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COMMUNITY-BASED ACCESS TO JUSTICE – BUILDING A RESPONSIVE JUSTICE SYSTEM IN NEW BRUNSWICK

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[Jula Hughes, PH D, delivered these comments at an Access to Justice panel at the University of New Brunswick, on October 28th, 2011. The panel followed the thirty-third Viscount Bennett Lecture by The Honourable Justice Cromwell.]

INTRODUCTION

This paper reports on the formation of a community-based Access to Justice coalition in New Brunswick and suggests that community involvement is crucial to reforming New Brunswick's justice institutions with a view to bringing about a civic-oriented, responsive and accessible justice system in the province. At the time of writing, the Coalition is convened by Gail Wylie and Norm Laverty and supported by the Maritime Conference of the United Church of Canada. It includes 34 service and advocacy organizations from every part of the province and provides a forum for networking and policy development in both official languages. In pursuit of its chief goal of Access to Justice, it was invited to propose and has developed and submitted a proposal for a working group on Access to Justice that makes the expertise of its member organizations available to public policy makers and advises the Minister of Justice on an ongoing basis. The proposal is currently being considered by the Minister.

The Origins of the Access to Justice Coalition

In 2007, Fredericton social activist Vaughn Barnett went to jail for 10 days for providing assistance to low-income people with issues related to poverty-law.[1] His imprisonment sent shock-waves through New Brunswick civil society. Volunteers in a number of community organizations that provide services to low-income New Brunswickers felt vulnerable to prosecution by the Law Society. It was clear that the highest court in the province was supporting the stance of the regulator and was not prepared to act to protect those who dedicated their spare time to helping others. This

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[1] *Law Society of New Brunswick v Barnett*, (25 January 2007), New Brunswick F/M/33/05, (NBQB) per Bell J, reasons reported in 2007 NBQB 165. Motion for leave to appeal refused *Barnett v Law Society of New Brunswick*, 2007 CanLII 24997 (NB CA) [*Barnett*].

event turned out to be a turning point. Not only did this make people feel vulnerable, it caused citizens who thought of themselves as pillars of the community and proud Canadian citizens to suddenly question the true nature of their society. Was this what the rule of law looked like? Was this justice?

Once these individuals discovered this other side to the place they called home, the questions just kept coming. Why was it that so many people with perfectly run-of-the-mill problems like family breakups, loss of employment, questions about government assistance or rental contracts were unable to access solutions? Why were the courts full of people waiting to have their problems addressed and few people actually found the help they desperately needed? Where was the legal profession in all of this? Why were social workers, police officers and court personnel all behaving as if they existed on different planets? And how real was the danger that Vaughn Barnett's fate could become others' fate if they tried to do their bit to help?

It is important to realize that the people who were engaged were not experienced in being disenfranchised. They brought neither cynicism nor resignation to this turn of events. Instead, they did what those of us with franchise do: they engaged their networks to get to the bottom of what they had just witnessed. The seeds to the Coalition for Access to Justice had been sown.

Access to Justice on the Political Agenda

The Access to Justice crisis was of course well-known to those in power. The provincial attorney general of the day, Liberal MLA, and former and current criminal defence lawyer T.J. Burke was acutely aware that all was not well in New Brunswick's courts and the broader justice system. In a letter to Dr. Chris Levan[2] dated August 7, 2007 he stated that "the issue [of Access to Justice] has been one of our primary concerns in the Office of the Attorney General, since our government took office last year." He was also dedicated to seeing improvement during his mandate. He identified two principal areas that required immediate attention: legal aid and family court. In short order, he appointed two provincial investigatory and recommendatory bodies to provide advice to the New Brunswick government on these areas. The family court file was placed in the hands of the Access to Family Justice Task Force chaired by Justice Raymond Guerette (whose comments, infra, recount the disturbing findings of the Task Force as well as the devastating failure of government to act on its well-considered recommendations.) The legal aid file was allocated to a legal aid review panel which I had the honour to co-chair with former Deputy Minister Ernest MacKinnon. Sadly, implementation of the Review Panel recommendations was just as frustratingly lacking as in the case of the Task Force.

[2] Dr. Levan was a minister at Wilmot United Church and headed the church's outreach committee. The letter is on file with the author.

