a house on it. In such circumstances, the tenant still has the theoretical right to the land even though as a practical matter he or she cannot occupy it.

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<sup>14</sup> *Taylor v. Caldwell* (1863), 3 B & S 826

<sup>15</sup> *Denny, Mott and Dickson Ltd.*, [1944] A.C. 435

<sup>16</sup> *Matthey v. Curling*, [1922] 2 A.C. 180

This doctrine did not survive Forbes' scrutiny. It will be recalled that Forbes arrived in St. John's just at the time of the major fires of 1816 and 1817 that destroyed major portions of the Town. No doubt, Forbes was affected by what he saw in terms of the poverty and suffering that resulted from these serious socially devastating events. Many leasehold premises were affected. In actions by landlords to continue to collect rents from the tenants of the destroyed properties, the question had to be squarely faced as to whether the doctrine of frustration applied. In a number of cases,<sup>17</sup> Forbes decided that it did. He ruled that, according to the custom of the Town of St. John's, the tenant had the right, upon the destruction of the premises by fire, to surrender the remainder of the term to the landlord and thereby bring to an end any continuing obligation to pay further rent.

One of the best examples of this is *Cowell et al v. MacBraire*<sup>18</sup> where, when the case first came before him, Forbes applied English precedent to decide the case in favour of the plaintiff landlord. However, following judgment, he granted a new trial to let in evidence of local custom and, as a result, reversed his previous ruling and decided for the defendant. He observed in his judgment following the second trial that he had "entertained doubts of the propriety"<sup>19</sup> of the original judgment and commented:

Feeling myself bound by the decisions of the English courts, whenever they are clear upon the case, I cannot say but I am rather glad to be released from the trammels of authority in this, and enabled to receive evidence of the usage of the place, because I

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<sup>17</sup>*Carnell v. Carson* (1818), 1 Nfld. L.R. 131; *Trimingham & Co. v. Brine* (1819) 1 Nfld. L.R. 158; *Newman v. Meagher et al* (1819), 1 Nfld. 182; *Duggan & Mahon v. Jonas Barter* (1820), 1 Nfld. L.R. 209

<sup>18</sup> (1819), 1 Nfld. L.R. 170; *Tucker's Cases*, p. 193

<sup>19</sup> *Ibid.* p. 170

entertained an opinion upon the first trial, that the law was one way, and the practice the other.<sup>20</sup>

While some subsequent Chief Justices expressed skepticism over the vibrancy of the principle Forbes had espoused<sup>21</sup> they nevertheless applied the precedents Forbes had created but tried to restrict their application as much as they could.<sup>22</sup> Nevertheless the doctrine took hold, being applied, for example when similar issues arose following the 1892 fire, with the Court commenting that the doctrine was “so well established in law as to require the intervention of the legislature to abrogate it.”<sup>23</sup>

How is it that Forbes, who has also been described as the first Chief Justice since Reeves to bring consistency and uniformity to the administration of law in the colony by insisting on application of English law to all decisions,<sup>24</sup> felt justified in nevertheless recognizing and applying local custom in derogation from English law? The answer is threefold. First, English law specifically recognized the possibility that local custom and usage may be applied in the face of contrary common law principles provided the stringent test for their application was made out. There is no incompatibility, therefore with applying custom as a rule of decision provided the rules for its recognition were satisfied. Secondly, the reception of English law doctrine provides that the colonists who settle new lands bring English law with them, but only so far as local conditions allow for their application.<sup>25</sup> Despite the fact that there were occupants here before English settlers arrived, Newfoundland has always been regarded in English law as a settled, not a conquered,

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<sup>20</sup> Ibid. p. 171

<sup>21</sup> *Broom v. Preston and Stabb* (1825), 1 Nfld. L.R. 427, p. 431, per Tucker C.J.

<sup>22</sup> Ibid.; *The King v. Arroll* (1831), 2 Nfld. L.R. 57

<sup>23</sup> *Kitchen v. Fenelon* (1893), 7 Nfld. L.R. 740, p. 743 per Carter C.J.

<sup>24</sup> O’Flaherty, FORBES

<sup>25</sup> *Young v. Blaikie* (1822), 1 Nfld.L.R. 277, p. 283 per Forbes C.J.



colony. And finally, the legislation creating and continuing the Supreme Court of Judicature expressly provided that decisions were to be made “according to the law of England as far as the same can be applied to suits and complaints arising in the islands...”<sup>26</sup> All three of these requirements for the application of English law, therefore, have built into them an escape hatch, to allow for the recognition and application of local customs and practices in appropriate cases.

I do not think it correct, therefore, to suggest that Forbes used the application of English law to stamp out or eliminate local customs. Rather, it seems he was simply recognizing such customs as were sufficiently established under English law or which, because of long-standing local reliance on their existence, it could be said that a contrary English common law principle could not be fairly applied in the circumstances.

Forbes certainly recognized and applied a number of other local customs. For example, he decided that fishermen were by the “custom of the island” entitled to a stay of execution on judgments of debt against them to enable them to continue to prosecute the fishery until the end of the season, before being called upon to pay.<sup>27</sup> In another case,<sup>28</sup> Forbes effectively recognized a custom that regardless of in whose name the title of a newly-constructed ship was registered, it is held on trust firstly as security for repayment of the capital furnished to build it and thereafter as security for payment of the builder for the work he or she put into it. It could be said that this was a recognition of a builder’s lien long before the enactment of mechanics’ or construction lien legislation. Finally, mention should be made of the decision in *Rourke v. Baine*

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<sup>26</sup> *Judicature Act, 1792*, 32 GEO. 3, c. 46.

<sup>27</sup> *Coleman v. Executors of Kennedy* (1817), 1 Nfld. L.R. 8; *Tucker’s Cases*, p. 8. This case was referred to without disapproval by the NL Court of Appeal as recently as 2013 in *Tremblett v. Tremblett*, 2013 NLCA 53, 340 Nfld & PEIR 135.

<sup>28</sup> *Delaney v. Nuttall, Cawley & Co.* (1920), 1 Nfld. L.R. 215; *Tucker’s Cases*, p. 193

*Johnston & Co.*<sup>29</sup> where Forbes, on the basis of a local custom, extended the reach of a statutory provision (which provided that fish and oil in the hands of a planter was subject to preferential payment of the wages of the workers hired by the planter<sup>30</sup>) to allow unpaid workers to effectively assert a lien over the fish and oil even if it had left the custody of the planter and was being held instead by the merchant who had advanced money and supplies to the planter but who had no privity of contract with the workers. He explained the origin of the custom as being “found in the necessity of the thing; and the interests of the fishery are its best expositor.”<sup>31</sup> This was a far-seeing judgment that grounded the decision in the local needs and expectations of those involved in the fishery.

### **(c) The Rule of Law and Administrative Law**

The notion of the rule of law is central to our democratic system of government. It is recognized in the case law as “a fundamental principle of our constitution.”<sup>32</sup> The idea is that all people, both governed and governors are subject to and governed by the law. Because the law is supreme over officials of government as well as private individuals, it is preclusive of arbitrary and unfettered power.<sup>33</sup> The body of law known as “administrative law”, which provides remedies for judicial review of governmental action is one aspect of the rule of law in action.

