Use and Occupancy: Building Codes and Maintenance Manuals: Can Court Rules Increase Access to Justice?

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I. INTRODUCTION

Access to justice is both a fundamental tenet of our democratic order and a code word for a complex social policy problem. Our awareness of access to justice as a problem in search of a solution has waxed and waned for three decades. In the 1960s and 1970s, there was a groundswell of public support for increasing access to the justice system on the part of those subject to exclusion as one aspect of our collective commitment to a just society. This commitment resulted in public investment in programs such as legal aid and public legal education. In the late 1980s and 1990s, the focus on the equality-promoting side to the access to justice landscape began to recede and the access to justice agenda shifted to one dominated by rational-bureaucratic drivers focused on costs, delays and efficiencies. My perception is that today the conversation about access to justice is lodged in an uncomfortable spot between these two movements. Participants in this conversation often speak at cross-purposes using the same words but not sharing common ground about what key concepts, including 'access to justice' mean or the goals of reform.

In her invitation to me to speak on this panel, Madam Justice Martin encouraged me to be provocative and I gamely accepted this challenge. I have worked on the issue of access to justice for more than two decades, mainly in the context of the Canadian Bar Association's national initiatives and my experiences have provoked countless hours of reflection on what is needed to overcome barriers to access to justice in a substantive, meaningful and lasting manner. I share with you some of these reflections that I believe are good starting points for a new conversation about access to justice. In my view, a new conversation is needed and I look forward to the opportunity to engage in this dialogue at the Annual Conference of the Canadian Institute for the Administration of Justice.

II. DISSENSUS ON THE CORE CONCEPT

I put forward three meanings for access to justice. First, access to justice is a fundamental legal constitutional principle that is one aspect of the rule of law and our democratic order.[1] There are two constitutional dimensions to access to justice: it shapes and protects the relationship between the individual and the court and it shapes and protects the relationship between courts and other branches of government. These two sides to access to justice were recently canvassed by the British Columbia Supreme Court in *Vilardell v Dunham*, a case considering whether hearing day fees were constitutional.[2]

Secondly, access to justice is an aspirational concept integrating notions of procedural and substantive justice. The National Action Committee on Access to Justice in Civil and Family Matters was established to increase the public's accessibility to the civil justice system. Its vision of access to justice is:

> A society in which the public has the knowledge, resources and services to effectively deal with civil and family law matters:
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> - By prevention of disputes and early management of legal issues;
> - Through negotiation and informal dispute resolution processes; and
> - Where necessary, through formal dispute resolution by tribunals and courts.
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> In this society:
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> - Justice services are accessible, responsive and citizen focused;
> - Services are integrated across justice, health, social and education sectors;
> - The justice system supports the health, economic and social well-being of all participants;
> - The public is active and engaged with, understands and has confidence in the justice system and has the knowledge and

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1 Melina Buckley, "Searching for the Constitutional Core of Access to Justice" (2008) 42 Sup Ct L Rev (2d) 567.

2 2010 BCSC 748.

attitudes needed to enable citizens to proactively prevent and resolve their legal disputes; and

- There is respect for justice and the rule of law.[3]

Conversely, access to justice can be described as a series of problems including inadequate access to legal services, complex procedures, and lack of legal literacy. To me, this is the flipside of the aspirational concept: describing the phenomenon in a way that emphasizes the dimensions in which it is absent or wanting.

A third approach is to focus on one central aspect of this broad policy concept and that is access to the courts. There is a tendency to refer to access to justice and access to the courts interchangeably, but I prefer to think of access to the courts as a central component within a broader access to justice system.

In my view, all three conceptions of access to justice are required to describe and understand the parameters of access to justice questions. All three conceptions are highly contested. Working together to build a consensus on the basic conceptions of access to justice and achieving some clarity about the parameters and relationships between them, is an important endeavour.

III. SIX ACCESS TO JUSTICE MYTHS

One approach that I have developed to reflect on the problem of inadequate access to justice is to look critically at myths about barriers and potential solutions with a view to discerning the tough questions lurking behind the myth. Based on my review of the literature and experience in this field, I have proposed six myths about the underlying issue.