The Law Society of New Brunswick v Vaughn Barnett – Protecting the Professional Monopoly against the Public Interest

The story of the prosecution of Mr. Barnett is worthy of more detailed attention. Mr. Barnett is a graduate of the Law School of Western Ontario, but not a member of any law society. A well-known Fredericton activist, he offered assistance to low-income New Brunswickers. In 2000, Justice Riordon of the New Brunswick Court of Queen's Bench issued a permanent injunction against Mr. Barnett, restraining him from practicing law.[3] Mr. Barnett's appeal was dismissed in 2002.[4] In 2007, Mr. Justice Bell found Mr. Barnett in contempt of Justice Riordon's court order and sentenced him to ten days of imprisonment.[5] He was led from the court house in handcuffs and leg irons and immediately taken to the provincial jail in Saint John where he served his sentence.

Imprisonment is the most severe punishment known to Canadian law and the Criminal Code directs its use as a measure of last resort. It expresses society's utmost disapprobation of a person's conduct as being contrary to the fundamental values of Canadian society.

The ways in which Mr. Barnett had offended the fundamental values of Canadian society were fourfold: he assisted a person in trying to avoid eviction by accompanying her to a meeting with the landlord and his lawyer; he proofread and edited a document a self-represented litigant had prepared; he corresponded with an administrative agency asking for some documentation; and, he was alleged to have received a used briefcase in compensation for a small claims matter representation. Mr. Barnett agrees that he received the briefcase, but does not agree that it was in compensation for the assistance he provided.

To be clear, all of these activities are of a kind that might be engaged in by lawyers, though not typically in the contexts in which Mr. Barnett provided assistance, or at least not on that side of the dispute. However, these are also activities that many non-lawyers engage in. An older sibling might proof-read a document and make suggestions for improvement. A parent might write a letter for a child. Clergy, social workers, friends, neighbours, former civil servants, and other professionals are all routinely engaged in these kinds of activities.

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[3] *Law Society of New Brunswick v Barnett*, (23 November 2000) F/M/83/00 (NBQB).

[4] *Barnett v Law Society of New Brunswick*, 2002 NBCA 89 (CanLII).

[5] *Barnett, supra* note 1.

The Outreach Committee of a downtown Fredericton church, Wilmot United Church, gave voice to the concerns of civil society arising out of the prosecution of Mr. Barnett. In a letter to then Premier Shawn Graham and Justice Minister T.J. Burke dated June 6, 2007, the committee members noted that "the breadth of this [the Law Society's] monopoly makes adequate representation in many social/economic situations (e.g., evictions), inaccessible to those without economic means."[6] They argued that the "gap in equitable access to the justice system for the poor is both obvious and untenable."[7] In his response, the Minister of Justice was unequivocal in his support for the professional monopoly. Acknowledging the Access to Justice crisis, he nonetheless articulated sharp disagreement with the group's suggestion that non-lawyers might have a role to play in addressing the issues: "We do part company however on the issue of representation by non-lawyers. I do not believe that any person's legal interests are served by relying on an unqualified, uninsured person to advise them, or even prepare forms on their behalf."[8]

The belief in and support for the professional monopoly is deeply ingrained in the professional identity of lawyers. Minister Burke's arguments are typical: non-lawyers are unqualified and uninsured. In my work with the Access to Justice coalition, it has become apparent to me how central the ideological commitment to the professional monopoly is to the legal profession. What is less clear is whether this commitment can be rationally supported. Many of the arguments would not appear to be sustainable empirically, but have surface appeal. Who would not prefer to be represented by someone who is well-trained and, if things do not go well, is at least insured? However, this really invites a comparison that strays too far from reality to be useful. When we compare the ideal of the well-represented and adequately funded litigant to the spectre of the person sadly misled by the unqualified and uninsured non-lawyer, and indicate a preference for the ideal, we do not make a contribution to the policy discussion we need to have: how does the situation of the unwilling self-rep compare to the person who receives neighbourly assistance from a better-educated non-lawyer? Equally importantly, what is the societal impact of vigorously enforcing a professional monopoly in a context of inaccessible legal resources? And, how does the professional monopoly of lawyers interact with the multi-faceted needs of people facing poverty, family crisis or unemployment?

Much of the professional turf that law societies protect through prosecutions for unauthorized practice of law will never be actually occupied by lawyers, at least

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[6] Letter from Outreach Committee to Premier Graham and A.G. Burke dated June 6, 2007. The letter is on file with the author.

[7] *Ibid.*

[8] Letter from A.G. Burke to Rev. Levan and the Outreach Committee dated August 7, 2007. The letter is on file with the author.

not by lawyers in private practice. To further take away from the quality representation argument, not infrequently, it seems likely that lawyers are not well-qualified to act in these situations. Lawyers receive limited or no training in poverty law. Law school courses in social justice tend to have a bend towards the theoretical, with the notable exception of courses taught in clinical contexts. Few lawyers specialize in poverty law outside of the Legal Aid system. In New Brunswick, we were unable to identify a single lawyer specializing in poverty law areas such as social assistance and OAS appeals, EI denials or disability benefit appeals. Also, the amounts of money ultimately at stake are simply disproportionate to even modest legal billing rates. It is clearly inefficient to incur $5000 in legal fees to achieve an additional $36.50 in social assistance. As a matter of public policy, we must find modes of ensuring that government programs are administered fairly and effectively without forcing people to require full-fledged legal representation.

