Remarks of the Right Honourable Beverley McLachlin, P.C.
Chief Justice of Canada

At the Annual Conference of the
Canadian Institute for the Administration of Justice

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Introduction

Distinguished guests, ladies and gentlemen. I am honoured to address you today at this very important event – the first national conference on indigenous law, bringing together judges, lawyers, police and correctional workers. **Merci beaucoup de m'avoir si gentiment invitée à venir vous adresser la parole aujourd'hui.** I would like to share with you some of my thoughts on a subject dear to me – access to justice – but from a special perspective – the perspective of Aboriginal peoples.

We Canadians like to think that we live in a just society. We have a *Charter of Rights and Freedoms*, a complex and vast edifice of law, a strong legal profession and a respected judiciary. This has not been achieved easily. Only the vision, tenacity and sacrifice of the generations that have preceded us has yielded these results. Yet the task of securing justice for Canadians is not done. Having achieved a justice system that is the envy of many countries, we have come to realize that we face another challenge: ensuring that all Canadians – be they rich or poor, privileged or marginalized – can actually avail themselves of the system.

Today, I propose to explore with you three questions: First, why does access to justice matter? Second, what are the barriers to access to justice? And finally, how do we address the cultural barriers that Aboriginal peoples face in accessing the justice system?

1. Why does access to justice matter?

Why is access to justice important? Let me suggest two reasons, one specific, the other, general.

The specific reason that access to justice matters is that obtaining justice is the basic right of every person. People have disputes and problems; they need to access the justice system in order to solve them.

On the civil side, dispute resolution in the courts allows people to solve their legal problems promptly and fairly, putting the matter to rest and getting on with their lives. On the criminal side, proper legal representation at a fair trial supports fundamental rights and freedoms, reduces the risk of wrongful convictions, and facilitates rehabilitation and a productive return to society.

Just results in specific cases – be they civil or criminal – benefit the individuals whose disputes are resolved in a fair, impartial manner. This obviates the need for self-help and vigilantism and allows people to move on with productive lives.

The second and more general reason why access to justice matters, is that it is essential to sustain the rule of law. Indeed, it is no exaggeration to say that access to justice is a precondition to the rule of law.

Access to justice is necessary for sustaining public confidence in the law and the courts, upon which the rule of law depends. In order for people to accept and have confidence in the justice system, they have to know that they can access it – that it is there for them and that it will not convict them or restrict their freedoms without justification. This is an important element of ensuring respect for our governance and democracy.

Moreover, access to justice is essential to ensure transparency and accountability in the exercise of government power. Under the rule of law, those who exercise power must be accountable for that exercise through the law as applied by independent and impartial courts. Without meaningful access to courts, accountability fails.

Finally, access to justice ensures that fundamental rights and freedoms are upheld and vindicated, which is important to the rule of law. The *Charter* proclaims everyone is equal before the law. But these are mere words, signifying nothing, unless people can actually come to court to seek and obtain vindication of their rights.

Access to justice, by providing for the just resolution of disputes and sustaining the rule of law, benefits both individuals and society. We are fortunate to live in a country that has one of the best legal systems in the world. Yet on the access to justice file, we have been falling behind

in recent decades. Internationally, Canada ranks 14th on the *2015 Rule of Law Index* of the Wold Justice Project, behind Japan, South Korea and Australia, in part because people can't use the justice system as easily as they should. We have an excellent, non-corrupt system, but access to it is not as good as it should be.

This said, I believe that things are beginning to change. Canadians – lawyers, judges, governments, academics, and individuals – are working on a host of access to justice initiatives in cities and communities across the country. Things are, step by small step, getting better. Still, many barriers to access to justice remain. It is to those that I next turn.

2. Barriers to access to justice

The barriers to access to justice in the civil and criminal justice systems are complex and numerous. Today, I will mention four of them: procedural barriers; financial barriers; informational barriers; and cultural barriers.

Procedural barriers are rules and processes that are more complicated than they should be. This leads to unnecessary delay and cost. And in some cases, it prevents people from using the justice system or availing themselves of their rights. The complicated structure of the courts and administrative tribunals, the complex rules and procedures, and the sheer difficulty of finding one's way in the law, all present formidable challenges to access to justice. Lawyers and judges understand this, and efforts to simplify processes are ongoing. Yet too often we fail, or are less successful than we should be. It's not just that lawyers love complex rules. The task of

simplification is anything but simple. The problem is that different problems may need different rules. The complexity of the rules must be "proportionate" to the problem. What works for a complex commercial dispute, may not be appropriate for a tenant's claim against her landlord.

