

Remarks of Hon. Gerard Mitchell at Think Tank on Access to Justice Nov. 25, 2011

It is often said by those in authority that access to justice is a fundamental right for everyone. If that is so, then it must include a right to legal information, advice and representation, because justice cannot be accessed without those. A right that cannot be exercised or enforced is no right at all.

When I was sworn into office as Chief Justice of the province in 2001 I expressed concerns to those present about the state of access to justice in the province. I thought the justice system was not well understood by the public, that it was too complex, and that legal assistance was unavailable to many.

That same year, in cooperation with the OAG, The PEILS and the PEI Branch of the CBA, I established a task force on access to justice. I chose those partners because, as the CJC has said in a recent speech, it is a fundamental responsibility of government, the legal profession and the courts to provide access to justice. The Task Force (TF) was chaired by former CJ of PEI Hon. Norman Carruthers and had 16 other members several of whom are with us today.

My hope was that the TF would find ways to make the justice system better understood, more user friendly, and more affordable.

The TF had no funds, limited support staff and its members all had day jobs. Despite these limitations the members worked diligently over the ensuing year and in July of 2002 came up with a final report containing many recommendations to improve access to justice in the province. A steering committee was established to implement the recommendations but it ceased operations in 2003 due to a lack of resources. That was disappointing. Nevertheless, when Ann Sherman, did her study of

self-represented litigants in 2008 she was struck by how much work had already been done within the courts to respond to the recommendations of the task force. She also noted some positive response from government to the recommendations of the Legal Aid sub-committee of the TF.

Ensuring access to justice is an ongoing process. Despite the enhancement to legal aid that followed the task force recommendations it has not been nearly enough satisfy the need. Far too many in our province remain unable to afford legal services yet are ineligible for the present legal aid program. This includes not just those living on incomes below the poverty line but also to many middle income earners.

Today we are here specifically to think and talk about strategies that might enable easier access to family justice. It is the area where the need to provide better access is greatest and most urgent. It is also the area in which the negative consequences of failing to provide access are the most profound. The instability arising from lingering unresolved disputes over custody, access, support and division of assets is extremely stressful. The consequences can be catastrophic for the parents and the children. In the context of family law access to justice is not just a legal issue it is also a health and welfare issue. People going through disputes around divorce and separation need lawyers to counsel and represent them especially when children are involved. The TF on A to J's subcommittee on legal aid concluded its report by emphasizing that in the family justice system, no matter what else is done to increase access to justice, there is simply no substitute for competent legal professionals acting for clients.

Whose business is it to ensure access to family justice? In a society that believes in justice and the rule of law it is everyone's business. However, as CJ McLaughlin has said, special responsibility lies with governments, the legal profession and the courts. Making justice accessible requires a coordinated and multi-pronged response by these three key players.

Governments may not have unlimited funds but they can set priorities as to how public monies are spent and how public resources are allocated. What good are governments if they cannot protect the poor and the vulnerable? Legal aid for these should be a government priority. I don't say that government should provide funds to litigate on and on *ad infinitum*. However, governments must provide more resources to assist those who cannot afford the legal services reasonably necessary to protect the basic rights of themselves and their children in family law cases. In the long run the additional costs to government will be more than offset by having a healthier, more stable and productive society.

Lawyers have a responsibility too. It is a privilege to be a member of the legal profession but it is a privilege that comes with conditions. The legal profession has a monopoly to provide legal service. Accordingly, it has an obligation to make the service which it monopolizes truly available to the public; not just the elite who can afford to pay high fees.

Courts can be part of the solution too by processes for resolving family law cases that are simple, fast, decisive and that tend to reduce acrimony and costs.

The CJC in a recent speech pointed out that access to justice is not just access to the legal system but to adequate dispute resolution. Litigation isn't the only way to resolve disputes. In many cases it is not the best way and it certainly not the cheapest way. When it comes to dispute resolution in family cases involving children the judicial system is too adversarial and dictatorial. It seems to me that in cases where the parties will need to have an ongoing relationship because of their children mediation, or something like it, would be a better option than litigation. In fact, some, like the CJ of Ontario, say mediation rather than litigation should be the default mode for the resolution in all family law cases. It is less adversarial, less formal, simpler and cheaper. It gets the parties to work together toward a cooperative solution.

I am not saying that mediation ought to be mandatory or that it suits every case. There are some cases where mediation is clearly inappropriate and in those cases forced mediation would be just another expensive step in the litigation process. Courts should establish a triage system and decide at the outset which cases are not amenable to resolution through mediation. These should be set on a fast track through the litigation process. Hopefully, in time fewer and fewer will have to go that route.