If lawyers are not available to provide these services, are not qualified to provide these services, and having these services provided by lawyers would be inefficient in any event, how can we say that it is in the public interest that only lawyers be permitted to provide these services? What we are really saying is that these services will not be provided at all.

Finally, there is the red herring argument about professional liability insurance. If a person cannot afford legal representation to resist eviction or get reasonable notice pay for termination of employment, it is absurd to suggest that they will be able to afford representation to sue their lawyer; it is no less absurd to suggest a pro se litigant could succeed. Professional insurance is very important to clients who can afford representation, but is meaningless in all other contexts.

Access to Justice Off the Political Agenda

The lack of implementation of both the Task Force and the Review Panel recommendations and subsequent further cuts to the system demonstrated to all concerned that Access to Justice is simply not a governmental priority. The reports share that fate with other Access to Justice initiatives in the country, even though one would be hard-pressed to find another jurisdiction in Canada where things have deteriorated quite as far as in New Brunswick. This further decline comes in the context of an already weak national civil justice system. Access to Justice is a problem for many G20 nations. According to the Global Survey on the Rule of Law, Canadians have reason to be proud of their justice system in terms of judicial independence and lack of corruption. However, along with some other wealthy countries, Canada scores poorly on Access to Justice. The survey authors note:

> The greatest weakness in Western Europe and North America appears to be related to the accessibility of the civil justice system, especially for

> marginalized segments of the population. In the area of access to legal counsel, for instance, Italy, Canada, the United States, and Norway rank 42nd, 54th, 50th, and 48th, respectively. These are areas that require attention from both policy makers and civil society to ensure that all people are able to benefit from the civil justice system.[9]

The same survey identifies that even when compared only to developed nations, Canada underperforms in the area of access to civil justice.

> Canada's lowest scores are in the area of access to civil justice — where it ranks 16th out of the 23 high-income countries indexed this year. This can be partially explained by shortcomings in the affordability of legal advice and representation, and the lengthy duration of civil cases.[10]

These shortcomings have a profound impact on how disputes are resolved. One of the more startling datasets included in the survey compares the behaviour of poor Americans[11] and Germans[12] to the behaviour of their wealthier peers when it comes to resolving civil disputes. The authors state:

> The cases of Germany and the United States provide an illustrative example. When facing a common civil dispute (in this case, an unpaid debt), most people in Germany, regardless of their socio-economic status, tend to use formal dispute-resolution channels, while only a few choose to take no action. The situation is quite different in the United States. While high-income Americans behave just like Germans, low-income people act very differently – only a few use the court system (including small-claims courts), while most take no action to resolve their dispute. These behavioral differences between income groups are also present in Canada and the United Kingdom (...).[13]

Access to Justice is not an issue affecting only low-income Canadians. It probably bears recalling the words of Chief Justice McLachlin who has noted on numerous occasions that Access to Justice is also a middle-class issue. For example,

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[9] Mark David Agrast, Juan Carlos Botero & Alejandro Ponce, *WJP Rule of Law Index 2011*, (Washington, DC: The World Justice Project 2011) [Emphasis added] at 21.

[10] *Ibid* at 23.

[11] The U.S. is very comparable to Canada in terms of its Access to Justice scores, ranking 52nd (compared to Canada's 54th) in the world while also ranking very high in most other aspects of the rule of law survey (*ibid*).

[12] Germany ranks 2nd (*ibid* at 22).

[13] *Ibid* at 24.

in an address to the Council of the Canadian Bar Association, August 11, 2007, she stated:

> The cost of legal services limits Access to Justice for many Canadians. The wealthy, and large corporations who have the means to pay, have Access to Justice. So do the very poor, who, despite its deficiencies in some areas, have access to legal aid, at least for serious criminal charges where they face the possibility of imprisonment. Middle income Canadians are hard hit, and often left with the very difficult choice that if they want Access to Justice, they must put a second mortgage on their home, or use funds set aside for a child's education or for retirement. The price of justice should not be so dear.[14]