Financial barriers continue to thwart access to justice. Solving legal problems takes time and money, and, sometimes, specialized expertise. For rich people and large businesses, cost may not be an issue. But for everyone else, it is.

For people charged with offences, and often in family matters, access to justice means getting legal aid. Legal aid is usually provided to people facing serious criminal accusations that could land them in jail. I note in passing that more than 25% of people who access legal aid are Aboriginal people – a figure that rises to 80% in some communities.[1] But funding to legal aid is in decline. Between 1994 and 2012, funding to legal aid in Canada per capita went down by 20%.[2] Some question whether the legal aid system is even sustainable. And yet, many empirical studies show that funding legal aid is a worthwhile investment. In the U.S., the U.K. and Australia, we are talking of a 6-to-1 return on investment[3]. There is no reason to think that the same is not equally possible in Canada.

[1] Legal Services Society, *Making Justice Work* (Vancouver: LSS, 2012), p. 8. Mentioned in Reaching Equal Justice, p. 35-36.
[2] In 1994, funding was 11.37$ per person, but in 2012, it was down to 8.96$ per person: Ab Currie, "The State of Civil Legal Aid in Canada: By the Numbers in 2011-2012" (Toronto: FCJC, 2013).
[3] Canadian Bar Association Access to Justice Committee, *Reaching Equal Justice: An Invitation to Envision and Act*, 2013, p. 53; Canadian research has not yet drawn such conclusions, but see Yvon Dandureau and Michael Maschek, *Assessing the Economic Impact of Legal Aid – Promising Areas for Future Research* (Vancouver: Law Foundation of British Columbia, 2012).

Because they cannot afford legal services, more and more people attempt to solve their legal problems on their own. Our courtrooms are increasingly filled with litigants who are not represented by counsel, trying to navigate the complex demands of law and procedure. In some courts, more than 50% of cases involve self-represented litigants[4]. This is a vicious circle. One cannot blame people who can't afford lawyers for taking their own cases to court. But too often, because they do not know the law or legal systems, the result may be flawed justice. Moreover, self-represented litigants impose collateral costs. Assistance by a judge may raise the possibility of an appearance of bias. The proceedings can be delayed or stretched out, adding to the public cost of running the court. Lawyers on the other side may also find the difficulty of their task greatly increased, driving up the costs to their clients. Judges may find themselves stressed and burned out, putting further pressures on the justice system. The litigants themselves, lost in a system they do not understand and that struggles to understand their reality, may lose faith in the system. And so it goes.

To overcome these financial barriers to access to justice, we are developing different models for providing assistance to people involved in the justice system who cannot otherwise obtain it. Lawyers and law schools are collaborating to offer free services to those who most need them. Workshops set up by the state, by NGOs and by lawyers, help people who must represent themselves before the courts. Rules have been changed to allow for contingency fees, and class actions provide ways for people of modest means to litigate some tort and consumer actions. Underlying these efforts is an acknowledgement that priority and resources should be

[4] Action Committee on Access to Justice in Civil and Family Matters*, Access to Civil and Family Justice: A Roadmap for Change*, October, 2013, p. 4.

directed toward serving people in the most just and effective way possible, as early as possible, as they begin to experience a legal problem.

These measures are in line with the recommendations of the National Action Committee on Access to Justice in Civil and Family Matters, which seeks to coordinate the access to justice efforts of many of the most important participants in our justice system on a national level.

I have spoken of procedural barriers and cost barriers. This leads me to the third barrier to access to justice – the information deficit. Many people – including (but not confined to) in-person litigants – lack the understanding and information to fully access the justice system. They may lack information on just about every legal issue, be it the criminal process, the family law process, the ancestral rights to fish and hunt, or residential schools claims[5].

The information barrier, like the financial barrier, demands new measures. Information is increasingly available online and through community help centres, on-line despite resolution processes are multiplying, and courts across the country have established information centres to help those seeking to access the system, particularly for family disputes.

This brings me to the fourth and final barrier to access to justice I want to talk about – the cultural barrier. By cultural barriers, I mean attitudes of mistrust or fear toward the justice system.