Francis Forbes is in many ways, the father of administrative law in Newfoundland. Very early on in his tenure he put to rest any lingering doubts as to whether colonial superior courts were imbued with the same jurisdiction and powers of the English high courts. He effectively

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<sup>29</sup> (1820), 1 Nfld. L.R. 210; *Tucker's Cases*, p. 237

<sup>30</sup> *Palliser's Act, 1775*, 15 GEO 3, c. 31

<sup>31</sup> *Rourke*, p. 212; 239

<sup>32</sup> *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721 at para. 59

<sup>33</sup> *Ibid.*, at para. 64

analogized them to their English equivalents. In one case,<sup>34</sup> he asserted a broad power of judicial review in these terms:

It is an important part of the duty of the Supreme Court to watch over the proceedings of the other tribunals established within the sphere of its authority, with a view not only to the rights of suitors, but to the protection of the tribunals themselves.<sup>35</sup>

In a later case,<sup>36</sup> where he dealt with the prerogative writ of prohibition, he was even more pointed:

Prohibitions are high prerogative writs, issuing from the King's Supreme Courts to some other court which is supposed to exceed its jurisdiction. In every country a power of this sort must be lodged somewhere; and in the colonies it is exercised by the superior courts in the same way as it is at home.<sup>37</sup>

In making these assertions, Forbes anchored the power of judicial review in the inherent nature of a superior court, and he was very much of the view that the Supreme Court of Newfoundland was such a superior court. That inherent power remains with the Supreme Court of Newfoundland and Labrador to this day.

Chief Justice Forbes was also the first, in a reported case, to issue *habeas corpus*, with *certiorari* in aid, requiring the gaoler at Ferryland to deliver up the body of a prisoner so that the legality of his detention, imposed by local justices of the peace, could be reviewed.<sup>38</sup>

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<sup>34</sup> *Hutton, McLea & Co. v. Kelly* (1818), 1 Nfld. L.R. 105

<sup>35</sup> *Ibid.*, p. 107; see also, to similar effect, *Clift v. Holdsworth* (1819), 1 Nfld. L.R. 167, p. 168: "...there must reside somewhere a supreme judicial authority to watch over the proceedings of all inferior tribunals and to keep the scales of justice even and uniform."

<sup>36</sup> *Conard et al v. Driscoll et al* (1820), 1 Nfld. L.R. 201

<sup>37</sup> *Ibid.*, p. 204

<sup>38</sup> *Re Patrick Kent* (1817), *Tucker's Cases*, p. 54

Perhaps even more important, in terms of the impact on the political and constitutional development of the colony, was the willingness of Chief Justice Forbes to challenge, when necessary, the legality of decisions of the Governor. It will be recalled that at this time Newfoundland had no legislature. The Colony was effectively ruled by the Governor who acted under authority and instruction from the Crown Office in London. The Governors themselves at that time were part of the naval tradition and were used to having their orders, issued from the quarter deck as it were, obeyed without question. The notion that anyone, especially a mere colonial judge, could question and, if necessary, set aside his decisions was anathema. Yet that is what Forbes did.

In *Carter v. Rendell*<sup>39</sup> the issue was whether the defendant had displaced the plaintiff from his office as Naval Officer with respect to his right to collect fees for acting on behalf of the Commissioner of Customs. Forbes treated the matter as a trial of the entitlement to the office, thus putting the Governor's authority to appoint Naval Officers directly in issue. Forbes required the plaintiff to provide cogent proof of his appointment and that adequate security, as required by the applicable English legislation, had been given. He was not prepared to infer such an appointment from indirect references by the Governor in correspondence to the plaintiff as naval officer. Although the case ultimately turned on lack of evidence, it is noteworthy that Forbes was not prepared to fall back on the normal presumptions that a person openly purporting to occupy an office is presumed to be the lawful occupier unless it is proven to the contrary, nor was he prepared to rely on the alleged fact that the plaintiff had customarily occupied the office during the terms of office of prior governors. Either he had been lawfully appointed or he had not and, if not, any actions of the Governor in purporting to appoint

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<sup>39</sup> (1821), 1 Nfld. L.R. 230; *Tucker's Cases*, p. 259

him were not sufficient. When it came to lawful exercise of legislative authority by the Governor, Forbes was not prepared to defer to him.

In *Carter*, the case ultimately turned on failure of the plaintiff to provide the requisite proof that the Governor had lawfully exercised his authority; it did not involve a declaration that the Governor did not possess the lawful authority, just that there was no sufficient proof that he had exercised it. In another case,<sup>40</sup> however, Forbes had the opportunity to opine on whether the Governor's authority was in fact limited. In an action of trespass against soldiers in the Royal Artillery for firing on the plaintiff's vessel as it was leaving St. John's harbour and compelling the ship to come to anchor, the defence was that they were acting under orders of the Governor requiring all vessels leaving port to obtain a pass from the Governor upon pain of being fired at if the pass was not obtained. The intent of the order was to ensure that ships would not leave the port surreptitiously with intent to avoid payment of duties and taxes. Forbes refused to justify the actions by reference to the necessity of enforcing the revenue laws, or by the common law, or by custom. He held that orders of the Governor were not a proper means of supporting a penal statute designed to enforce the revenue laws. He stated:

I know of no general law which would enable me to say that it is legal here; and I feel that I should be taking a very serious responsibility upon myself, if led into speculations upon the expediency of a better mode of enforcing the revenue laws, I were to allow an opinion to pass the Court that might to seem to sanction a practice which may be followed by the most fatal consequences.

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<sup>40</sup> *Trimingham & Co. v. Gaskin* (1821), 1 Nfld. L.R. 244, *Tucker's Cases*, p. 274

The order under which this vessel was fired at appears to me to be founded in a misapprehension of the law. It is therefore no defence to the action; for every man, whatever may be his profession, is required to yield his first obedience to the laws of his country.<sup>41</sup>

[Underlining added.]

[Take that, Governor Hamilton !!]

Forbes took the challenges to the Governor's authority to a new level in *Jennings and Long v. Hunt and Beard*.<sup>42</sup> The case is very important and has been discussed by others, such as Dr. Patrick O'Flaherty.<sup>43</sup> It will suffice to say here that, in a case where the issue was whether an action was precluded by the doctrine of *res judicata*, Forbes held that the previous decision which was made by a naval surrogate applying by rote a rule of decision contained in a proclamation by the Governor was erroneous because the Governor had no legal authority to issue the proclamation. In other words, the Governor had no general legal authority to legislate by proclamation. O'Flaherty concludes that "[t]his extraordinary opinion ... undermined in a single stroke the informal gubernatorial system of Newfoundland."<sup>44</sup>

#### **(d) Access to Justice**

Chief Justice Forbes was also concerned about procedural, as well as substantive, justice. "Cheap and ready access to the fountainhead of justice" was a phrase that he employed when talking about the issue. To achieve that, he was prepared to overlook informality in proceedings provided no unfairness would result. In *Heath v. Kean*,<sup>45</sup> for example,

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<sup>41</sup> Ibid., p. 246-247

<sup>42</sup> (1820), 1 Nfld. L.R. 220

<sup>43</sup> O'Flaherty, FORBES; Patrick O'Flaherty, *Old Newfoundland: A History to 1843* (St. John's: Long Beach Press, 1999), pp. 133-134.

