

SPEECH TO
ACCESS PRO BONO ANNUAL VOLUNTEER APPRECIATION BREAKFAST

Mr. Justice T. M. McEwan

APRIL 25, 2013

Mr. Chairman, Chief Justice, Colleagues and Friends:

It is an honour to say a few words to you this morning, and I thank Jamie Maclaren for asking me and those who have organized this event for this privilege.

I want first of all to recognize and to thank you all for the work you do in ensuring access to justice to as many people as you can, although I know the needs are overwhelming. I also want more generally to express my profound appreciation for the remarkable response of members of this group, the CBA and the TLABC, all *pro bono*, to the call for assistance I issued in *Vilardell v. Dunham*. I could not have had more help. It was one of those times when it could truly be said that you ought to be careful what you wish for!

Let me say even more generally how important an independent bar is to the legal system and the courts. The system simply cannot operate without lawyers, not only because they know the law, but often more pragmatically, because they bring objectivity to the problems of people in emotional turmoil. The drastic reduction in legal aid does not just harm the poor, or "persons in need" to use a recent formulation, it seriously destabilizes the whole system of justice.

I see among the elders in the room some who may remember a time when I took a more active role in access to justice than I do in my present, passive position. I served on the Board of the Legal Services Society from 1986-92, chairing it from 1989-91, during a tumultuous time that included a strike by the bar, and a doubling of the budget from something in the \$40 millions to

something in the \$80 millions by a government then in the waning days of its mandate. I note, sadly, that history has not, this year, repeated itself.

At the time, we did not think we were living in the best of times. We felt considerably short of fulfilling what was then a specific and ambitious mandate - in contrast to the inscrutable terms of the present statute - "to ensure that services ordinarily provided by a lawyer are afforded to people who would otherwise not receive them because of financial or other reasons."

We fell short notwithstanding the presence of staffed branch and community law offices and native community law offices throughout the province. Still, something of the temper of those times may be gathered from the fact that the Attorney General at one point called us to Victoria to discuss the possibility of implementing a civil tariff in addition to the family and criminal tariffs to provide legal assistance for things like social assistance appeals, which seems incredible now. We resisted—on the basis that the time required for such things could be better handled by staff lawyers. That was then....

I mention these things not to indulge in war stories but to give an example of a difference in attitude between then and now that reflects a profound change over the last 20+ years in the concept of what courts are for on the part of elected governments. What seems clear in retrospect is that the dramatic increases in hearing fees in 1998 was a sign of a change to which government was already seriously committed, but that went essentially unnoticed at the time. *Pleau*, the Nova Scotia case that still stands for the proposition that hearing fees are unconstitutional in that jurisdiction, was decided in the same year.

I do not raise this to comment on the substance of *Vilardell*, upon which the Court of Appeal has spoken, but to note that that argument was latent for almost a decade before *Vilardell* came before the courts. By then the anti-adjudication narrative was explicit in some of the materials generated in connection with the *Rules* revision project, about which much could be said, but I

will not linger. I will only note, for those interested in history, that the 1883 English *Rules* which were much maligned as the foundation of our "archaic" pre-2010 rules, actually emerged out of the wreckage of a disastrous experiment in rulemaking in the wake of the Judicature Acts, the principal features of which were aggressive case management, stripped down pleadings and limited discovery. A case of history, perhaps, repeating itself.

The change in attitude that saw civil justice re-characterized as a user-pay service offered by the government instead of a common good seems to have started in England around 1992 and to have gone about the common law world. Since the implementation of the *Rules* here, the hum of anti-adjudication rhetoric has continued and the withdrawal of resources from the courts and from essential legal services, including legal aid, has proceeded apace. We are lately told, variously, that the courts are merely a "valued but last resort", that they are expensive and inefficient, that they are in need of "modernization", that they lack transparency, that they are resistant to change, and that they perpetuate a culture of delay". The adversary system is conflated with adversarialism and lawyers are unfairly accused of making things worse rather than better, a case of the rare exception being substituted for the norm. It is suggested that judges may be good adjudicators but they are not good managers, and that they somehow need bureaucratic intervention.

The voices that have been raised against this tide, some of whom are represented in this room have, despite their best efforts, been markedly unpersuasive. Governments seem to hear "constitutional responsibility" and phrases of similar import as simply our idiosyncratic way of expressing demands that are the same in essence as those they hear from the health care or the education or the social services sectors.

We are clearly dealing with a kind of constitutional illiteracy. When I say that, I include myself among the illiterates. I include members of our professions who say, "what can you do, you

can't compete with health care." I infer from the fact that hearing fees went unchallenged for so long, despite *Pleau*, and from things like the late mobilization of the bar in respect of the *Rules* that our professions include a lot of people like me.

When I speak of myself all I mean to say that I was a busy lawyer in a small town who had a practice that included civil trials and jury cases but almost no criminal law. I went through my whole career without ever encountering the Charter or, with one exception, constitutional issues of any kind. I do not think I gave more than a passing thought to the separation of powers or the relationship between the branches of government. As far as I was concerned the role of the courts was to be available when I had things that needed to be heard.