[5] Yedida Zalik, *Aboriginal Peoples and Access to Legal Information* (Toronto: Community Legal Education Ontario, 2006).

Minority groups may fear the justice system, avoid it, refuse to engage with it and, ultimately, decline to recognize its legitimacy. New Canadians who have come from countries where justice was equated with oppression and corruption may find it difficult to trust Canadian courts. The same is true for many Aboriginal peoples. Many First Nations people bear little trust towards the Canadian justice system, as the Canadian Bar Association recognized in its 1988 report on Aboriginal Rights[6]. The Truth and Reconciliation Commission led by Justice Murray Sinclair recently stated that Aboriginal people "often see Canada's legal system as being an arm of a Canadian governing structure that has been diametrically opposed to their interests"[7]. There is a sense that the legal system is not there to protect what Aboriginal peoples hold dear, but rather to impose non-Aboriginal law on them.

Why this mistrust and fear? The reasons are rooted deep in what the Supreme Court of Canada has called the "tragic history" [8] of the treatment of Aboriginal peoples in the Canadian justice system. For generations, the law treated First Nations people as second-class citizens in matters as diverse as: education (the legacy of residential schools looms large); voting rights (until the 1950s, Indians were not allowed to vote); and even drinking laws. It should hardly surprise us that people who see the law as victimizing them and discriminating against them, might be slow to embrace it.

[6] Canadian Bar Association, *Report of the Canadian Bar Association Committee on Aboriginal Rights in Canada: An Agenda for Action* (Ottawa: Canadian Bar Association, 1988).
[7] Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada*, 2015, p. 202.
[8] *R. v. Gladue*, [1999] 1 S.C.R. 688, at para. 34.

The result is that Aboriginal people are significantly underrepresented among all those who are involved in the administration of justice, whether as court officials, prosecutors, defense counsel, judges and jurors[9]. This compounds the mistrust with which many First Nations people view the justice system.

A complicating factor is the dissonance between how indigenous people approach conflict resolution and the values represented by the basic tenets of general public and private law. Simply put, indigenous concepts of justice may differ in important ways from those held by most of the population. Indigenous dispute resolution systems may see the goal as finding a practical resolution, restoring co-operative co-existence, and eliminating bad feelings[10]. As former Supreme Court of Canada Justice Frank Iacobucci explained in his report on First Nations representation on Ontario juries, Aboriginal restorative justice operates under the principle of balance, harmony and healing, whereas the mainstream Canadian system tends to focus on retribution and punishment[11]. The phrase "clash of cultures" comes to mind.

A final complicating factor is geographical isolation. Aboriginal people living in remote northern communities may not know much about how the court system in its totality works, and what they do know may not endear that system to them. Moreover, the sheer physical distance involved may make it difficult to find a lawyer, or to respond to a request to do jury duty[12].

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[9] First Nations Representation on Ontario Juries: Report of the Independent Review Conducted by The Honourable Frank Iacobucci (February 2013), p. 2.

[10] Justice Robert Allan Cawsey, "The Cawsey Trial" in *Justice on Trial: Report of the Task Force on the Criminal Justice System and its Impact on the Indian and Metis People of Alberta* (Edmonton: Alberta Justice and Solicitor General, 1991).

[11] First Nations Representation on Ontario Juries: Report of the Independent Review Conducted by The Honourable Frank Iacobucci (February 2013), p. 4.

[12] The lack of juror participation from members on remote reserves is an example that has recently come to the fore and constitutes but a symptom of a more serious ill. See First Nations Representation on Ontario Juries:

The result is that, instead of seeking access to justice or engaging with the system when it affects them, Aboriginal people may avoid it, and when they cannot, passively submit to whatever happens. This may lead to wrongful convictions and "unjust" resolution of family and custody issues, reinforcing mistrust of the system. The result is a vicious circle that reinforces Aboriginal alienation and denies the people true access to justice.

3. Addressing the Cultural Barrier

This brings me to the final part of my talk – how can we address the cultural barriers to access to justice experienced by many Aboriginal people?