<sup>44</sup> O'Flaherty, FORBES

<sup>45</sup> (1820), 1 Nfld. L.R. 193

where title to land depended on whether a previous court order, reputedly made by the first Chief Justice, John Reeves, some twenty-eight years previously, had been properly made, Forbes expressed his views as follows:

... it should not be forgotten that justice is the first object of all courts; forms are only the means by which that object is attained. To disregard the proceedings of Courts in this Island merely for informality, would be to ... sacrifice the ends of justice to its forms.<sup>46</sup>

In addition to a strong emphasis on ensuring that excessive formality did not defeat the ends of justice, Forbes was also very vigilant not to give up jurisdiction and thereby deny access to the courts. In *Clift v. Holdsworth*<sup>47</sup> the question was whether the Supreme Court had jurisdiction to review a decision of the Surrogate Court at Ferryland which involved a judgment under 40 pounds. The applicable legislation constituting the Supreme Court only provided for review by the Court of judgments for sums *exceeding* 40 pounds. Forbes nevertheless assumed jurisdiction, asserting that the Supreme Court had to have jurisdiction to review all cases; otherwise errors of lower courts could never be corrected. He stated:

This Court was expressly constituted by Act of Parliament “The *Supreme* Court of Newfoundland”; and, as such, by analogy to the Supreme Courts of England, it had an universal control in all cases and over all courts within the boundaries and subject-matter of its jurisdiction, unless it were ousted by express words. ... It is part of the constitutional law of the land that there must reside somewhere a supreme judicial authority to watch over the proceedings of all

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<sup>46</sup> Ibid., p. 194

<sup>47</sup> (1819), 1 Nfld. L.R. 167

inferior tribunals, and to keep the scales of justice even and uniform. The same principle forms a part of the law of every civilized state in the world.<sup>48</sup>

(Underlining added.)

As far as Forbes was concerned, the statute had not expressly taken jurisdiction away so the Supreme Court still had that jurisdiction even though the statute did not expressly confer it.<sup>49</sup> In so doing, Forbes not only imported into colonial law in Newfoundland the full panoply of powers held by the superior courts in England, as he had also stated in *Conard v. Driscoll* mentioned earlier, but he also laid down a marker that he would not easily turn away a potential litigant from access to his court.

### (e) Forbes in Retrospect

One of Forbes' Australian biographers<sup>50</sup> summed up his Newfoundland career this way:

Forbes' judgments reveal a polish and an incisiveness not then common among the decisions of many judges on colonial service in the British dominions. Forbes shone out among them as if a rare jewel. He was no discard of the English circuits, driven by poor performance there to seek his fortune beyond the seas. He was rather a colonial jurist, born and bred, who was in his element. Although Newfoundland was not long to enjoy his influence, what

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<sup>48</sup> Ibid., p. 168

<sup>49</sup> The actual point in *Clift* – that the Supreme Court had an *appellate* jurisdiction even though it was not expressly conferred by statute – was ultimately not accepted, in *Hunter & Co. v. Hernaman and Howard* (1823), 1 Nfld. L.R. 285; *Tucker's Cases*, p. 321, Tucker C.J. rejected the proposition. He nevertheless affirmed the idea that although an *appeal* could not be entertained where the amount at stake did not exceed 40 pounds, the Supreme Court had inherent jurisdiction to review such a decision by way of *judicial review*, using the prerogative writs. In that sense, Tucker C.J. nevertheless affirmed Forbes' larger point that the jurisdiction of a superior court is presumed to exist unless it is expressly taken away by statute.

<sup>50</sup> Bennett, *Forbes*, pp. 27-28.



he accomplished in his few years' tenure permanently changed the administration of justice there, and changed it markedly for the better.

With that I wholeheartedly agree. It may be a bit of a stretch, but I am going to say it anyway: in my view, Chief Justice Forbes was to the development of Newfoundland law what Lord Mansfield<sup>51</sup> was to the development of English law half a century earlier. Both were responsible for systemizing the law into a coherent body of principle. Both believed strongly in developing the law with a view to practical considerations – Mansfield by taking account the Law Merchant when crafting his commercial and contract decisions and Forbes by taking account of local custom. Both believed in the importance of maintaining the rule of law and ensuring access to the courts. We were fortunate to have Forbes in our legal history.

I have spent a long time on aspects of Forbes' career but I think it is important, when considering the state of our system today, to keep in mind these three points that come out of Forbes' career in Newfoundland: (i) his desire to keep the law grounded in the local community; (ii) his emphasis on the importance of the Courts in protecting rights, especially as against the state; and (iii) his emphasis on access to justice. Each of these in my view feeds directly into the second part of this lecture, to which I now turn.

### **“To keep the scales of justice even and uniform”<sup>52</sup>**

Using Forbes' utterances about keeping the scales of justice “even and uniform”, not letting form triumph over substance, and providing

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<sup>51</sup> See Norman S. Poser, *Lord Mansfield: Justice in the Age of Reason* (Montreal & Kingston: McGill-Queen's University Press, 2013)

<sup>52</sup> *Clift*, p. 168

“cheap and ready access” to justice as the touchstones, we are required to look to see if we can do better with respect to the administration of justice today.

Often, “access to justice” is equated with access to the courts.<sup>53</sup> That is certainly the sense in which Forbes used it. For my purposes, however, I will define it somewhat more broadly. I will speak of it as access to sufficient information about rights as well as how to vindicate or defend against the assertion of those rights, and the provision of an understandable, attainable mechanism that will effectively resolve disputes relating to claims regarding those rights in a fair and timely manner. The point here is that it is not only the fact that the door of the courthouse is open to all but that people have to, as well, have the means of deciding whether they can or should open that door and, if they do, to be treated inside in a manner that facilitates their initial purpose in entering.

You will have noticed, no doubt, that the title of this lecture has its premise that there *is* an access “crisis.” Whether one calls it a crisis (though I am not the first person to have used that word<sup>54</sup>), lack of easy, effective and affordable access certainly is a serious problem with our system. For the purpose of this lecture I am content to rely on the

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<sup>53</sup> See, e.g., *B.C.G.E.U. v. British Columbia (Attorney General)*, [1988] 2 S.C.R. 214; *British Columbia (Attorney General) v. Christie*, [2007] 1 S.C.R. 873, 2007 SCC 21; *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, 2014 SCC 59, [2014] 3 S.C.R. 31; Alberta Civil Liberties Research Centre, “What is Access to Justice?”, online at <http://www.aclrc.com/what-is-access-to-justice>; Patricia Hughes, “Law Commissions and Access to Justice: What Justice Should We Be Talking About?” 46 *Osgoode Hall L.J.* 773, p. 780; Anton Oleinik, “Access to Justice as a Form of Inequality” (2014), 48:2 *Journal of Economic Issues* 1.