This raises the question why Access to Justice has no political traction. Michael Trebilcock, who undertook a review of the Ontario Legal Aid system at about the same time that we were engaged in the Review Panel in New Brunswick, theorized in his report that the reason for the lack of political interest in Access to Justice was that the majority of Ontarians had no material stake in the system. He opined:

> [T]he legal aid system, despite the important normative rationales that underpin it, is not a system in which most middle class citizens of Ontario feel they have a material stake. As a percentage of the population, fewer and fewer citizens qualify for legal aid, and many working poor and lower middle-income citizens of Ontario confront a system which they cannot access and which they are expected to support through their tax dollars even though they themselves face major financial problems in accessing the justice system (...). [15]

In response, he recommended:

> ... some range of legal aid services should be provided to all Ontario citizens on a non-means-tested basis, in particular summary forms of advice and assistance, so that middle-class Ontarians develop a material stake in the well-being of the legal aid system (...).[16]

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[14]The Right Honourable Beverley McLachlin, PC Chief Justice of Canada, Remarks to the Council of the Canadian Bar Association at the Canadian Legal Conference in Calgary, Alberta (11 August 2007), online: <http://www.cba.org/cba/calgary2007/pdf/chiefjustice_remarkscouncil.pdf> at 4. Last accessed January 5, 2012.

[15] Ontario, Attorney General of Ontario, *Report of the Legal Aid Review 2008* (University of Toronto, 2008) (Prepared by Michael Trebilcock), online: < http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/trebilcock/legal_aid_report_2008_EN.pdf> at 76.

[16] *Ibid* at 178.

While it is intriguing to think that giving middle class Canadians a stake would translate into political support for Access to Justice, it seems to me that this may be only part of the answer. A significant contributing factor appears to be the generally stigmatizing contexts in which the need for legal representation arises - marriage breakdown, job loss, eviction, and criminal charges. Each situation requires legal assistance but few people wish to contemplate them ex ante, are in a position to advocate for system changes while they are experiencing these problems, or wish to advertise their situation ex post. Thus, Access to Justice suffers from a similar fate as abortion litigation or challenges to legislation aimed at panhandling: the people most directly affected are unlikely litigants or public advocates and they do not have the representation and advocacy of others at their disposal.

Yet another contributor to the relative political weakness of the issue seems to me that one of the groups most likely to be direct beneficiaries of increases in legal aid and other forms of assistance for accessing representation are a group of people not generally thought to be short on either political influence or financial resources, viz. lawyers. If, in the public imagination, funding Access to Justice means getting more tax payer money into the hands of lawyers, it will lack public appeal.

If my conclusions on this point are at least somewhat correct, some of the essential features of a successful Access to Justice initiative would have to include public engagement, particularly engagement that enables participation of advocates and clients beyond the legal community; de-stigmatizing the need for legal assistance; and broadening the base of professional and other stakeholders.

Many of these goals can be supported by civil society. Service and advocacy organizations play an important role in educating the public about the challenges their clients face. This work is already being done through fundraiser and awareness campaigns and it is not difficult to include the Access to Justice dimension in these efforts. By allowing those who provide services to people who have significant poverty law needs, to network, these service providers gain more knowledge about the systemic barriers to justice and become versed in contextualizing the experience of their clients as justice system participants. This, in turn, leads to a richer and more detailed understanding of the scope of services and mechanisms that are available, the limits to those services and mechanisms, and how they respond or fail to respond to the legal and social needs of people with poverty-law needs.

The Formation and Work of the Coalition

Since its modest beginnings as work of the Outreach Committee of a single congregation, the Access to Justice Coalition has grown into an organization of

considerable scope. Its mission is to focus "on the need for improving Access to Justice for those without sufficient economic means to engage a lawyer, through a strategic campaign of communication to provincial and federal governments, beginning in the Province of New Brunswick."[17]

A working group for Access to Justice was co-convened by two members of the Outreach Committee, Gail Wylie and Norm Laverty. Both Ms. Wylie and Mr. Laverty are retired provincial public servants and bring their professionalism and governmental expertise to the work of the Coalition. The working group received modest funding through the Maritime Conference of the United Church which approved the initiative at its 85th Annual Meeting in May 2010. The co-conveners and a number of presbytery representatives set out to recruit a core group of Access to Justice experts including Ms. Sandra Burtt, a family violence counselor and chair of the New Brunswick Committee on Family Court Justice (NB), Mr. Vaughn Barnett, Dr. Melissa Embser-Herbert, professor of sociology at Hamline University in Minnesota, and myself. Together, with the presbytery representatives, the co-conveners, and experts, we became the Working Group for Access to Justice. The working group then began a campaign to engage other United Church presbyteries and congregations and by networking with community organizations and with other religious denominations. A letter to the Minister of Justice, Marie-Claude Blais, opened the dialogue with government. In her response dated December 20th, 2010 to Laura Hunter, Conference Minister for Justice and Stewardship of the Maritime Conference, the stance on the issue of assistance being provided by non-lawyers appeared to have softened. She stated:

