21ST CENTURY JUSTICE

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

to the Probus Club

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I. Introduction

Thank you very much for the honour of inviting me to speak here today. The Probus Club of Vancouver is well known for its mission to stimulate thought, interest and participation. By talking today about the future of our justice system, I hope that I will be able to contribute, however modestly, to your endeavours.

A recent headline in a legal publication featured this headline: "Judge decries 'horse and buggy' justice system."[1] The article beneath the headline referred to a pronouncement by Ontario Superior Court Justice Arthur Gans, in a report prepared in March, 2011 for the Canadian Judicial Council. It was accompanied by a large photograph of an ancient stationary buggy, to which were attached two mismatched mares of different hues of grey, standing stolidly outside the stone walls and grated bars of an ancient prison. The symbolism in the photo was potent — it sent a message a justice system that is old, ill-assorted, and not going anywhere very soon or very fast.

[1] Law Times, Vol. 24, No. 1, January 7, 2013.

Justice Gans was talking about the problems in the Canadian correctional system in keeping track of incarcerated offenders, which result in agreed statements of fact, and presentence, psychological and psychiatric reports not making it to the provincial institutions where inmates are held. But critics might, with some reason, extend the horse and buggy to other aspects of the Canadian justice system. Whether merited or not, the headline hit home for me. The question it posed struck home: does Canada really have a "horse and buggy" justice system?

My immediate response was "no". The Canadian justice system is widely admired throughout the world. Just a few years ago, Louise Arbour, a former colleague at the Supreme Court of Canada, reported that the Davos Institute had ranked Canada's justice system as the second best in the world.[2] Our police forces are professional and well-trained. Our prison system is widely admired. Our courts are more open and accessible than many other justice systems. Despite difficulties, most people who really need legal representation get it, at least in criminal proceedings. True, court cases sometimes drag on, but not for decades as in some parts of the world. And, corruption is virtually unknown. "No," I said, "we have a good justice system. It has its challenges, to be sure. But it is a system of which we can be proud."

But then I thought again. The question provoked by the headline was not whether Canada has a good justice system, compared to that of other countries. The question is whether we have an up-to-date 21st century justice system — a justice system that is in synch with the

[2] Louise Arbour, "Exporting Criminal Justice" (2001).

modern world and utilizes the up-to-date technology and knowledge to tackle the problems it is asked to deal with. That question, I found myself admitting, was a lot harder to answer.

After all, progress is a word not often associated with any justice system. It has been said that "judges and legal scholars can make archeologists seem forward-looking."[3] Perhaps the judiciary's reputation for being mired in the past arises from the fact that the law seeks constancy and predictability. Perhaps it has something to do with the fact that judges spend most of their time examining the past; trial judges pore over past events in the lawsuit before them, and appellate judges in turn scrutinize what the trial judges did – all events in the past. Perhaps it has to do with the law's focus on precedents, what courts have decided in the past. Or perhaps it is the role of the law in ensuring consistency and predictability. The truth is that judges and the judicial system in which they operate are in many ways backward looking. Even the courtrooms we sit in are rooted in tradition. If Samuel de Champlain or Sir Matthew Begbie walked into one of today's courtrooms, they would instantly recognize what was said and done: the physical structure of a courtroom is much the same, as are the rules of evidence and the adjudicative process.

When I finally confronted the question of whether Canada has a "horse and buggy" justice system, I found myself forced to say, "we could do better". Despite much progress in recent years, there still is a gap between the real world and the way people operate in it, and the way the justice system conducts its business.

[3] John Foreman, "The Future of the Courts in Champaign County: Summary of a Conference at the Champaign County Courthouse" (February 8, 2003), online: <http://www.co.champaign.il.us/circt/courtfut.pdf> at 3.

Today, I would like to share with you some thoughts on where we fall short of 21st century standards, and how we could do better. I will focus on the part of the justice system I know best — the court system and its aftermath, leaving policing to others.

So, in no particular order, here is my personal list of five areas in which we could do better.