I say this only because I think a lot of us are so absorbed in learning our trade and in the specific problems of those we serve that we do not spend much time musing about the theoretical underpinnings of the legal system. It is only through the accident of random judicial assignments that I have been forced to consider first principles. It took a long time to recognize that things I had so taken for granted that I could hardly articulate them, were being challenged by what I see as at least two coincidental trends in a number of parliamentary democracies.

The first is a trend in this and other jurisdictions for power to accrete to the executive branch of government because it controls the expenditure of money, and an attitude, perhaps derived from business models, that control of the money invariably implies control of everything else. This is not true with respect to the obligation to finance the basic mechanics of government, which includes the courts, but it seems hard to put this across. As well, the restraint proper to each branch of government in dealing with the others, embodied in conventions, sometimes appear to have been forgotten.

This may, in part, reflect the fact that lawyers seem to have lost interest in elective office, that is, in taking a direct hand in shaping public policy and the law. This is regrettable, in that

lawmaking without lawyers strikes me as a bit like building bridges without engineers. It is obviously possible, but the results tend to be unstable.

The attitude almost certainly reflects the fact that the historic function of the Attorney-General in curbing some of government's enthusiasms has atrophied in many jurisdictions in recent times, as a number of academics and other commentators have noted.

The other trend has been well-meaning, but amounts in my view to a species of magical thinking. This is the notion that the problem with the way we resolve disputes as a society is linked to the formalism of the courts and adversarialism of the legal profession, and that people would get along better if they abandoned their rights and focussed on what are called their "interests."

One of the fundamental premises of this way of thinking is that far too many people resort to court and that their problems would be better dealt with elsewhere. Let me say that if this were actually true, the first people who would know it would be judges. Now, I speak only for myself and only from the perspective of a Supreme Court judge. The challenges in Provincial Court may be somewhat different. But it is not my experience or that of the colleagues to whom I have spoken, that we spend our days doing pointless work that should never have come before us. We certainly see many people who would not be in court if they were more reasonable. The fact is, however, that they are not, and that human nature being what it is, they need an impartial and authoritative forum to peacefully resolve their issues.

In what I have so far said, I hasten to add, I do not mean, in any way, to disparage alternate dispute resolution. As a complement to the courts it has a valuable role, and is a viable option for those who choose it. I am not concerned with the court's "market share." I am only concerned with the notion that courts are being discouraged as a "valued but last resort," or, as depicted in government publications, as the small tip of an inverted pyramid laden with

deterrents and obstacles. Going to court is a right, and going straight to court should be respected as a responsible choice.

The evolution of this anti-adjudication narrative is described in "Judging Civil Justice," a book by Hazel Genn, the Dean of the Law School at the University of London. She demonstrates that it dovetails rather neatly with government cost-cutting objectives, and provides a rationale for "privatization" (which is what mandatory mediation amounts to) and for other forms of discouragement. Remember that the primary rationale the government expressed for hearing fees in *Vilardell* was the rationing of court time.

It also makes it easier to justify the "amateurization" of the courts, sending people in alone with tick box pleadings and no legal assistance, if going to court can be seen as a form of deemed unreasonableness.

Oliver Wendell Holmes, the great American Jurist, observed that the life of the law is experience. That experience has been documented in the common law for centuries. It informs the rules of evidence and the order and discipline of the courtroom.

Many of you will have heard someone or other in a position to know better say things like "if a doctor from 1880 walked into a modern hospital he wouldn't know the place, but if a lawyer from that time walked into a modern courtroom he would immediately feel comfortable," as a preface to some observation or other about how archaic and out of step the courts are. Apart from a lingering suspicion that this may underestimate the adaptability of the 1880s doctor - it is the tools that have changed, after all, not the human brain - I suggest that the observation is, in fact, true, and reinforces a simple basic fact: that experience has long since refined the trial format as the best way to conduct a serious enquiry into truth.

The right to go to law, that is, to test the truth in the context of a legal controversy, is a fundamental aspect of democracy, not a privilege to be rationed by government. In *Representing Justice*, a book by Professors Judith Resnik and Dennis Curtis of the Yale Law School, the authors observe:

A distinct facet of what makes courts especially useful in democracies comes from shifting attention from what potential observers may see and do to the interactions among litigants, judges, witnesses, and jurors. This aspect of our argument about the utility of open courts hinges on the view that adjudication is itself a democratic practice - an odd moment in which individuals can oblige others to treat them as equals as they argue in public about their disagreements, misbehavior, wrongdoing, and obligations. Litigation forces dialogue on the unwilling (including the government) and momentarily alters configurations of authority. Social practices, etiquette, and myriad legal rules shape what those who enter courts are empowered to do.

When cases proceed in public, courts institutionalize democracy's claim to impose constraints on state power. More than that: in criminal trials, the theory of trial is that defendants are enabled, by procedures, to "*contest the common interpretation*" of their actions and to oppose government-imposed meanings. Many commentators note that the jury, as well as lay judges more generally, infuses adjudication with democratic participation by citizens who gain the stature of judges, ad hoc. But consider also the democratic constraints imposed on professional jurists. Working in open courts, the government employees we call judges have to account for their own authority by letting others know how and why power is used. Recall Bentham's admonition: "Publicity is the very soul of justice It keeps the judge himself, while trying, under trial."