> Your two proposals related to assistance from non-lawyers for court appearances has been discussed at various levels of government in the past. To a limited extent it is happening in certain types of cases at present. I will take your comments on this particular issue into consideration.[18]

It remains to be seen how much can be achieved on this issue. The recent removal of non-lawyer agent assistance for proceedings under Rule 80 (compared to the prior arrangements in the predecessor small claims court) is, however, a change heading in the wrong direction, in that it expands rather than restrains the professional monopoly.[19]

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[17] A summary of the Coalition's work can be found online: Maritime Conference the United Church of Canada <http://www.marconf.ca>, <http://marconf.ca/resources/access-to-justice-working-group/>.

[18] The letter is on file with the author.

[19] New Brunswick, *Rules of Court*, r 80.16.

Two UNB law students working with ProBono Students Canada and two social work interns from St. Thomas University contributed their expertise. The law students, Adam Baker and Michael Prang, produced a booklet titled "Quick Facts on Access to Justice in New Brunswick," which was distributed to all Coalition members and which was made available to others through the website of the Maritime Conference. The booklet is a plain language guide to Access to Justice in the province, outlining resources as well as legal limits for non-lawyers to assisting others in law-related issues. This publication has proven useful for many volunteers and agencies in getting a better understanding of the legal frameworks and institutions interacting with their clients. Importantly, it has also allowed for informed discussions among volunteers and social service agencies about the scope of the professional monopoly of lawyers.

The social work students, Brittany Hunter and Kristen Walsh began the process of engaging a broader set of politicians. Before the provincial elections, they contacted all candidates to elicit responses to the proposals on Access to Justice endorsed by the Maritime Conference. The interns also conducted research into possible Coalition partners from the community and gathered stories of individuals and groups affected by Access to Justice problems.

The students identified and interviewed representatives from 18 local groups. The response to these interviews was overwhelming. The students found that being associated with Access to Justice also created immediate demands for assistance.[20] So pressing is the need that people desperate for help would contact the interns with requests for help in threatened evictions, family law issues and other law-related problems. It was important to the professional formation of the interns to understand the kind of help they could and could not offer in the context of their internships.

The work of both sets of students benefitted the Working Group greatly. As a result, in January of 2011, the Working Group held its first community meeting in Fredericton. In that meeting, the represented groups established the Access to Justice Coalition. This step took the work of public engagement outside of the narrow confines of the Working Group and placed it in the hands of the broader community. The Coalition now had access to a broad range of expertise. Founding members included representation from anti-poverty and shelter groups, multicultural organizations, counsellors, social workers, and others engaged in providing services to a wide variety of clients.

[20] During a discussion with the students at Wilmot church, the author experienced such a request first-hand. The students also related that this was a common occurrence.

The initial meeting also saw the attendance of some community members who were directly affected by the Access to Justice crisis. As was the case in the context of the intern interviews, we were faced with urgent requests for individual assistance and understandable emotional responses when we had to explain that the Coalition was not able to provide poverty-law services. It came as somewhat of a surprise that the most urgent needs were identified in the area of mental health law. This demonstrates the importance of allowing for individual participation, because some issues are so underrepresented that relying on institutional stakeholders may prove inadequate. However, it also highlights the capacity limitations of the Coalition. We are grateful for the continued and growing efforts of the Fredericton Legal Advice Clinic (FLAC)[21] and establishment of the Family Law Legal Information Project (FLLIP) (an initiative brought about through the leadership of UNB ProBono Students led by law student Kathy Moulton).[22] These entirely volunteer-driven initiatives provide assistance to people, allowing the Coalition to focus on policy development. However, these organizations are only providing services in Fredericton. This brings home the truth that while volunteers and law schools[23] can play a role in promoting Access to Justice, coverage, continuity and level of service will always be haphazard at best in the absence of sustainably funded, professionalized organizations.

Because of the geographic and linguistic coverage of the service organizations identified through networking radiating out from the interviews conducted by the interns, it became clear that community meetings in other locations had to follow. Since January of 2011, the Coalition has developed contacts and held meetings in Moncton, Saint John, Miramichi, and Caraquet and the group of member organizations has grown to 35.