<sup>54</sup> See for example the comments of Beverley McLachlin, Chief Justice of Canada as related in Tracey Tyler, “Access to Justice a ‘basic right’”, *The Toronto Star* (12 August 2007) and in Bob Tarantino, “When even the attorney general can’t afford a lawyer”, *The National Post* (21 August 2012); the remarks of former Chief Justice Hon. R. Roy McMurtry, CFCJ, Civil Justice Reform Conference: Phase II, “Remarks” (7 December 2006), pp. 3-4, online at <http://cfcj-fcjc.org/docs/2006/mcmurtry-en.pdf>, p. 3; The Canadian Bar Association, *Equal Justice: Balancing the Scales*, (Ottawa, 2013), p. 59

pointed comments of Justice Karakatsanis of the Supreme Court of Canada in a recent decision:<sup>55</sup>

[1] Ensuring access to justice is the greatest challenge to the rule of law in Canada today. Trials have become increasingly expensive and protracted. Most Canadians cannot afford to sue when they are wronged or defend themselves when they are sued, and cannot afford to go to trial. Without an effective and accessible means of enforcing rights, the rule of law is threatened. Without public adjudication of civil cases, the development of the common law is stunted.

To me, that is a terrible indictment of our justice system. It is not the first time such things have been said. The Canadian Bar Association in a report published in 2013, entitled (in words reminiscent of Chief Justice Forbes' language), *Equal Justice: Balancing the Scales* echoed many of the same thoughts. Here is one quote:<sup>56</sup>

Justice has been devalued. We see justice as a luxury that we can no longer afford, not an integral part of our democracy charged with realizing opportunity and ensuring rights.

Traditionally, the access to legal knowledge – and by extension, access to the courts - has been effectively controlled by the Bar, which has statutorily been granted a monopoly over appearing in the superior courts and arguing cases. It is a monopoly which, traditionally, has been jealously guarded. The monopoly is supported by the legislative and executive branches of government, with wide statutory definitions of “the practice of law” and provisions for prosecution of those non-lawyers who attempt to engage in such practice.<sup>57</sup> It is also supported by

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<sup>55</sup> *Hryniak v. Mauldin*, 2014 SCC 7

<sup>56</sup> p. 49

<sup>57</sup> *Law Society Act*, 1999, SNL 1999, c. L-9.1, ss. 76, 79

the courts who (certainly in this jurisdiction) have adopted procedural rules that restrict significantly the circumstances when a non-lawyer can appear in and argue a case in court.<sup>58</sup>

Yet, despite this monopoly, the courts are seeing increasing numbers of people coming to the court seeking information and advice about how to access the process and trying to file papers and initiate a lawsuit or an appeal themselves, without help of a lawyer. In some cases, they have to be turned away because of the restrictive rules requiring legal representation. In other cases, where they are allowed to represent themselves, they attempt to muddle through a very dense thicket of procedural rules. The courts and other agencies try to provide some basic *information* about the “how” but generally have refrained from giving legal *advice* both about procedural strategy and about how the legal rights they are asserting or resisting might apply to their particular case and shape their argument.<sup>59</sup> But, make no mistake, it is *advice* that people are after.

This is not a rare phenomenon. In the Court of Appeal, the highest court in the province, where the arguments generally involve points of law, not disputes of fact, and are often technical and have to be abstracted from interpretation of a myriad of prior precedents (things that persons who are not legally trained find difficult to deal with), more and more litigants are trying to present their cases themselves. In 2015, of the total appeals filed, 44 % involved at least one unrepresented party.<sup>60</sup> That number drops somewhat by the time the matter proceeds to a hearing because at some time during the process the litigant

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<sup>58</sup> *Rules of the Supreme Court, 1986*, rule 5.07; See *Leyson Holdings Inc. v. Newfoundland and Labrador (Department of Works, Services & Transportation)*, 2008 NLCA 66

<sup>59</sup> Julie Macfarlane, *The National Self-Represented Litigants Project: Identifying And Meeting The Needs Of Self-Represented Litigants*, (Windsor: May 2013), p. 69; Rachel Birnbaum & Nicholas Bala, *Experiences of Ontario Family Litigants with Self-Representation*, (February 2012) [hereinafter Birnbaum & Bala, *Self-Representation*]

<sup>60</sup> Statistics supplied by the Deputy Registrar of the Court of Appeal. See generally Macfarlane, above fn 59.

subsequently gets legal aid or decides to hire a lawyer but the number is still significant. In 2015, 42% of the judgments filed by the Court were judgments relating to cases in which one party was still not represented by a lawyer. The matter is worse in the trial courts. The percentage of cases in the Family Division where litigants appear in person is now well over 50%.

Studies in Canada and elsewhere have shown that persons who receive legal assistance are significantly more likely to receive better results than those who do not.<sup>61</sup> This can hardly be said, to use Francis Forbes' phrase, to amount to "keeping the scales of justice even and uniform."

So, why are we facing this situation? Many of the people who attempt to litigate in person are not there by choice. It is because they are simply unable to afford the cost of legal services and the eligibility criteria for legal aid are so stringent that they do not qualify for assistance.

Most of you will have heard the news stories about new lawyers in Ontario not being able to obtain suitable articling positions. Similarly, I have heard it said that we do not need a law school in Newfoundland and Labrador because we already have enough lawyers. Is there not a paradox in the fact that we allegedly have an over-supply of *lawyers*, yet we have a clear undersupply of *legal services* for a large segment of the population?<sup>62</sup>

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<sup>61</sup> Trevor Farrow, "The Future of Self-Represented Litigants", (Presentation at National Judicial Institute seminar, *The New Reality: Managing Cases With Self-represented Litigants*, Ottawa, Ontario, 28 February 2014); Julie Macfarlane, *The Use of Summary Judgment Procedures Against Self-Represented Litigants: Efficient Case Management or Denial of Access to Justice?* (Windsor: November 2015); *Hope v Pylypow*, 2015 SKCA 26

<sup>62</sup> This paradox is discussed in greater detail by Deborah L. Rhode in her book, *The Trouble With Lawyers* (Oxford: Oxford University Press, 2015), Chapter 3, p. 1

Lawyers have effectively priced themselves out of the market for many people. There may be many reasons for this, but the fact remains that, whatever the reason, many people cannot afford to be represented by a lawyer. As long as this situation remains and as long as lawyers have a monopoly on the practice of law and legal representation, the problem of lack of access to legal services will remain. People will either be prevented from accessing the system altogether or the outcomes they receive will amount to second-tier justice. While in theory, the courts are open to all, in practice many cannot effectively access them. As Sir James Matthew pithily put it many years ago in a phrase that is equally applicable to Canada,<sup>63</sup> “In England, Justice is open to all – like the Ritz Hotel.”<sup>64</sup>

The presence of self-represented litigants in the court process presents problems for the whole system. The fact that they might not receive the same outcomes as if they were legally represented is often because they come unequipped to present their cases effectively. The system, as traditionally constructed, does not accommodate them very well.

The court system, as traditionally conceived, was strictly an adjudicative process that was adversarial in nature. It worked on the theory that the judge was for the most part a passive participant who received evidence and argument filtered, researched and organized by lawyers on each side. The “trial” was expected to proceed according to well-understood rules with evidence primarily presented by sequentially-examined witnesses who (unless they were, exceptionally, permitted to express opinions) were expected, following questions, to speak only of

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<sup>63</sup> See, *Globe and Mail*, (3 July, 2013). See the trenchant comments of D.M.Brown, J. in *York University v. Markicevic*, 2013 ONSC 4311, including paragraph 2: “Access to the civil justice system requires ensuring that courts are made accessible to all, not just the wealthy...”

