

Notes for Remarks

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***Access to Justice: Putting the Myths to Rest, Waking Up
Canadian Values in Law***

Greetings to each of you! Good afternoon.

Thank you for your invitation, thank you for expressing your curiosity and interest by being here today.

Let's check out what is happening right now. Can we increase our "situational awareness" by acknowledging that this place has been the traditional territory, the meeting place, the homelands of many indigenous peoples?

Can we choose our option: confirming in our minds that we are a community -- or seeing this gathering as a mere collection of isolated compartments sorted by gender, sex, culture, age, class, race, momentarily sharing this time and space?

Can we make our choice to accept each other's gifts or will we deny ourselves of the gifts each of us has to offer? Is this just a nice crowd -- or can we see ourselves as a long-term diverse community of common interests, potential allies for struggle in a common cause? Can we shake ourselves for a moment to confirm our relationships to each other as members of the same human family, brothers and sisters, aunts and cousins, elders and youth, standing on a common turf? The way you answer those questions will determine the way you will hear my words, and determine whether you will be talking about this message tomorrow and the next day, or whether you will just leave it and move on to something else.

I am here today, really, to offer you the opportunity to participate in a Grand Conspiracy to revolutionize our legal system, to engineer a self-coup in which you take control of your own lives and destinies. My proposition requires, however, that we will have to respect and give thanks to each other, that we will have to acknowledge our diversity, that we will have to position ourselves to work together across many lines to make change.

The topic of this dialogue is "Access to Justice" and I am told that this is the main institutional theme of this Law School. That theme speaks to the future – they are words of expectation, of goal-setting. They say that we are still falling short of the mark when we speak of access to justice, that we have yet to achieve the social justice which we would like to be known for.

We are not dealing with some minor flaw, mind you -- the Chief Justice of the Supreme Court of Canada, Beverly McLachlin, said some 2 ½ years ago that we face a "crisis" which imperiled Canada's legal system. She said "justice" should be considered as much a basic right as "education" or "health care". Why is there a crisis?

I suggest that a good part of the problem is that Canada has changed quite a bit since 1867, and the legal system has not made corresponding changes. Canada's building

blocks were made in the image of John A Macdonald, a country that was essentially English and French, patriarchal to the core racist, homophobic and unforgiving.

Institutions are notoriously resistant to change, and Canada's institutions are no exception. Each year we move closer to an historical junction where accommodation becomes an imperative, where the failure to change carries consequences. Too often our institutions find themselves in culture shock, cloaked in nostalgia that denies reality, using power and privilege to create policies, practices and processes that all too often serve to alienate, exclude and discriminate.

Obviously, none of us can be satisfied with the status quo. But we must also guard against any tendency to expect that change in the status quo will "just happen". That said, we should not simply "demand change". Just making demands implies an admission of powerlessness, confirmation that others will determine our destiny, asking that others provide for us what we are capable of achieving for ourselves.

As students of law who are concerned about your own future, our future and the future of law, you must seek change, yearn for change but most of all, work towards change. This afternoon, tomorrow, next month, wherever you go, in whatever you do – in your conversations with yourself and others, initiate and engage in the dialogue – ask what kind of law school you want Windsor to be? What quality of law do you want to prevail in our cities, in Ontario, in Canada?

Now usually this topic of Access to Justice is addressed by the legal profession as an adjustment to be made to ensure that the poor and disadvantaged are somehow able to have legal representation in a near-perfect system of Canadian "peace, order and good government."

We speak of "equality before the law". How, then, do we explain the fact that our correctional institutions have an embarrassing over-representation of indigenous peoples? Or, for that matter, that so many inmates are poor? Or that it costs so much to become a lawyer? Or for that matter, that it costs so much to obtain the services of a lawyer? I am suggesting the answer to "Access to Justice" lies in your hands. If not in your hands, whose? We cannot speak of Access to Justice as an academic issue, one to be dealt with by Parliament or meetings of the Canadian Bar Association.

As President Obama asked in his autobiography, "How far do our obligations reach? How do we transform mere power into justice, mere sentiment into love?" He said he was encouraged, believing that so long as the questions are still being asked, what binds us together might somehow ultimately prevail.

And so I ask you, “Are the questions still being asked?” And the answer, I say, lies in your hands and hearts.

In a speech at Ryerson University last year the Honourable Roy McMurtry spoke about Access to Justice. He said that his five decades in law “have made plain for me this palpable truth: the law alone is not enough to protect those who are a different colour, or those who profess a different religion because there is no legislature in the world capable of legislating ultimate principles.”

Justice McMurtry quoted Justice Learned Hand, who also referred to “hands and hearts”. Justice Hand said that justice

“lies in the hearts of men and women; when it dies there, no constitution, no court, no law can save it . . . but while it is alive, it needs no constitution, no court, no law to save it.”

With the words of those learned jurists in mind, we can contemplate what we, each of us, must do if we are to bring about change and truly integrate diversity and acknowledge our differences. I see in front of me enormous talent, huge capability. If you, together, can engage in earnest, honest and open discussion if you are determined, we should all have every reason to believe you will be successful in finding some answers, some ways to move ahead, some ways to improve access to justice in significant ways.

But you must recognize that this journey is a long and difficult one. Many of the changes which you want to see “in the system” must also occur in yourselves, individually, in profound ways.

We might hope that a faculty of law, accustomed as it is to dealing with conflicts, would be well-equipped to engage in the enterprise of improving access to justice. You are taught to follow certain rules in argument: you know the merits of avoiding *ad hominem* attacks, of keeping arguments focused, of avoiding direct confrontation. So, I ask you: when you discuss Access to Justice or diversity in your community, or how to practice equity in this School of Law, do you follow these same rules?