Myth #1 – The rich can afford lawyers and the poor have legal aid – so access to justice is a middle class problem

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[3] Working Group on Access to Legal Services of the Action Committee on Access to Justice in Civil and Family Matters, *Report of the Access to Legal Services Working Group* (Ottawa: Action Committee on Access to Justice in Civil and Family Matters, 2012) at 1–2 [emphasis in the original].

This statement is simply unsupportable given the inadequate state of legal aid across Canada. Behind this myth is a series of tough questions about whether we as a society are prepared to rebuild a consensus on ensuring 'basic justice care' for all people within Canada.[4] Recent civil justice needs research has taught us quite a bit about the differences in experience of legal disputes by different groups within society which we could loosely categorize as middle-income and low income persons, while also recognizing other important dimensions: linguistic, geographic and specific vulnerabilities due to social and economic marginalization. The question is how do we translate this knowledge into effective policy responses. Three questions immediately come to mind:

- How can we ensure that access to justice initiatives take into account the differing needs of low-income and middle-income persons?
- How can we ensure that initiatives to increase access to justice for middle-income people do not detract from our ability to meet the legal needs of low-income persons?
- How can we think about who should be eligible for publicly funded legal services in a way that rations those valuable services in a principled manner?

Myth #2 – Court Rule Changes Are the Answer

My starting point has tended to be that rule changes are a very small part of the range of solutions needed to increase access to justice in a meaningful way. I say this because very few legal disputes get to court. I fully recognize that court rules can and do shape the quality of access to a courtroom. This is one situation in which the conception of access to the justice system and access to the courts becomes important. It seems to me that what we need are overarching justice system rules, 'mega' rules if you like, that direct the pathways to justice. The central question here is: How can we foster a dispute resolution culture that supports early intervention and rewards early substantive attempts to resolve disputes? I return to the role of rules in the concluding section of this paper.

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[4] The Hague Institute for the Internationalization of Law. *Hiil Trend Report, Towards Basic Justice Care for Everyone: Challenges and Promising Approaches* (The Hague: 2012), online: <http://www.hiil.org/publication/Basic-justice-care>.

Myth #3 – More pro bono is the panacea

One of the clearest trends in the access to justice field over the past decade or so is a fundamental shift in the provision of pro bono services to a much larger and more organized scale than in the past. Pro bono seems to be the solution of choice. However, in my view, there are some tough questions lurking behind this phenomenon. We need to be asking ourselves about the viability and sustainability of a justice system increasingly reliant on the volunteer efforts of lawyers and paralegals.

Myth #4 – The Constitution prevents the federal government from acting on access to justice

On previous occasions, I have written about the gap in access to justice attributable to the inadequate engagement of the federal government in this field.[5] Access to justice is clearly a shared federal-provincial-territorial responsibility. As the Australian example demonstrates, there is much to be gained through a national access to justice policy and active federal government commitment.[6] One of our greatest challenges is re-engaging the federal government in access to justice and encouraging the fulfillment of obligations under the Constitution and international human rights instruments.

Myth #5 – Cutting access to the justice system saves the public money

There is a huge knowledge gap in access to justice information. Many studies from other jurisdictions have shown that increasing access to justice saves public funds by effecting cost savings in the health, social and criminal justice services.[7] The sad truth is that we have very little concrete data about the costs of accessing justice and the costs of barriers to accessing justice or inadequate access. The Canadian Forum on Civil Justice is undertaking a multi-year 'Cost of Justice' project to answer

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5 Melina Buckley, *Moving Forward on Legal Aid: Recent Needs Research and Innovations*. Canadian Bar Association (Ottawa, April 2010).

6 Australia, *A Strategic Framework For Access to Justice in the Federal Civil Justice System* (Canberra, 2009).

7 See for example, Laura Abel, *Economic Benefits of Legal Aid* (National Center for Access to Justice at Cardozo law School, 2012).

some of these questions.[8] It is interesting to reflect on why it is that we have so little concrete data about the justice system: a problem that the Canadian Bar Association identified as an obstacle to court reform and access to justice in 1996.[9] This information is essential for planning and evaluating access to justice initiatives and for better understanding the role of legal/justice services vis-à-vis other support services.