<sup>64</sup> *The Oxford Dictionary of Quotations*, 3<sup>rd</sup> ed. (Oxford: Oxford University Press, 1980), p. 336, item 2

what they themselves saw or heard. Out of the clash of points of view, a fair and just result – and hopefully the truth – was expected to emerge. The lawyers as professionals bound by codes of ethics and as officers of the court knew and were expected to abide by certain understandings of conduct and interacted and dealt with each other and the court accordingly. The expected result was an adjudication of rights by the judge who either gave his or her decision immediately or reserved and filed a judgment sometime later after further consideration. Having completed one matter in that way, the judge asked for the next file and the matter repeated itself. That was all the judge was expected to do.

When the presence of the unrepresented litigant is overlaid on this it can be seen that that dynamic does not fit the traditional concepts. The unrepresented person does not know about and is not bound by the professional understandings existing between counsel and their responsibilities as officers of the court. He or she does not know how procedurally to present the case within the well-understood rules and does not know how to prepare for trial. And most important, he or she does not often understand the nuances of the legal principles that are necessary to be argued in order to gain the legal result sought.

The Court, traditionally, has been presented with limited alternatives. It could simply say, “Sorry, that’s the system. Too bad.” But that is really not an option. Everybody should be entitled to have a timely and fair adjudication of their legal claims. Without it, people begin to lose respect for the law and the system and feel they have no alternative but to engage in self-help – to “take the law into their own hands”, as it were. The judge’s oath is “to do *right to all manner of persons* without fear or favour, affection or ill-will, *according to the laws and usages of the province.*”<sup>65</sup> All persons are entitled to the proper

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<sup>65</sup> *Oaths of Office Act*, R.S.N.L. 1990, c O-2, s. 4

application of the law. But, if the judge becomes too actively involved, helping one unrepresented party, he or she risks being perceived by the other (perhaps represented, party) as not maintaining an even hand between the participants in the adversarial system.

The current court process increasingly does not represent the paradigm of an adversarial contest any more. The procedural steps necessary to get the case “ready” for trial have become much more elaborate and time-consuming. When finally ready for adjudication, many matters are disposed of by attenuated procedures short of a “full trial” where evidence is taken, as in the so-called summary trial procedure, primarily by affidavit subject to limited cross-examination.<sup>66</sup> As well, the courts have become involved actively in a process of judge-assisted mediation with a view to resolving cases short of trial. In fact, the philosophy in the Family Court is that the primary emphasis should be on settlement and that trial should be regarded as a default position, an admission of failure, as it were. The fact is that the process of dispute settlement has become more elaborate and wider-ranging using different techniques for bringing about acceptable resolutions in a wider variety of circumstances. In addition, judges are increasingly feeling they have to become more actively involved in assisting unrepresented litigants to present their case, by teasing out relevant information through questions and doing their own legal research because they cannot rely on lawyers to do it and present it to the court.<sup>67</sup>

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<sup>66</sup> See *Markicevic, Hryniak* at para. 24

<sup>67</sup> *Leigh v. Milne*, 2010 NSCA 36 at para 19, *Szakacs v. Clarke*, 2014 ONSC 7487 at para. 5, *Olson v. Yorkton Carpetland Ltd.*, 2002 SKQB 361 at para. 6; Lorne.D. Bertrand, & John-Paul E. Boyd, *Self-Represented Litigants in Family Law Disputes: Contrasting the Views of Alberta Family Law Lawyers and Judges of the Alberta Court of Queen’s Bench*, (Canadian Research Institute for Law and the Family, July 2014) online at <http://www.crilf.ca/Documents/Self-represented%20Litigants%20-%20Views%20of%20Judges%20and%20Lawyers%20-%20Jul%202014.pdf> , discusses several recent studies, including R. Birnbaum, N. Bala, & L. Bertrand, “The Rise of Self-representation in Canada’s Family Courts: The Complex Picture Revealed in Surveys of Judges, Lawyers and Litigants” (2013), 91 *Can Bar Rev* 67 which find uniformly that the judges surveyed believe cases with self-represented litigants pose additional challenges and that the self-represented litigants fare worse than those who are represented.



Yet, people are still having trouble understanding and accessing the system. Recent studies<sup>68</sup> in other parts of Canada involving interviews with unrepresented litigants about their experiences have disclosed widespread dissatisfaction with the system. The Court of Appeal last year conducted its own survey of persons who had to access the court without a lawyer. It was eye-opening. Here is one comment:

It is less about rules than about a kind of ‘institutional prejudice’ against self-represented litigants: when you look at a justice’s eyes and understand that you have absolutely no chance.<sup>69</sup>

Whether that is true or not does not matter. Any system that depends for its legitimacy on public confidence and is perceived in those terms has got a major problem.

The issues involving access are not only related to affordability. There is also a trend across the country, and in this province as well, of a flight from the courts by commercial litigants towards private arbitration and mediation. The argument is that, in addition to causing high cost, the detailed and cumbersome rules of procedure encourage delay.<sup>70</sup> As well, there is a perceived concern that in such specialized areas as corporate and commercial law or construction law, there will be no guarantee that the judge who will be assigned to the case will have sufficient experience in the field that is engaged. That is because in this province we do not maintain specialized lists of judges so that a judge from a particular list will be selected. Assignment is on a generally random basis from all judges who are expected to be competent in all areas of

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<sup>68</sup> Ibid; Julie MacFarlane, *Identifying And Meeting The Needs Of Self-Represented Litigants*, above fn 59, p. 95.; *Listening to Ontarians: Report of the Ontario Civil Legal Needs Project*, (Toronto: Ontario Civil Legal Needs Project Steering Committee, 2010), p. 19 [hereinafter *Listening to Ontarians*]; *Equal Justice*, p. 15

<sup>69</sup> Self-represented Litigants Survey, conducted by Deputy Registrar in 2015.

<sup>70</sup> See for example Andrew Little, “Commercial Arbitration Can be Better than Court” (22 February 2013) online at <http://blog.bennettjones.com/2013/02/22/commercial-arbitration-can-be-better-than-court/>; Department of Justice Canada, *Dispute Resolution Reference Guide: Arbitration*, online at <http://www.justice.gc.ca/eng/rp-pr/csj-sjc/dprs-sprd/res/drrg-mrrc/toc-tdm.html>

the law. The result is that disputes are being resolved outside of the court system where the parties can select their own judge, as it were, but where the ability of the courts to enunciate and develop the law in particular areas is being, to use Justice Karakatsanis's words in *Hryniak v. Mauldin*, "stunted." In the long run, this cannot be a good thing.

There is certainly a place for mediation and arbitration in our justice system but, even if it is cheaper and more time sensitive than going to court, if it takes place outside of a publicly-funded court system it is not available to a large segment of the population.

Of course, access to justice is also affected by many other factors, such as language, education levels and geography.<sup>71</sup> As far as geography is concerned, we need to be sensitive to the barriers faced by many of our aboriginal citizens, especially in Labrador, where the presence of the Supreme Court on the north Labrador coast is virtually non-existent.