In February of 2011, the co-conveners attended the provincial budget consultations and made representations on behalf of the Coalition. In the same month, the Coalition also reached out to the Canadian Civil Liberties Association (CCLA). Since then, CCLA has supported the work of the Coalition through a series of letters related to the scope of the professional monopoly and social benefit overpayments.

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[21] The clinic operates twice monthly out of Wilmot United Church, and once a month on the North Side of Fredericton. Its executive director, Dr LA Henry, is a recent graduate of UNB Law. All student volunteers at the clinic are UNB law students. The clinic is made possible by the generosity of lawyer volunteers providing supervision for students and advice to clinic clients.

[22] The UNB ProBono Students Canada Chapter received the Lexpert Zenith Platinum Award in the category of "Pro Bono by Law School Student of Students" for this initiative which provides assistance to women living in transition houses.

[23] The law schools at the Université de Moncton and at UNB have had legal aid clinics at various times in their history. Their status has always been precarious due to uncertainty of sustainable funding, school size and, at times, lack of institutional commitment. Currently, UNB collaborates with FLAC.

At the time of writing, the Coalition is once again being assisted by pro bono law students (Jenny Mason, Meghan Brown and Laura Veniot) and engaged in three new initiatives:

1) Organizing a forum on Access to Justice;
2) Gathering stories on the expected impact of the federal crime bill C-10; and
3) Studying instances of quasi-legal assistance or representation not in conflict with the Law Society Act (e.g. grievance officers).

Through these various initiatives, the work of the Coalition has already contributed to broadening the base, networking stakeholders and strengthening the knowledge-base of a group of stakeholder experts who are now in a position to participate in policy development. Some elements of necessary reform have become clearer through this process. They will be discussed next.

Elements of Access to Justice Reform

Access to Justice is often understood as synonymous with access to the courts. This model of Access to Justice falls short of the needs of people served by Coalition members in various ways: many issues with a legal component are outside the primary jurisdiction of the courts; legal problems are recast as adversarial problems; and the focus on procedure obscures the lack of substantive justice that is available to people once they reach courts. For these reasons, the Coalition advocates for a broader understanding of Access to Justice to include approaches that builds capacity for people to solve their own problems to the greatest extent possible, allows them to access the assistance of their choice where that is consistent with a proper functioning of the justice system, and for substantive law reform.

Legal Problems Below the Eyeline: Vignettes[24]

A single parent in rural New Brunswick heats her house with a woodstove. When it comes time to buy stove wood in the Spring, the woman is told (erroneously) that no subsidy is available because heating subsidies are paid monthly during the Winter to coincide with the needs of people using fossil fuels.[25]

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[24] These vignettes are based on stories collected by the Coalition, but do not represent a comprehensive "case report" of the experiences of any one individual, nor do they cover the breadth of challenges uncovered by the Coalition. They are illustrative only.

[25] According to the Department of Social Development, the "Bulk Fuel Supplement of $870.00 for the purchase of wood or oil is provided from November through April. The benefit can be provided monthly

A social assistance recipient is caring for a parent experiencing dementia. The child has power of attorney for the parent and is required by the provincial authorities to draw on the parent's federal benefit (which is held in trust by the child) in contravention of their obligations under the federal program and their legal obligations as a trustee.[26]

A young person under the age of majority is charged with a serious offence. He is denied legal aid because the court will appoint counsel under the *Youth Criminal Justice Act* if legal aid is denied.[27] This is not explained to the youth.

These experiences highlight that many problems with legal dimensions are not readily susceptible to solution by access to the courts.

Clearly, the error in the first case could be addressed through an administrative appeal if the person is aware that such an appeal lies and how to go about it. However, many people may not be in a position to pursue their entitlements in this manner and even for those who appeal, a delay in accessing the benefit will result.

The second scenario results from a decision of a case worker that is compliant with the provincial scheme but which might be subject to a challenge on paramountcy grounds. This would undoubtedly make for interesting test litigation and in that sense, might be considered a good candidate for court resolution. However, the situation of a social assistance recipient looking after a parent with dementia is so challenging that the person is not likely to have capacity to commence litigation even assuming the availability of pro bono resources.

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at $145.00 per month or in a bulk format." The challenge lies in the fact that stove wood needs to be purchased in the Spring for the following Winter so it can season.

[26] New Brunswick, Department of Social Development, *Household Income Policy* (Government of New Brunswick 2012) provides that "Elderly parents 65 years of age and older, whose annual income does not exceed the maximum prevailing Old Age Security (OAS) pension and Guaranteed Income Supplement (GIS) rates, and who live with their adult child (children) who are in receipt of social assistance benefits, in a residence occupied or owned by the adult children, are exempted from the Household Income Policy.

