COMMENT ON JUSTICE CROMWELL'S VISCOUNT BENNETT LECTURE

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[Professor Bogart 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

It is an honour to be asked to take part in the Viscount Bennett lecture. It is particularly so because of how much I admire Justice Cromwell. The energy, determination, and ability he is bringing to the Civil and Family Access to Justice Project is so admirable. His Committee has a formidable task. Its chances of success are greatly improved because of its leadership. In responding to Justice Cromwell's address I would like to make two sets of remarks. The first concerns some of the specific points that he made in his lecture. The second is about the importance of the question: What is Access to Justice?

There have been numerous efforts over the last decades to improve civil and family courts and, in particular, access to them and to legal services.[1] There has been innovation, especially regarding access: just three prominent examples are the rise of ADR, the widespread adoption of expanded class action mechanisms throughout the

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[1] The following is but a partial list (I have participated, in various roles, in all of them):

Allan C Hutchinson, ed, Access to Civil Justice (Toronto: Carswell, 1990). Hutchinson edited proceedings of a conference held by the Ontario Ministry of the Attorney General in June 1988.

Ministry of the Attorney General, Study Paper on Fundamental Review of the Ontario Civil Justice System (1995).

Ontario Legal Aid review Report of the Ontario Legal Aid Plan Review: A Blue Print for Publicly Funded Legal Services (1997).

Bogart et al, Access to Affordable and Appropriate Law Related Services in 2020, Report of a Roundtable sponsored by the Department of Justice, the Law Commission of Canada, the Canadian Bar Association, the Faculty of Law, University of Windsor, January 1999.

Julia Bass, WA Bogart & Frederick H Zemans, eds, Access to Justice for a New Century: The Way Forward (Toronto: LSUC, 2005) edited proceedings of a conference by the Law Society of Upper Canada in 2003.

Advocates' Society, Final Report: Streamlining The Ontario Civil Justice System: A Policy Forum (2006).

Jasminka Kalajdzic, ed, Accessing Justice: Appraising Class Actions Ten Years After Dutton, Hollick & Rumley (Toronto: LexisNexis, 2011) edited proceedings of a conference held at the Faculty of Law, University of Windsor in March 2011.

country, and the formalization and promotion of pro bono legal services. Yet it remains clear that there is a common belief that there are still many urgent issues regarding access to courts and to legal services. Clear evidence of these concerns is the unusual measure taken by the Chief Justice in establishing the Committee presided over by Justice Cromwell. She could have as easily taken the view that however important these issues might be, it was for the governments of the day to attend to them. Establishing the Committee is a brave step by a Chief Justice with empathy and vision.

Responding to Justice Cromwell: Three Questions

In terms of my first set of remarks, I would make suggestions to the Cromwell Committee by way of three questions.

(A) What Happened to All those Good Ideas?

Over the years, and because of the many attempts to improve Access to Justice in the courts and to legal services, there have been many good ideas that have been advanced. This is not to suggest that others will not still emerge. Rapid advance in technology may be one source for ideas that are yet to come. I'll say more about technology in a moment.

My point here is that the many previous attempts at reform provide a ready inventory that the Cromwell Committee can assess in terms of its own recommendations. Regarding that inventory, I would ask the following questions. Concerning the good ideas that were not implemented: why not? What were the barriers that prevented adoption? Can they be overcome this time? If so, how? If not, the consequences of not doing so should be underscored in terms of government's and society's actual (rather than proclaimed) commitment to access to courts and to legal services.

Concerning good ideas that were implemented, there should be a curiosity about the actual effects that were produced. It is probably unrealistic for the Committee to do its own evaluative research, but it can certainly highlight the findings of such studies when they have otherwise been done. The disappointing results are as important to take account of as the successful ones. Pitfalls need to be avoided when similar reforms are undertaken. In "assessing the assessments," the Committee can underscore the need for rigorous, independent evaluations of law reform.[2]

[2] WA Bogart, Consequences: The Impact of Law and its Complexity (Toronto: University of Toronto Press, 2002) at 87.

A final set of questions regarding good ideas: what can we learn from other countries with higher standing in the World Justice Project cited by Justice Cromwell? We were told by him that, despite Canada's high standing in some categories, our nation is sixteenth in terms of access to civil justice. Question: what are the top five countries doing in terms of this rating that we are not? One society is not a template for another. Democracy is a door through which a people walk: what they do on the other side is up to them. We should, however, try to learn as much as we can from others' successes. As Justice Cromwell notes, inspiration does not lie south of the border.