Myth #6 – Only the individuals directly involved suffer when access to justice is denied

The access to justice crisis has remained a silent crisis for years, although there are signs that the critical situation is making inroads on public consciousness. As members of the judiciary and officers of the court, we see every day the impact of inadequate access to justice on the individuals involved and we can perceive the way these struggles and unfair outcomes chip away at the rule of law which is integral to our democratic order. It is hard to translate our understanding of the implications of justice denied into sound bites and easy solutions. The challenge is to find ways to build public support for reinvesting in the justice system to facilitate equal access to justice.

IV. ACCESS TO JUSTICE AS A "WICKED PROBLEM"

I have set out in very basic terms some reflections on the challenges that I perceive in moving forward on improving access to justice in a substantive meaningful way. My next reflection is on how to resolve some of the tough questions and challenges that create the access to justice myths serving as barriers to progress. At the outset, I recognized that access to justice is a very complex policy problem. Here I share a framework addressing policy issues of this order of magnitude: the decision-making theory concerning 'wicked' problems.

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8 *The Cost of Justice: Weighing the Costs of Fair and Effective Resolution to Legal Problems*, online: Canadian Forum on Civil Justice <http://www.cfcj-fcjc.org/cost-of-justice>.

9 Canadian Bar Association, *Report of the Systems of Civil Justice Task Force* (Ottawa: 1996).

The term 'wicked' in this context is used, not in the sense of evil, but rather as an issue highly resistant to resolution.[10] The Australian Public Service Commission has published a very helpful discussion paper entitled 'Tackling Wicked Problems: A Public Policy Perspective' (APS Report).[11] Some of the key points raised in that publication are summarized here to stretch our thinking and facilitate discussion on potential approaches to access to justice reforms.

The APS Report points out that successfully tackling wicked problems requires a broad recognition and understanding that there are no quick fixes and simple solutions. These problems share a range of characteristics:

- They are difficult to clearly define: the nature and extent of the problem depends on who is asked, as different stakeholders have different views of what the problem is;
- They are often interdependent or co-exist with other problems and there are multiple causal factors;
- They usually have no clear solution;
- They go beyond the capacity of any one organization to understand and respond to;
- There is often disagreement about the causes of the problems and the best way to tackle them;
- They tend to be "socially complex" rather than "technically complex";
- Usually, part of the solution to wicked problems involves changing the behaviour of groups of citizens or all citizens;
- Some wicked problems are characterized by chronic policy failure and therefore appear intractable; and
- Attempts to address wicked problems often lead to unforeseen consequences.

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[10] The terminology was originally proposed by HWJ Rittel and MM Webber, both urban planners at the University of California, Berkeley, USA in 1973. See HWJ Rittel and MM Webber, "Dilemmas in a General Theory of Planning" (1973) 4 *Policy Sciences*, 155–69.

[11] Australian Public Service Commission, *Tackling Wicked Problems: A Public Policy Perspective* (Commonwealth of Australia, 2007).

All of these pose challenges to traditional approaches to policy-making and program implementation.

Key ingredients in solving or at least managing wicked problems include:

- Holistic rather than partial or linear thinking—need to grasp the big picture including the interrelationships between the range of causal factors and policy objectives;
- Innovative and flexible approaches;
- Successfully working across both internal and external organizational boundaries;
- Engaging citizens and stakeholders in policy making and implementation;
- A principle-based rather than a rule-based approach;
- Iterative processes involving continuous learning, adaptation and improvement; and
- Developing innovative, comprehensive strategies or solutions that can be modified in light of experience and on-the-ground feedback.

Wicked problems require governmental and non-governmental agencies to work together in new ways and through novel processes. This shift must be facilitated through:

- supportive structures and processes;
- a supportive culture and skills base;
- facilitative information management and infrastructure;
- appropriate budget and accountability frameworks; and
- ongoing forums of exchange.