Access to legal information is also an important consideration. Studies have shown that approximately 50% of people will experience a legal problem of some kind over any given three-year period.<sup>72</sup> Many of these problems can be solved without the intervention of a formal court process. But to do this in an effective way, people need to know what their rights are. For most simple disputes, it is not realistic to expect that lawyers will become involved. Yet, "justice" in our system is predicated on the idea that disputes will be decided "according to law." In my view, the courts in this jurisdiction do not do enough at present to make legal information available to those who need it. Nor do we attempt any more

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<sup>71</sup> UNDP, *Access To Justice Practice Note*, (2004), online at [http://www.undp.org/content/undp/en/home/librarypage/democratic-governance/access\\_to\\_justiceandruloflaw/access-to-justice-practice-note.html](http://www.undp.org/content/undp/en/home/librarypage/democratic-governance/access_to_justiceandruloflaw/access-to-justice-practice-note.html); Karen Cohl & George Thomson, *Connecting Across Language and Distance: Linguistic and Rural Access to Legal Information and Services*, (Toronto: Law Foundation of Ontario, 2008), p. 15; Birnbaum & Bala, *Self-Representation*, p. 20

<sup>72</sup> Trevor Farrow, above fn. 61; Trevor Farrow, "What is Access to Justice?" (2014), 51:3 Osgoode Hall L.J. 957 online at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2503501](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2503501).

to educate our young people, through mandatory civics courses in schools, about basic legal rights and issues or about legal method and reasoning. The result is that the Bar becomes all the more the monopolistic repository of legal knowledge.

This is not to say that nothing is being done in these areas. Organizations such as Public Legal Information Association of NL do a lot to promote the dissemination of general legal information to the public. The Law Society is making funding available to assist PLIAN in its work. Courts are using websites to put more information on line. Courts are trying to revise and simplify procedural rules and to apply a principle of proportionality to all proceedings. The Canadian Bar Association has made calls for lawyer response to a *pro bono* program in the Court of Appeal. All these are good things. But in many respects we are playing catch-up with respect to what is happening in other parts of the country. For example, the Supreme Court of Nova Scotia has recently inaugurated a series of evening legal clinics for members of the public to provide information about the court process and how to access it more effectively.<sup>73</sup>

I have to say I am disappointed by the response of the local Bar to the CBA initiative regarding *pro bono* advice and assistance. When first attempted in 2014, only seven lawyers signed up for the program. If nothing else, it reinforces the idea that voluntary *pro bono* service is not the answer to the access deficit. This is in marked contrast to programs in other provinces where significant numbers have become involved and even Pro Bono societies have been incorporated.<sup>74</sup> Ideas such as placing an assessment on all legal transactions or lawyers' bills to fund *pro bono*

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<sup>73</sup> Described online at [http://www.courts.ns.ca/Self\\_Reps/NSCA-NSSC\\_Free\\_Legal\\_Clinic.htm](http://www.courts.ns.ca/Self_Reps/NSCA-NSSC_Free_Legal_Clinic.htm)

<sup>74</sup> For example Pro Bono Law Ontario (<https://www.pblo.org/about-us/>), Access Pro Bono BC (<http://accessprobono.ca/about-apb>), Pro Bono Law Alberta (<http://www.pbla.ca/>), Pro Bono Quebec (<http://www.probonoquebec.ca/en/>), Pro Bono Law Saskatchewan (<http://www.pblsask.ca/>)

legal assistance or requiring lawyers as a condition of practice to devote a certain number of hours to *pro bono* work or to pay an assessment in lieu of doing the work have been mooted elsewhere.<sup>75</sup>

I am not suggesting that all of these ideas should be implemented here but they are all worthy of being part of the conversation. What is needed, however, is a means of coordinating all of these efforts to ensure that they are properly applied to all those who need the assistance.

Finally, mention should be made of the fact that infrastructure and administration also have a real and significant impact on access to justice. Courthouses themselves, if designed properly, can provide a much more welcoming and less intimidating atmosphere for members of the public seeking to access the system. Our Courthouse on Duckworth Street, built in 1904, does little to promote this. It badly needs to be replaced.

The way in which the courts are managed and administered is also an important consideration. The administration of the Courts operates on the “executive model” of court administration, where the courts are subject to many government executive decisions regarding day to day administration. This system is counterproductive because it slows the decision-making process significantly, leads to decisions being made by people who are removed from proper understanding of the actual issues and therefore hampers the court from making proper management decisions to enable the courts to run more efficiently. Within the budget allocated, the courts should have reasonable autonomy to make decisions based on what the courts’ needs are. It is a little known fact that the courts have significantly less autonomy with respect to their

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<sup>75</sup> See for example an article by the Executive Director of Access Pro Bono BC and Law Society Bencher Jamie Maclaren, “A Pay or Play Proposition for Access to Justice,” (17 January 2012), online: <http://www.slw.ca/2012/01/17/a-pay-or-play-proposition-for-access-tojustice/comment-page-1/#comment-783119>

operations than this university. Yet we are supposed to be the paradigm of independence.

As a matter of principle, this is problematic. The Crown is the biggest single litigant in the courts. It is important not to give litigants or members of the public cause for concern that the court might make decisions in favour of the Crown so as to curry favour with government with respect to obtaining approval of administrative decisions. Many alternative approaches<sup>76</sup> are being employed in other countries and some other courts in Canada have also moved away from the executive model for this and other reasons.

Since preparing this lecture, I have received a communication (just two hours ago) from the Attorney General's office indicating that certain requirements for approval of administrative decisions in the Court are being relaxed to assist in streamlining court administrative processes. This is very good news. I take this opportunity to publicly thank the Attorney General for his proactive approach to this issue.

### **“Justice is the first object of all courts”<sup>77</sup>**

These matters are ones that the general public should be concerned about. After all, in the end, it is *their* justice system. Justice should be a community issue. It should not – as unfortunately in some respects it has become – the preserve of judges and lawyers.

I have often said that there are four pillars of the justice system – the Attorney General, the Bar, the Judiciary and the academy.<sup>78</sup> It is

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<sup>76</sup> Many of them are outlined and discussed in publications of the Canadian Judicial Council: *Alternative Models of Court Administration* (2006) and *Administering Justice for the Public* (2007). These reports are available on line at [www.cjc-ccm.gc.ca](http://www.cjc-ccm.gc.ca) (Publications)

<sup>77</sup> Heath, p. 194

they who hold up the roof, if you will, of the justice system. But those pillars have to be grounded in a solid foundation. That foundation has to be the people it should be serving. Right now, the pillars are holding up a leaky roof and the people who are supposed to be protected by the roof are exposed to the rain and snow of unequal justice.

Why should this be? People have been talking about these issues for many years. But all of the canaries chirping in the coal mine have not led to any root and branch reform of the civil justice system. There are at least three reasons.

First is the inherent conservatism that institutions like the Bar and the judiciary bring to the table. We by nature look to what has been done before as guides to future action. After all, the application of precedent involves looking backward. Secondly, the people affected most by the system and for whom the system is designed to serve have not been part of the conversation in any meaningful way. And thirdly - and perhaps most importantly - is the problem of fragmentation.<sup>79</sup> The well-intentioned attempts at reform in the past have often been undertaken in self-contained silos, focusing on only parts of the problem. As noted in a report that I will reference more a little later, “No one government department or agency has sole responsibility for the delivery of justice in Canada.”<sup>80</sup> Government, courts, lawyers, court staff, justice-related agencies and NGOs all have their own jurisdictions and interests in the issue. No one looked at the issue from a holistic point of view. Yet, all of the issues are interconnected. One initiative cannot really proceed without work on the others. As the CBA noted in its 2013 report, our greatest challenge has been “to simultaneously focus on individual

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<sup>78</sup> I recognize that Newfoundland does not have a law school and it could be said that one of the pillars in this province is missing. I believe that to be so; nevertheless, the academy in the broader sense still has a role to play.