Area #1

II. Communications in the Criminal Justice System

I will start with the concern that provoked Justice Gans' sobriquet of a "horse and buggy justice system" — the problem of hit and miss communications between courts and carceral institutions and between different parts of a carceral system. Important documents, including psychological and psychiatric reports and victim impact statements too often do not follow the offenders when they are taken to the penitentiaries.

The results of failure to promptly communicate information within the criminal justice system may be tragically botched treatment. A sentencing judge may intend one thing to happen when he or she sentences a person to prison, yet prison officials — lacking proper information due to gaps in the system — may do something quite different. Prisoners may be treated inappropriately, due to gaps in the information system. Clearly, the disconnect between the judicial and corrections system should be of concern to us.

The different bodies that deal with people charged and convicted with crimes need to work together to produce just results. To do so effectively, they must communicate with each other, and effective oversight must be brought to bear. And this must happen in real time, not after an unjust and tragic outcome. In the 21st century, when information passes electronically in an instant, we can and should do better. Whether the answer lies in allowing broader access to existing electronic information, better training for staff, lawyers and judges, of adopting new technology, ensuring proper communication between different actors tasked with the treatment and rehabilitation of offenders remains a challenge in the 21st century.

Area #2

III. Mental Illness and Addiction

People who suffer from mental illness and addiction consume a large chunk of the resources, human and material, that society allocates to the criminal justice system. This is a fact of Canadian life, whether we like it or not. And, it is likely to continue to be a fact of Canadian life.

I once asked the Chief of a large Toronto precinct what his biggest problem was. I thought he might complain of lack of funding or overbearing judges. He surprised me. “Mental illness”, he said. He went on to describe his jail filling up each night with addicted and ill people arrested on minor charges, warehoused for a while, maybe sent to court, only to be released to reoffend, in an unending cycle.

Until recently, the justice system approached mental health and addiction through a 19th century lens, both in terms of the substantive law and the procedures that apply to mentally ill people.

A century ago, mentally ill people who committed crimes were treated like common criminals. In 1843, in *M'Naghten Case,*[4] the law moved forward to recognize that if the accused did know the nature and quality of his act, he did not have the necessary *mens rea*, or intent, and could not be convicted of a crime. However, the person was not released. Instead, he was held in secure custody; not guilty but a prisoner for life. In 1991, the Supreme Court of Canada held that this violated the guarantee of liberty guaranteed by the *Charter of Rights and Freedoms*.[5]

In response, Parliament enacted Part XX of the *Criminal Code*. Under this new process, mentally ill offenders are now channeled into a treatment/carceral regime under the supervision of Boards staffed by lawyers, psychiatrists and lay people. The Boards are charged with the dual task of ensuring appropriate medical treatment for the mentally ill person and making appropriate orders having regard for his liberty and for the security of the public.

The system has worked well. Incarceration has been reduced, and recidivism rates have fallen. Public safety has been maintained. The people in the system are treated humanely and fairly, and the rehabilitation rates are among the highest in the world.

[4] (1843) 8 E.R. 718.

[5] *R. v. Swain*, [1991] 1 S.C.R. 933.

Part XX recognizes that mental illness is what the term implies – an illness – and builds upon rapid advances in the treatment of mental illness. Diseases like schizophrenia and bi-polar disorder, we now know, are linked to chemical changes in the brain and are often treatable by medications which offer hope for alleviating the symptoms of these diseases and helping those living with mental illness to lead healthier, more productive lives.

Aside from improved treatment, specialized mental health and addiction courts have been established throughout Canada, to the end not only of ensuring appropriate and just treatment, but of helping the offenders deal with their illnesses and addictions and get off the streets and out of the court. Mental health courts provide an alternative to criminal prosecution by diverting accused with mental health problems to treatment programs in the community. As Brian Lennox, Chief Justice of the Ontario Court of Justice, said at the opening of the Mental Health Court in Ottawa:

> The Ottawa Mental Health Court is an example of a progressive movement within criminal justice systems in North America and elsewhere in the world to create "problem-solving courts". These courts, with collaborative interdisciplinary teams of professionals and community agencies, attempt to identify and to deal with some of the underlying factors contributing to criminal activity, which have often not been very well-addressed by the conventional criminal justice process. The goal is to satisfy the traditional criminal law function of protection of the public by addressing in individual cases the real rather than the apparent causes that lead to conflict with the law.