(B) Are All Proceedings Alike?

Of course all proceedings are not alike. Just in terms of the Committee's mandate, family and civil matters can be substantially different. Within civil matters there are many divergences. Starting about three decades ago, we came to realize that mass wrongs needed separate provisions to be redressed: thus, the modern class action, for which a pivotal justification is enhanced Access to Justice. We've enshrined robust summary judgment mechanisms based on the idea that if facts are not in dispute, it is wasteful by several different measures to require a trial.

Yet, this is a critical question to bear in mind. Important opportunities for improvement may be lost if reformers cling tenaciously to a mindset that insists that "one size fits all." Concepts like "proportionality" and a finely-tuned sense of how individuals react to different kinds of claims are only two examples of indicators that may be key in fashioning improvements.[3] Changes should be uniformly applied when they can be, and differentially forged when they need to be.

(C) Are We Harnessing Technology or Being Dragged Along By It?

It is a truism that we live in a world of rapidly developing technology. Widespread access to cyberspace and its boundless capacity for facilitating communications and spreading knowledge scarcely existed as more than a concept two decades ago.[4]

How can courts and legal services harness technology? Others, more knowledgeable and sophisticated, will have to provide specifics. What is critical is to embrace its potential. To turn away is to ultimately be dragged along by it in ways that may not be conducive to Access to Justice. One avenue that may be instructive is

[3] Regarding proportionality: see, for example, Ministry of the Attorney General, Coulter A Osborne, Civil Justice Reform Project (November 2007). Regarding "different kinds of claims": WA Bogart and N Vidmar, "Problems and Experience with the Ontario Civil Justice System: An Empirical Assessment" in Hutchinson, *supra* note 1 at 1-51.

[4] WA Bogart, Good Government? Good Citizens?: Courts, Politics, and Markets in a Changing Canada (Vancouver: University of British Columbia Press, 2005) ch 6 at 118ff.

to consider how other professions are harnessing technology's rapid advances. The health professions use its developments to enable such wonders as the provision of medical treatment in the remotest corners of Nunavut.[5] What can courts, lawyers, and judges learn from such exploits?

What Is Access To Justice?

What we mean by Access to Justice is an important question to consider. Justice Cromwell was careful to indicate that his conception of Access to Justice is a broad one: "I do not view Access to Justice ... as simply access to litigation or even simply as access to lawyers, judges, and courts ..." Given the mandate of the Committee, he did go on to speak in some detail regarding issues of Access to Justice, particularly regarding civil and family courts.

At the same time, it is vital that Access to Justice should be broadly conceived.[6] There are several reasons for this more embracing conception. First, Access to Justice is about two words: "access" and "justice". The second is as important as the first, if not more so. Having ample access to a system that cannot provide justice is as bad, if not worse, than a denial of access.

This expansive idea of Access to Justice becomes a haven for those who have been denied equal treatment: feminists, first peoples, the LGBT community, the disabled, environmentalists, the poor (especially children), to name but some on too long a list.[7] An initial reaction to such an idea and to this list is that Access to Justice is meant to be a shelter for disgruntled progressives. There is a bit of this: a tilt towards the left side of the political spectrum has been known to occur. But as a political moderate, I feel very comfortable with this broad conception because rigorous Access to Justice discussions, of necessity, must take account of a multitude of perspectives in our society, which traverse the political spectrum.

Second, the legal institutions that most people in our society encounter are not courts but various manifestations of the regulatory state. To equate courts with Access to Justice (something Justice Cromwell was clearly not doing) is to banish from consideration, agencies, organizations, programs, and more, which both help achieve Access to Justice and raise critical concerns about it for the vast majority of

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[5] Healthtech Inc, online: Healthtech Consultants <http://www.healthtech.ca/2011/news/nunavut-improves-patient-care-with-its-new-electronic-system-canadian-healthcare-technology>.

[6] Two other examples of a broad conception are: Roderick A Macdonald, "Access to Justice in Canada Today: Scope, Scale, and Ambitions" in Bass, Bogart & Zemens, supra note 1, 19-112 and C. Backhouse, "What is Access to Justice?" *ibid* at 113-146.