<sup>79</sup> F. Bhabha, “Institutionalizing Access-to-Justice: Judicial Legislative and Grassroots Dimensions” (2007) 33 Queen's L.J. 139 online at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1912520](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1912520), p. 3

<sup>80</sup> *Access to Civil and Family Justice: A Roadmap for Change* (October 2013), p. 20

innovations and the broader context *of the interdependence of all aspects of access to justice.*”<sup>81</sup>

The problem, in my view, is so intractable and interconnected across jurisdictions and interests that it is necessary to have coordinated leadership in tackling the problem. I will come back to this point in a few moments.

The emphasis on developing coordinated solutions received a big boost with the work of the *Action Committee on Access to Justice in Civil and Family Matters: A Roadmap for Change*, chaired by Hon. Thomas Cromwell of the Supreme Court of Canada with the support of the Chief Justice, the Hon. Beverly McLachlin. This report asserted that all stakeholders, including the public, must be involved in designing solutions to existing problems and that the notion of access to justice must include access to legal knowledge about legal rights and how they impact the average citizen. It also reiterated that the problem of barriers to access to justice was multi-faceted and required a holistic solution that required local action committees who can tailor solutions to the specific problems that are identified at the local level.

The work of the Action Committee is being continued by implementation committees set up across the country. Within this province, the Canadian Bar Association has taken the initiative in promoting and supporting such a committee. It is composed of representatives of a number of stakeholders, including a member of the public. In my view, we need to expand the group to gain more public input. We have to guard against the risk that the process will become captured by those who are already within the system. At the moment, it is not clear how wide a mandate it will set for itself and what its overall vision will be.

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<sup>81</sup> *Equal Justice* report, p. 2

## **“Cheap and Ready Access to the Fountainhead of Justice”<sup>82</sup>: Where do we go from here?**

One wonders what jurist Francis Forbes, who believed in community engagement, who believed in tailoring law to local conditions, who believed that form should not prevail over substance and who believed in affording citizens “cheap and ready access to the fountainhead of justice” would think about the current problems of access that we are facing in the 21<sup>st</sup> century.

Along with taking a holistic and coordinated approach to access-to-justice reform, we need to rethink some of the fundamental conceptions of what a state-supported justice system should look like. We have, in effect, to admit defeat with respect to the past approaches of band-aid fixes and stop trying to fit square pegs into round holes. We have to rethink our notions of what the system is supposed to do and how it can achieve that.

First and foremost, we need to abandon the pretense that we should be operating in a primarily adversarial system.<sup>83</sup> If we accept that the lawyers are not going to be able to supply legal services to virtually everybody and that the state is just not prepared to finance a truly accessible legal aid system, we cannot count on lawyers to provide the necessary raw material to enable the decision-making process to work properly in all cases. Thus, the courts will have to adapt to this reality and change the way they do business. They will have to become more proactive in providing information to unrepresented litigants, triaging

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<sup>82</sup> Francis Forbes, *Decisions of the Supreme Court of Judicature in cases connected with the Trade and Fisheries of Newfoundland 1817-1821*, Unpublished Manuscript in the Mitchell Library, New South Wales, Australia, A740, p. 6

<sup>83</sup> See for example Hon. V. Gray, *Filling in the Blanks: Towards a More Inquisitorial Process (with Relevant and Organized Evidence)*, (Vancouver, BC: 2013); J-P. Boyd, “[Family Justice 3.1: Inquisitorial and Abridged Hearing Processes](http://www.slw.ca/2015/02/20/family-justice-3-1-inquisitorial-and-abridged-hearing-processes/)”, (20 February 2015) online at <http://www.slw.ca/2015/02/20/family-justice-3-1-inquisitorial-and-abridged-hearing-processes/>



and organizing their cases when they are presented, asking directed questions to elicit relevant information during the hearing and doing the necessary legal research to ensure that the relevant legal principles are identified and applied. This will entail having additional personnel in the court (properly insulated by a Chinese wall from the judiciary) to provide the direction – and, dare I say it, advice – as to how to present the case. It will also entail the provision of more legal research officers within the court to do the necessary legal research to enable the judges to be fully prepared to deal with the cases presented.<sup>84</sup>

This effectively will mean that the court process will become more inquisitorial in nature, like civil law systems. Make no mistake about it, we are already moving in that direction now, with procedures that eschew oral evidence and rely more on affidavits, which require the evidence to be presented through document filings and affidavits long before the hearing itself, with judges asking questions to elicit enough information to be able to decide the matter sensibly and with judges doing their own informal research. We should recognize this for what it is and build on it.

Secondly, we need to jettison the pretense that what people want whenever there is a legal dispute is some sort of formal rights adjudication and, instead, embrace the notion that what people usually really want is a fair *solution* to their problem. The corollary is that courts should become “disputes resolution centres” rather than “rights adjudication centres”. They should be prepared to offer dispute resolution alternatives as soon as they access the courts following an appropriate triage procedure. Mediation, informal arbitration and

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<sup>84</sup> *Equal Justice*, pp. 82-91; For example Manitoba is creating “problem-solving courts”, at least for some issues: Donna J. Miller, *Enhancing Access to Justice: Some Recent Progress in Manitoba* (2013), 36:2 Man L.J. 201, p. 207; Julinda Beqiraj & Lawrence McNamara, *International Access to Justice: Barriers and Solutions*, (Bingham Centre for the Rule of Law, 2014), p. 27

judicially-assisted mediation, as well as information dissemination so parties might even be able to work out a solution with negotiation, should all be available, as well as adjudication, under the umbrella of the state's mandate of maintaining social order by assisting in peaceful resolution of disputes. While it is true that private mediation and arbitration exist as separate procedures outside of the court system now, they are not part of any coordinated system and their expense often means that they are not available to many litigants.

Thirdly we need to rethink what facilities we need and how they should be designed. (This is my only plug for a new courthouse!). Old-style courthouses are no longer adequate. They now need to accommodate the existing realities (different types of trials, attenuated procedures, other settlement-orientated procedures (thus requiring different sorts of hearing rooms) and they need to be made less intimidating and more user friendly. Areas need to be set aside for the provision of information, both electronically and otherwise, to enable litigants to navigate the system.<sup>85</sup> Generally, courthouses have to be designed with the idea of being a dispute resolution centre in mind. Here is how I metaphorically put it in some comments I made in 2001:

In my more wistful moments I like to think of what courthouses may look like in the future. Think of courts not simply as rights adjudication bodies but as dispute resolution centres. Imagine with me for a moment standing in the foyer of the Duckworth Street level of the Courthouse in St. John's. Instead of being surrounded by doors all marked as Courtroom No. 1, No. 2, etc., the doors are marked with the names of different services offered to citizens to help them resolve disputes that have the potential of raising legal issues.