At the same time, a contribution to the overall costs of the household, set at 25%, will be deducted from the Basic Household Rate to which the adult child's household is entitled to receive." As a result, the child will have to use the disabled parent's OAS, GIS and CPP benefits (all of which are held in trust by the child) to contribute to their own basic household expenses. The manual is available online: <http://www2.gnb.ca/content/gnb/en/departments/social_development/policy_manual/intake_and_continu ingeligibility0/content/household_incomepolicy.html> (last accessed February 6, 2012).

[27] *Youth Criminal Justice Act* SC 2002, c 1 para 25(4)(b) and s 25(5).

The third scenario will play itself out in the courts, but the anxiety created over the lack of representation is considerable and totally unnecessary.

What these scenarios have in common is that they are unlikely to create paying files for any lawyer, that some subject matter expertise and legal expertise is required to resolve them, that a resolution cannot wait, and that the people experiencing these situations have everyday challenges that make it unlikely for them to access legal assistance even if it were available at a lower cost.[28]

Building Solutions From the Ground Up

One of the recurring themes of our consultations has been that not only are legal processes too slow and unresponsive, but even when parties finally arrive at a legally sponsored resolution, it is experienced as profoundly unfair. Facilitating Access to Justice is only meaningful when the application of the law is experienced as an expression of a just society. Social benefit programs that have been designed to achieve minimal services and that are being administered in the spirit of government austerity will not be experienced in that way even if legally correct solutions are generally available. Forcing women to stay in or return to abusive family contexts will never seem just, even if the deprivation of benefits or withholding of government support is in accordance with the law. What good is access to the law when Access to Justice remains elusive? For these reasons, the primary tool of Access to Justice reform should be substantive law reform. One of the key challenges of poverty law is that poverty itself is unjust in a wealthy society. One of the ways in which austerity is administered is through a web of byzantine laws, regulations and policies that suffer from a lack of clarity, policy design and administrative integration. The sum of available benefits, even if they are all identified, falls below the poverty level. These problems are well-known. A recent report on welfare in New Brunswick notes:

> The 'tangled safety net' of welfare is a complicated, rule-burdened system that is difficult to understand and sometimes inconsistent in its treatment of recipients. There are rules governing eligibility, definitions of employability, amount and type of benefits, monitoring of clients and

[28] Many of the stories collected by the Coalition amplify and deepen the picture developed by Ab Currie in an important quantitative study of what he terms "justiciable events", i.e. situations of a serious nature with a significant legal component. See: Ab Currie, *The Legal Problems of Everyday Life: The Nature, Extent and Consequences of Justiciable Problems Experienced by Canadians*, Report prepared for the Department of Justice Canada (Ottawa: Government of Canada, 2009) <http://www.justice.gc.ca/eng/pi/rs/rep-rap/2007/rr07_la1-rr07_aj1/index.html> (last accessed January 20, 2012).

> reporting requirements. The rules are so complex that many files contain errors despite the best efforts of both welfare workers and recipients. New Brunswick's welfare system reflects this complexity, with three different programs, each with two rate schedules.[29]

No amount of lawyering, offered pro bono or by the billable hour, will provide Access to Justice in this situation. At best, an applicant may receive assistance in understanding why she has been turned down for a benefit that she desperately needs.

A second pillar of Access to Justice is a requirement that the law must speak to its primary target audience: for most laws, the citizenry. This requires plain language drafting, clean program architecture, regular statutory and regulatory maintenance and extensive testing of existing and novel mechanisms for conveying law. For example, in the context of the Saint John pilot project in family court, the court is experimenting with smart forms for marital property divisions.[30] These are similar to income tax forms that are available from programs like Quicktax: tallying outcomes and providing drop-down boxes and self-filling components as well as help functions. If many applications of the *Income Tax Act* can be rendered intelligible to citizens, most other laws should be capable of similar reform.

Third, we have to rethink the scope of and rationale for the professional monopoly. There are many, many situations where legal representation is crucial, proportionate and appropriate. However, there is significant work to be done to disentangle the valid public interest in the administration of justice from the merely anticompetitive urges of regulators and the profession. Not in every situation where legal representation is desirable is it also in the public interest to proscribe other forms of assistance. Nor can this work be left to lawyers alone. Self-regulation is only defensible when society as a whole through the democratic process has had the opportunity to delineate the scope of the self-regulated field. One important determinant of the correct scope of the professional monopoly ought to be the scope of state-sponsored assistance we are willing to fund. If a service is not available through legal aid or affordable to those not eligible for legal aid, we cannot as a matter of fundamental equity make that service part of the professional monopoly.