[7] See, for example, the enormous variety of articles published, over the years, by the Windsor Yearbook of Access to Justice.

citizens in their everyday lives: from education to health care, from human rights to income security. I would illustrate that weave of Access to Justice and the regulatory state by briefly discussing two areas that I have been focusing on these last years: human rights and consumption.

The promise of enforcing human rights through the regulatory state was twofold.[8] Fundamental protections could be achieved in an accessible way for individuals. Human rights would be enshrined as various claims emerged over time, and through new understandings concerning what the scope of such protections ought to be. That promise has been fulfilled in many inspiring ways.

Yet, in terms of access, there remains persistent issues regarding effectiveness and efficiencies of enforcement through the regulatory state. The recent controversies in Ontario resulting in a paradigm shift in terms of addressing human rights claims is but one example of concerns about access and how best to address these issues.[9] In terms of recognition, there are also issues about lack of protection from some serious forms of prejudice. Appearance bias is one such area that will command our attention over the next decade;[10] fat rights is another.[11]

The story of excessive consumption and its encounter with the regulatory state is a long and complicated one. There are many aspects to this saga: human rights implications certainly make up one of them. Here, I want to highlight our treatment of recreational drug users. The overarching theme regarding excessive consumption and law in the last century and this one has been "permit but discourage".[12] We have rolled back the criminal law to permit consumption of tobacco, alcohol, gambling, and all manner of food and drink while using the regulatory state, with varied success, to discourage excess.

The outlier is recreational drugs. We continue to employ the heaviest machinery of the state, the criminal law, to suppress their use at whatever the cost.

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[8] WA Bogart, *Courts and Country: The Limits of Litigation and the Social and Political Life of Canada* (Toronto: Oxford University Press, 1994) at 112-117.

[9] For example, see the exchange of views online: EMPOWWORD <http://www.empowword.on.ca/>.

[10] Deborah L Rhode, *The Beauty Bias: The Injustice of Appearance in Life and Law* (New York: Oxford University Press, 2010).

[11] Anna Kirkland, *Fat Rights: Dilemmas of Difference and Personhood* (New York: New York University Press, 2008) at ix.

[12] WA Bogart, *Permit But Discourage: Regulating Excessive Consumption* (New York: Oxford University Press, 2011) at 158-169 [Bogart].

Substance abusers are among the most vilified and marginalized individuals in our society: mangled by drug laws built on racist foundations.[13]

The safe injection site initiative in Vancouver is an experiment in humane treatment of substance users that, at the same time, underscores the horror of drugs.[14] The federal government's attempt to close this clinic was a serious error from a number of perspectives. The Supreme Court's decision requiring it to be kept open was courageous.[15] It may also be consistent with a deep understanding of democracy not dependent on the momentary whims of one ruling party.[16]

Legalization of recreational drugs will surely come. Not because the roll back of the criminal law will be a happy solution, but because it is, as The Economist claims, "the least bad policy" to address a pernicious problem.[17]A hopeful sign was the report of the Global Commission on Drug Policy in the summer of 2011 and its demonstration of the failure the "war on drugs" has been.[18] Until such decriminalization occurs, treatment of drugs by the regulatory state is a sorry reminder of the need for an expansive definition of Access to Justice. If ever there were a group in society that both needs access and justice, that pleads for humane treatment, not punishment, it is surely those caught in the dreadful grip of substance abuse.

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[13] There are many accounts of how the specter of the "yellow peril," Chinese men lusting after white woman and opium, incited a series of legislative attempts to suppress the drug trade around the turn of the last century. For Canada see: Catherine Carstairs, *Jailed for Possession: Illegal Drug Use, Regulation, and Power in Canada, 1920-1961* (Toronto: University of Toronto Press, 2006). In the United States pernicious images of black men were added to those of Chinese males, see: Doris Marie Provine, *Unequal Under Law: Race in the War on Drugs* (Chicago: University of Chicago Press, 2007) and G Loury, *Race, Incarceration, and American Values* (Cambridge, MA: MIT Press, 2008).

[14] Bogart, *supra* note 12 at 189-94.

[15] *Canada (Attorney General) v PHS Community Services Society*, 2011 SCC 44, [2011] 3 SCR 134.

[16] Bogart, *supra* note 12 at 189.

[17] "How to Stop the Drug Wars", The Economist (5 March 2009) 15.

[18] Global Commission on Drug Policy, [War] On Drugs: Report of the Global Commission on Drug Policy (June 2011), online: Global Commission on Drug Policy <http://www.globalcommissionondrugs.org/Report>.