Important steps to facilitate working across organizational boundaries include inter-organization mapping on a given issue, strategic reviews, and creating a shared understanding of problems across organizations. Community engagement is key:

> Because wicked problems are often imperfectly understood it is important that they are widely discussed by all relevant stakeholders

> in order to ensure a full understanding of their complexity. If a resolution of a wicked issue requires changes in the way people behave, these changes cannot readily be imposed on people. Behaviours are more conducive to change if issues are widely understood, discussed and owned by the people whose behaviour is being targeted for change.[12]

The APS Report points out that the social complexity that accompanies nearly all wicked problems means that "a lack of understanding of the problem can result in different stakeholders being certain that their version of the problem is correct."[13] It can be extremely difficult to make any headway on an acceptable solution to the wicked problem if stakeholders cannot agree on what the problem is. Achieving a shared understanding of the dimensions of the problem and different perspectives among external stakeholders who can contribute to a full understanding and comprehensive response to the issue is crucial because:

> The Holy Grail of effective collaboration—is in *creating shared understanding about the problem, and shared commitment to the possible solutions.* Shared understanding does not mean we necessarily agree on the problem ... Shared understanding means that the stakeholders understand each other's positions well enough to have intelligent dialogue about the different interpretations of the problem, and to exercise collective intelligence about how to solve it. Because of social complexity, solving a wicked problem is fundamentally a social process. Having a few brilliant people or the latest project management technology is no longer sufficient.[14]

Canada's Institute on Governance has developed a framework to facilitate active participation and citizen engagement. The principles include: 'shared agenda-setting for all participants; a relaxed time-frame for deliberation; an emphasis on value-sharing rather than debate; and consultative practices based on inclusiveness, courtesy and respect.'[15]

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12 *Ibid* at 27.

13 *Ibid*.

14 J Conklin, *Dialogue Mapping: Building Shared Understanding of Wicked Problems* (West Sussex: John Wiley & Sons, 2008) at 29, cited in APS Report at 27 [emphasis in the original].

15 Institute on Governance, *A Voice for All: Engaging Canadians for Change* (Report of the Conference on Citizen Engagement, Ottawa, 27–28 1998) at 25.

The lessons derived from the 'wicked problems' approach appear to be particularly apt for furthering our thinking on access to justice reforms. The APR and Institute on Government's frameworks for facilitating collaboration and active participation offer useful guidance that could be integrated into change processes aimed at increasing effective and meaningful access.

V. RETHINKING RULES: BUILDING CODES AND ZONING ORDINANCES

The wicked problems framework encourages us to develop shared understanding of the problem and shared-values to guide reform objectives and the reform process itself. It highlights the need for ongoing forums of engagement. From this perspective, innovation and flexibility are key and principles are preferred over rules. Within this framework, rules continue to have a role but we may need to rethink the nature of court rules and build in much more regular feedback loops to measure the impact of rules in specific situations. The rulemaking process should be highly iterative and incremental. To follow the building code analogy, it may be that we need to consider whether we need a new code for a different type of building. Perhaps we need to design a model building code and test it in various situations, creating greater room for flexible innovation. While the concept of the multi-door courthouse has been around for over a decade, it may be that the courthouse building code itself is unsound in that it does not take into account all those doors.

In addition to thinking about model building codes, 'zoning ordinances' should be on the shared access to justice agenda. In my view, the often unspoken element of the access to justice conversation is about the role of courts within an access to justice system. We need to ask ourselves should reform be based on de-centering courts or re-centering courts? I favour the latter and am interested in the possibility of court rules as a mechanism to achieve a re-centered court as the main pathway to dispute resolution processes for legal disputes and referral to other services for non-legal aspects of people's problems. Re-centered courts are required to ensure the resolution of disputes and the declaration of rights that are required to keep our laws and legal system alive and relevant. Some American courts are moving into the zoning ordinance field in a way that has transformative potential. Chief judges are chairing

access to justice commissions,[16] making rules on mandatory pro bono[17] and actively taking steps to increase legal aid budgets.[18] Some of these initiatives make me positively squeamish because they are outside of our cultural references for the proper role for members of the Canadian judiciary. Nevertheless, the access to justice crisis requires us to expand our thinking in this direction. Ignoring the tough questions and challenges will, I believe, lead to a much-diminished role for courts and judges within our access to justice system: an outcome that would give new meaning to the term 'wicked problem.' Yes, court rules can increase access to justice, but we may need to rethink the very idea of court rules in order for them to contribute to access to justice in a substantive, meaningful, and lasting manner.

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16 See e.g. Texas Access to Justice Commission, online: <http://www.texasatj.org/>.

17 Mosi Secret, "Judge Details a Rule Requiring Pro Bono Work by Aspiring Lawyers" *The New York Times* (19 September 2012).

18 *Ibid.*