If trials were simply the way judges and lawyers have conspired to serve themselves, as one of the papers underlying the *Rules* project suggested, they would long since have been exposed as such, and you would not expect to see dramatists, TV writers and advertisers resort to representations of trials so often when an elemental non-violent confrontation is required. Trial scenes are iconic because the trial has proven itself over time to be the fairest and most satisfactory way to manage and resolve legal conflicts. The law reflects centuries of experience with human nature. It is highly unlikely that the theorizers of the last 20 years or so have discovered something new about human nature. Rather, in the terms used by Resnik and Curtis, these notions contribute to "government imposed meanings" that discourage access to

the courts, a process that, if we properly understand the role of courts in a democracy, would ultimately undermine the legitimacy of government itself.

How, in any event, would you modernize the trial? How would you bring it into the 21st century? How would you make it more efficient? How, in other words, would you make our courtrooms satisfyingly uncomfortable to an 1880s lawyer?

I would suggest you can't, unless you tamper with its fundamentals. You could take away the parties' right to control their own cases by converting judges into judicial bureaucrats who manage litigation, if the judges succumbed. You could remove some parts of the work of the court and put it in the hands of in-house tribunals with limited independence and limited fact finding tools. You could take away a party's right to be heard in person, to make their best case, to have the sort of exchange of empathy with the trier of fact that occurs in face to face encounters, something all juries comprehend very quickly. You could hold "virtual" hearings or hearings on paper alone.

I make no specific comment as to whether any of these things have happened or are about to happen, but suggest that narratives that disparage the courts may create a climate in which such things are possible.

For this reason, I think it is incumbent on us all to improve our constitutional literacy so that we are able to recognize threats to the judicial branch of government and to firmly assert the principle that the courts are a core function of government, not a service; that they are a constitutional obligation, not a discretionary activity; and that a proper respect for individual and minority rights precludes patronizing notions that the little problems of little people can be addressed by curbing due process and limiting access to independent courts or tribunals.

In other words, I do not join the chorus of those who say we must inevitably *adapt* to change. I think we have to *confront* proposals for change with a clear understanding that certain things about the courts are, in fact, unalterable, unless we want to alter the premises of democracy itself. This does not mean that we should not be open to the use of tools or processes that help us improve how we do things. It does mean that we should not permit technological or other substitutions for the proper measure of due process in the circumstances of any given case simply because they are possible or cheaper.

We should collectively be trying to change the narrative. You will all be aware of the steps the Chief Justices have recently taken in this regard in jointly putting out a paper entitled "The Rule of Law and What Everyone Should Know About It" in response to certain intentions the government appeared to express. The more recent "Memorandum of Understanding" between the three courts and the government is another such effort, predicated on the sensible notion that where there is a possibility of friction, good fences make good neighbours. Other initiatives, like the upcoming CBA summit, and the National Committee on Access to Justice headed by Justice Cromwell are promising. My principal point is that we will all be able to make better, more informed contributions to a better and more accessible system of justice if we understand the values at its core, and the ways in which some of our rather casually maligned practices are, in fact, essential to the protection of those values.

I have touched only briefly on the concerns I wanted to express to you today. I have said some things categorically that I would wish to amplify or qualify or justify if I had a larger scope than this brief talk. Let me leave you with a recommendation for five books (three of which are small) that I have found useful in shaping my own appreciation of the challenges we face.

The first is "Judging Civil Justice" by Hazel Genn, the dean of law at the University of London. It is a small book in the Hamlyn lectures series, on what has happened in England, where the

government has embraced the notion that the courts are a user pay service in a way that *Vilardell* showed, clearly informed developments here.

The second is "The Rule of Law" by Tom Bingham, the late top judge in England, which is a brief and valuable treatise on that sometimes elusive topic.

The third is "The Death of the American Trial" by Daniel Burns. It is unfortunately rather academically written, but it is a brief and penetrating analysis of why we do trials the way we do; what would be lost if we did not have them; and why it is essential to democracy that they be kept.

The fourth is "Unjust by Design" a recent study by Ron Ellis, a Canadian lawyer, concerning recent trends in Administrative Law, including the removal of court adjudication or court-like adjudication to administrative tribunals without the necessary tools or independence to perform their work adequately.

The last is a tome. "Representing Justice" by Judith Resnick and Dennis Curtis is about a lot of things, including the iconography and architecture of the courts, but it also contains a very insightful analysis of the centrality of the courts as an aspect of democratic governance.

In closing, let me again express the hope that by clarifying our own thinking about the functional essence of the judicial branch of government, which includes the protections built into its processes, we will contribute more usefully to awareness of the importance of access to justice generally, which will in turn benefit the peace and safety of society as a whole.

I thank you again for this opportunity.

BOOKS

- Judging Civil Justice, Hazel Genn
- The Rule of Law, Tom Bingham
- The Death of the American Trial, Daniel Burns
- Unjust by Design, Ron Ellis
- Representing Justice, Judith Resnick and Dennis Curtis