When I say equity, I mean that being “fair” requires people and groups to be treated differently, not equally, so as to take into account their specific circumstances and contexts in order to give them access to equitable results. Determining if results have been equitable means that we have to look at the actual effects or impact of treatment, policies, laws and regulations rather than at the intention to be fair. We will not have equity if we continue to treat everyone as if they are the same.

As practitioners and experts in law, you should be especially well-equipped to apply your training to resolving these issues, meaning that you would behave differently than what prevails in society at large. You should be equipped more than most to avoid

polarization within your community, to avoid setting up a win-lose situation in which the status quo ignores the often-unacknowledged divides which we have in Canada – yes we do have them! – with respect to class, race, ethnicity, religion, sexual identity and those differences in capabilities so often termed “disabilities”.

Your double task will be to integrate diversity into the Faculty, and to ensure that equity is offered in everything the Faculty does. These tasks are, of course, challenges facing Canadian society at large. Rather than using this fact-of-life as an excuse, however, I suggest you accept the challenges and deal with them in the much smaller environment of this Faculty in which you have greater control, then let your example shine out to inspire others.

I caution you against proceeding “by declaration”. It happens so often. There is a declaration that our doors are open to diversity, that we respect and embrace diversity – and when that approach doesn’t work, we blame diversity for the failure. Declarations and respect are nice, but you can not simply make a declaration and expect the world to change. They have to be accompanied by action, by real change.

The same is true of human rights – it is one thing for each of us to defend and advance our respective rights, and another to create a live culture in which everyone’s rights are protected and advanced. It is easier, of course, to see the biases and prejudice set up against us personally than it is to see the biases, too often unacknowledged, that each of us have against others. It is easier to engage in arguing one’s own position than to engage in the difficult task of understanding competing interests, of finding compromise, ways to accommodate others, to resolve differences between ourselves and others with respect to our views, our perspectives, our lived experiences.

I urge you to create many opportunities to listen and reflect on the stories which each of you have to tell. I urge you to set up some mechanism, even an informal one, for people to be able to make complaints and to express concerns. I urge you to create means for this community to have input into policy and program development, the means to provide information, advice and assistance in preventing unnecessary conflict, to resolve conflict when it does occur. Constructive dialogue and equitable participation will be required to realize the tremendous opportunity that you have.

You will need to open your eyes to see, perhaps for the first time, the reality that I can see from here, rather than to adhere to a mythical status quo which long ago ceased to exist, if, in fact, it ever did. May I congratulate you in advance? Or should I wait to see if you accept the challenge? Are you willing to work together to advance improvements in good governance by adopting the accountability of subjecting yourselves to independent scrutiny, and the consequent necessity of addressing systemic change? How else are you to ensure equity is built into all your relationships?

I have another proposition to leave with you. It would be a great topic for a thesis, for debate and discussion. As Ombudsman, I help the people of Toronto in their right to be treated fairly by the City's administration, without bias or discrimination. If anyone believes he or she has been treated unfairly and has been unable to have the matter dealt with to their satisfaction, they are encouraged to call me. My staff and I are independent of the City, and if we cannot resolve the matter, we have certain powers of investigation. Our services are offered at no cost, and are completely confidential. We are exempt for example from Freedom of Information legislation. We are accessible, wanting to be of service especially to those persons who may be most vulnerable to mistreatment.

I have seen over the course of my experience that an Ombudsman can help institutionalized cultures make shifts, adopt changes, improve conduct, reduce inequities – actually make systemic change. In addition to the spread of Ombudsman in government, we now see Ombudsman-like officials appointed in banking, air transportation, universities, corporations and elsewhere. The Ombudsman concept is a way in which a powerful institution can offer improved accountability to those it serves.

So, I ask you, why does our legal system not have Ombudsman? Today, if a person has a complaint against a judge, that person must ask judges to evaluate the complaint. If a person has a complaint against a lawyer, the person must ask lawyers to evaluate the complaint. This arrangement would not be acceptable in other fields. Do you think it is fair, transparent or accountable? Why should it be acceptable in law and justice?

So I ask you: if an Ombudsman had jurisdiction with respect to the legal system, would there be an improvement in Access to Justice? Someone who could deal with complaints about lack of prosecutors causing undue delays in trials? About showing up in court time after time to hear only that the matter has again been adjourned? Someone who could resolve issues about rude treatment? Wouldn't that be an interesting exploration for this faculty to adopt -- subjecting the administration of justice to outside scrutiny? If I might suggest the question to address it would be how Canada's legal system, including its practitioners, could benefit if there were an Ombudsman.

An Ombudsman providing an independent, objective reference point as an intermediary between parties in conflict; providing a way for power imbalances to be corrected so individuals can be heard and protected; providing a means for groups to be understood and protected. Independent resolution of complaints provides an opportunity for growth, for ameliorating disadvantage of vulnerability and marginalization. It evens the playing field and allows others space at the table.

Ombudsman principles can convert complaints from irritations to be avoided into opportunities for new understanding, new accommodation; opportunities for the rectification of unintended wrongs and unnoticed mistakes. An Ombudsman institution for the legal system could reduce complaints and conflicts, improve the opinion which

Canadians have of lawyers and the legal system. I suggest to you that an Ombudsman might be an essential element in creating a healthy future for the system in which many of you will be working over the next half-century.

Go for it! Let Windsor be the birthplace of the future! Let this be the place to which the future will owe its appreciation, its gratitude. I hope you will draw strength from each other, and from an obvious opportunity to find unity of purpose long after this day is over. When we respect each other, when we listen to each other, we are able to find common ground, and be comfortable standing with each other on it.

Thank you for your invitation to share this historic moment with you. You will make this an historic moment, won't you? Thank you for sharing your presence and strength.