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<sup>85</sup> *Law Libraries and Access to Justice: A Report of the American Association of Law Libraries Special Committee on Access to Justice*, (American Association of Law Libraries, 2014), p. 3

One door might lead to an area offering pre-litigation mediation services staffed by professionals of differing backgrounds but all skilled in mediation techniques; another, offering pre-litigation arbitration leading to final and binding decisions by non-judge adjudicators chosen for their expertise in the particular field of the dispute. Another door might lead to what is currently the Registry, to enable persons to file lawsuits in the traditional manner. Another door in this area might lead to a litigation mediation services area where all litigants would be required to go first as a condition of proceeding with the lawsuit that has been filed. Again this area might be staffed by non-judicial professionals with particular mediation skills.

Another area would deal with all case management issues including pre-trial applications and other summary mechanisms for resolving the litigation in ways alternative to full trial. That would include such traditional procedures as summary trial and determinations of law on agreed facts. At various points in this area, there would be internal corridors leading from this area back to the mediation services area where the parties, if they thought it appropriate or a judge suggested it, could re-avail of mediation services. Yet another door would lead to the trial preparation area if the parties get to the point where all else has failed to resolve the matter and they say they are ready for trial. This area would involve trial organization and management and at the same time would explore still other alternatives to resolution by trial, including judge assisted mediation (the settlement conference) and non-binding judicial opinions (the mini-trial). Judges trained in

these techniques would be specially designated to perform this type of work. Finally, there would still be a door marked “Courtroom” for parties who still wanted to “duke it out” in front of a judge. Even here, however, there could be a side door where, at various points in the trial, the parties could slip out at their own behest or at the suggestion of the judge, to discuss settlement with or without mediation assistance, either by judicial or non-judicial mediators. The trial process itself would therefore be more attuned to the possibility of settlement in mid-stream so to speak.<sup>86</sup>

Fourthly, where we deliver justice must be reconsidered. Must litigants always have to go to the courthouse to get the services they need? The time has come for a much greater use of online means of not only providing legal information and advice but actually facilitating settlement or adjudication of the actual dispute.<sup>87</sup> I see no reason why, in simple and common disputes, computer programs could not be used, like existing tax programs, to elicit the requisite factual information and to package that information within the legal frameworks that are necessary to ensure that all the right issues are canvassed, and then use that information as the basis of the claim or defence that is being made. Increasingly, private services designed to provide mediation of certain types of disputes are being offered online.<sup>88</sup> These have had mixed success. One of their shortcomings is that they are piece-meal in their application and are limited to certain types of disputes, like consumer disputes. A more generalized service could be offered under the

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<sup>86</sup> Hon. J. Derek Green, “The Use of ADR Techniques in the Court System” (Remarks to a Joint Meeting of Mediation Newfoundland and Labrador, Canadian Bar Association Newfoundland Branch (ADR subsection) and ADR Atlantic Institute, 18 October 2001)

<sup>87</sup> Alison MacPhail, *Report of the Working Group on Access to Legal Services of the Action Committee on Access to Justice in Civil and Family Matters*, (Action committee on access to Justice and Family Matters, May 2012), p. 3; James E. Cabral et al, “Using technology to Enhance Access to Justice”, (2012), 26:1 *Harv J.L. & Tech* 241.

<sup>88</sup> Department of Justice Canada, *Dispute Resolution Reference Guide: Online Dispute Resolution*, online at <http://www.justice.gc.ca/eng/rp-pr/csj-sjc/dprs-sprd/res/drrg-mrrc/toc-tdm.html>

umbrella of the court system and thereby facilitate a more broadly-based access to dispute resolution. Finally, more use of video and audio conferencing services and visual online capabilities like Skype can surely be used to adjudicate many disputes. To those who say that they are not as good as having the parties in the courtroom where they can be observed, I would respond that may be true but is it nevertheless adequate to get the job done in a fair and efficient manner? In many cases it will be. Remember the aphorism: do not let the perfect become the enemy of the good.

Fifthly, the court system needs to be managed differently. Access to justice can be improved by administering court processes more effectively. That requires greater autonomy with respect to day-to-day decision-making about resource deployment, hiring practices and the myriad other administrative matters that enable any functioning institution to operate properly. The management and operation of the courts also needs to be accomplished with greater input from all stakeholders, including the public. That is why I favour, as a model of court administration, something akin to the structure of court administration adopted a number of years ago in the Republic of Ireland.<sup>89</sup> There, all courts are administered under one umbrella using essentially a quasi-corporate model. They are managed and directed by a senior chief executive who reports to a board of trustees consisting of representatives of the judiciary, the Bar, senior government officials and court administrators, as well as representatives of the public, including the trade unions and business. A broad perspective on what is required to operate the system is thereby effectively made available. Like anybody spending public money, it must act within its budget but it can make the

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<sup>89</sup> See Noel Rubotham, “Management of the Courts in Ireland”, (Paper prepared for a session of the Canadian Bar Association in Dublin, Ireland, 16 August 2009).

management decisions about deployment of resources itself, within that framework.

Sixthly , the Bar must address how to deliver services more effectively and cheaply, employing creative ways (like unbundling legal services<sup>90</sup>) to charge only for what is really needed by the client considering the nature of the case at hand. In addition, I believe that the Law Society and the CBA must join forces to promote a much more proactive and comprehensive program, not only of assisting persons to get into court, but also to make legal information available, through public education about the legal system and about enforcement of rights generally. The Law Society is first and foremost required to act in the public interest.

Seventhly, the courts must be more willing to modify procedures to ensure that formal processes do not result in denying access to justice. Precedent may be important for substantive law, to ensure consistency in its application, but precedent is not as important in the area of procedural justice, which must always be tailored to fit the fairness of the particular case and in accordance with the overriding notion of proportionality. The key must be simply to ensure that no party is irremediably prejudiced if the procedural rules are bent in a given case to achieve fairness. We must be mindful of Chief Justice Forbes' admonition that forms are only the means by which justice is obtained.

Finally – and most importantly of all – we need overall coordination of the reform effort if we are to have any hope that the root and branch reform that is needed can be achieved.<sup>91</sup> Individual

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<sup>90</sup> Beg, Samreen & Lorne Sossin. “Should Legal Services Be Unbundled?” in *Middle Income Access to Justice* (Toronto: University of Toronto Press, 2012); *Listening to Ontarians*, p. 55.; *Middle Income Access to Civil Justice Initiative, Background Paper*, (University of Toronto Faculty of Law, 2011).

<sup>91</sup> *Roadmap for Change*, p. 7

piecemeal solutions tried in the past have not worked. All issues are interconnected. We still have major problems with respect to access to justice. We all need to be standing up and saying “this is not good enough!” But, how do we begin? We all need to be moving forward together: the chief justices of all the courts, the Benchers of the Law Society, the Canadian Bar Association and especially the Attorney General. As the chief law officer of the Crown, he is more than a cabinet member. He speaks for the administration of justice in the province. He has traditionally been regarded as the defender of the court system. He can speak on the system’s behalf to government and argue for the policies necessary to improve the system and therefore he plays a pivotal role.

I would also include the academy in this process. Even though we do not have a law school at the moment, the university is making a conscious effort to engage the community. It is a repository of creative, forward-thinking approaches. I would encourage the university community to become involved.

I end where I began, with Francis Forbes and his desire to “keep the scales of justice even and uniform.” We can do no better.

Thank you.