Using this measure, the scope of the monopoly in New Brunswick ought to be smaller, not larger, than in other Canadian jurisdictions. This is because the scope of legal aid is extremely limited and shrinking. As we rethink the professional

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[29] Ken Battle, Michael Mendelson & Sherri Torjman, *Reconstructing Social Assistance in New Brunswick: Vision and Action*, (Ottawa: The Caledon Institute of Social Policy 2010) at 2.

[30] See: <http://www.familylawnb.ca/english/forms_for_saint_john> (last accessed February 6, 2012).

monopoly of lawyers, we also need to reevaluate the boundaries between legal and other forms of assistance. Most individuals seeking legal assistance have a variety of needs, only some of which can be addressed by lawyers. Often, ignoring these other needs (e.g. mental health interventions, need for accommodation, respite care) will compound legal problems and make it less likely that an individual will be able to maximize self-help. Clearly, there are challenging questions to be resolved if lawyers were to work in multi-disciplinary practices in New Brunswick. Legal education might be a good place for considering how this might be accomplished in ways that would uphold legal professional values such as confidentiality, loyalty and advocacy and at the same time allow for interdisciplinary cooperation.[31]

Much of the foregoing could be understood as suggesting that our traditional justice institutions are irrelevant to low-income people. This would be a misunderstanding. Courts, administrative tribunals, lawyers and police officers are all very important components of a just system of law. The argument is simply that they are necessary but not sufficient components. Also, numbers matter. In 2012, Canada had 862 full-time federal and over 1000 provincial court judges holding office, or one judge for approximately every 20,000 Canadians.[32] In order to put this in perspective, it might be helpful to look at a jurisdiction that scored high on the access to civil justice survey. In 2008 (the latest published data), Germany had 20,100 full-time judges, or one judge per 4000 inhabitants.[33] These numbers are somewhat misleading as Germany uses judges in some instances where Canada uses administrative adjudicators, but even taking these differences into account, it is obvious that the number of judges might be one reason why Germany scores higher in access to civil justice than Canada. Ratios may also be important: Germany has 143,647 practicing lawyers,[34] Canada has over 100,000.[35] For every judge in Canada, there are 54 lawyers. In Germany, there are seven. The lived experience of many Coalition clients that there are a lot of lawyers engaging in a lot of activity while waiting for very limited court time is borne out by the numbers. In order to achieve Access to Justice in the narrower sense of providing access to the courts, we will have to reinvest in our public justice institutions.

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[31] Jacqueline St Joan, "Building Bridges, Building Walls: Collaboration Between Lawyers And Social Workers In A Domestic Violence Clinic And Issues Of Client Confidentiality"(2001) 7 Clinical Law Review 403.

[32] The number of federally appointed judges is published by the Office of the Commissioner for Federal Judicial Affairs Canada. Online: <http://www.fja-cmf.gc.ca/appointments-nominations/judges-juges-eng.html>. Last accessed March 25, 2012. The number of provincially appointed judges is estimated by the Canadian Association of Provincial Court Judges, online: <http://www.judges-juges.ca/en/home/>. Last accessed March 25, 2012.

[33] Stefan Brings, *Justiz auf einen Blick*. Wiesbaden: Statistisches Bundesamt 2011 at 38.

[34] *Ibid*.

[35] The Federation of Law Societies reports this estimate on its home page: <http://www.flsc.ca/>. Last accessed February 6, 2012.

CONCLUSION

This account of one citizen-driven initiative may be seen as too anecdotal and too unique to provide much guidance for Canada's Access to Justice discussion. I offer it despite misgivings that this might be so, because it appears to me that it has components that transcend the anecdotal and the parochial. First, Access to Justice is a democratic concern of a politically engaged citizenry. In order to resolve the various issues tangled up in the debate, we must broaden the discourse to move beyond the legal community. Second, as lawyers, we may be worried about protecting the scope of our professional work, but unless we can justify the scope of our professional monopoly in the face of Access to Justice demands, we may win individual prosecutions for the unauthorized practice of law, but that win will always be a reputational loss for the profession. Third, lawyers have been underutilized in our efforts to promote public justice. There are significant needs in substantive law reform and in the reformation of the expression of our laws. Lawyers collaborating with other professionals and with the citizenry at large are likely to generate creative and professional solutions that will transform our justice system. Finally, what might be true for economics is probably true for law. In the inimitable words of Kenneth Galbraith: Do not be alarmed by simplification, complexity is often a device for claiming sophistication, or for evading simple truths.[36]

[36] John Kenneth Galbraith, *The Age of Uncertainty* (BBC: 1977).