As a first step, we should educate and inform ourselves. Those involved with the justice system, be they judges, lawyers or justice officials, should understand indigenous history, legal traditions and customary laws. Thus the Iacobucci report emphasized the need for cultural training for police, court workers, Crown prosecutors and prison guards. Echoing this recommendation, the Truth and Reconciliation Commission called on the Federation of Law Societies of Canada to ensure that lawyers receive appropriate cultural competency training on the history and legacy of residential schools, the *United Nations Declaration on the Rights of Indigenous Peoples*, Treaties and Aboriginal rights, Indigenous law, and Aboriginal-Crown relations; and called on the law schools to require all law students to take a course in Aboriginal

Report of the Independent Review Conducted by The Honourable Frank Iacobucci (February 2013); and R. v. Kokopenace, 2015 SCC 28.

peoples and the law that covers those subjects[13]. And I add this: we who are involved in the administration of justice must not stop at learning *about* the history; we should also strive to learn *from* it, lest we condemn the justice system to repeating past errors.

Having informed ourselves about Aboriginal history and the reality of First Nations people's lives, we are in a position to act. A number of initiatives are already helping First Nations people to participate more effectively in the justice system. I refer to the Aboriginal Courtwork program, native Justices of the Peace, cross-cultural training programs, court interpreters for those not fluent in English or French, and specialized legal aid services focusing on assisting First Nations people. While these programs do not fundamentally change the way that the justice system interacts with Aboriginal people, they promise to alleviate the alienation experienced by many First Nations people involved in the legal system, and empower them to participate more fully in its processes[14].

One of the most important steps we must take to address the mistrust and alienation many people of indigenous heritage feel toward the legal system, is to train more First Nations lawyers and appoint more First Nations judges. Many years ago, here in Saskatoon, the Law School started a program to encourage Aboriginal students to study law, and to mentor them in their progress. The program, along with others, has helped to produce many First Nations lawyers. Many courts across the country now have judges of Aboriginal descent. We have made progress, but we need to do more.

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[13] *Honouring the Truth, Reconciling the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (2015), at p. 168.

[14] Royal Commission on Aboriginal People, Bridging the Cultural Divide (Ottawa: Ministry of Supply and Services, 1996), at p. 93.

Reducing cultural barriers to access to justice for Aboriginal peoples requires sensitivity and change on the part of lawyers, judges, court administrators, and educators. But the street is not one-way; Aboriginal peoples must be involved too. Access to justice is but one facet of the broader reconciliation agenda that is currently taking place between First Nations and other Canadians[15]. First Nations peoples should be encouraged to participate in the system by enriching it with the values that underlie their own communities[16]. Only then will they truly see the legal system as their own.

This collaborative route to reconciliation is not new. Article 40 of the *United Nations Declaration on the Rights of Indigenous Peoples*, endorsed by Canada, recognizes the right of indigenous peoples to have their disputes with states resolved promptly and to obtain effective remedies for the infringement of their individual and collective rights. Decisions on these matters, it stipulates, must "give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned". More recently, the 2015 Truth and Reconciliation Commission said this: "the revitalization and application of Indigenous law will benefit First Nations, Inuit, and Métis communities, Aboriginal-Crown relations, and the nation as a whole"[17].

[15] *R. v. Kokopenace*, 2015 SCC 28.
[16] P. A. Monture-Oksnrr, M.E. Turpel, "Aboriginal Peoples and Canadian Criminal Law: Rethinking Justice" (1992), U.B.C. L. Rev. 239. Advisory Committee on the Administration of Justice in Aboriginal Communities, *Justice For and By the Aboriginals: Report and Recommendations of the Advisory Committee on the Administration of Justice in Aboriginal Communities* (Quebec: Justice Quebec, 1995). D. Auger, "Legal Aid, Aboriginal People, and the Legal Problem faced by Persons of Aboriginal Descent in Northern Ontario", in J.D. McCamus, Chair, A Blueprint for Publicly Funded Legal Services, 3 vols. (Toronto: Report of the Ontario Legal Aid Review, 1997), at 420.
[17] p. 205.

Conclusion

It is said that every generation faces its own unique challenges. If the task of the generations that preceded us was to build an excellent justice system, then the task that falls to our generation is to ensure that every man, woman and child has access to that system. Achieving this will not be easy. The barriers to true access to justice are many and varied – procedural, financial, informational and cultural. And change – particularly cultural and attitudinal change – does not happen overnight. If we care about access to justice – and I believe we should – we must seek to understand the barriers that prevent people from obtaining the justice that is their right, and strive to eliminate them. All Canadians – not least the descendants of our First Nations – are entitled to access to justice. Our task is to make that aspiration a reality.