Mental health courts have opened in Ontario, British Columbia, New Brunswick, Manitoba and Newfoundland. Many other jurisdictions, including British Columbia, Manitoba, Nunavut and Yukon, are in various stages of developing these courts.[6]

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[6] "Court for Mentally Ill to Open" *Kitchener-Waterloo Record* (June 15, 2005), online: Canadian Mental Health Association <http://www.ontario.cmha.ca/content/mental_health_system/public_issues.asp?cID=5834>.

Because mental health courts are a recent phenomenon, we still lack hard evidence on their efficacy.[7] However, anecdotal evidence from people working in the system is that mental health courts, with their focus on rehabilitation rather than punishment, are working. They are treating people appropriately. They are breaking the cycle of court-jail-reoffending-and back to court. And this, in turn, makes our streets safer and relieves pressure on the regular courts. And such data that does exist supports this position. A 2006 evaluation of the Brooklyn Mental Health Court, for example, indicated significant improvements in several outcome measures, including substance abuse, psychiatric hospitalizations, homelessness and recidivism.[8] In a recent article on the mental health court in Saint John, New Brunswick, Provincial Court Judge Michael McKee stated "90 per cent of its clients had completed the requirements of the program in the mental health court and out of that number, 85 per cent of those never returned to court."[9] Those are encouraging statistics.

Still, we need to do more. The challenge is to find the resources, human and financial, necessary to deal with the needs. We have gained huge understanding of mental illness and

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[7] R.D. Schneider, H. Bloom & M. Hereema, *Mental Health Courts: Decriminializing the Mentally Ill* (Toronto: Irwin Law, 2007). Critics worry that they magnify the stigma associated with mental illness and convey the message that persons with mental health problems are a special population whose behavior requires extraordinary institutions and controls: see S. Stefan & B.J. Winisk, "Foreword: A Dialogue on Mental Health Courts" (2005) Psychology, Public Policy and Law 11(4) 507. Others have argued that mental health courts serve as coercive agents, tantamount to forcing non-dangerous people with mental illness into treatment: see T. Seltzer, "Mental Health Courts: A Misguided Attempt to Address the Criminal Justice System's Unfair Treatment of People with Mental Illnesses" (2005) Psychology, Public Policy and Law 11(4) 570 and S. Stefan & B.J. Winisk, "Foreword: A Dialogue on Mental Health Courts" (2005) Psychology, Public Policy and Law 11(4) 507.

[8] Kelly O'Keefe, *The Brooklyn Mental Health Court Evaluation: Planning, Implementation, Courtroom Dynamics, and Participant Outcomes* (New York: Center for Court Innovation, 2006), online: <http://www.courtinnovation.org/_uploads/documents/BMHCevaluation.pdf>.

[9] CBC News, "Judge Optimistic Over Mental Health Plan: Judge Michael McKee Hoped More Attention Would be Paid to Mental Health Courts" (May 5, 2011), online: <http://www.cbc.ca/news/canada/new-brunswick/story/2011/05/05/nb-mental-health-mckee.html>.

addiction, and how it can be treated. But too often, the resources required to implement that understanding are absent. We are using the horse and buggy when we could be using – if not a Cadillac – a dependable Toyota. A 21st century approach to mental illness and addiction in the criminal justice system would use what we know to prevent addictions through education, to help the mentally ill through early and effective treatment, and to assure that the justice system works to rehabilitate them.

Area #3

IV. Effective Dispute Resolution

This brings me to the civil side of the justice system. One of the main responsibilities of the justice system is to provide a fair and effective forum where citizens and commercial actors can resolve their disputes. Historically, this involved a trial before a judge or before a judge and jury.

In modern times, where trial procedures are sophisticated, evidence copious, and expert witnesses ubiquitous, this process is often expensive and takes a very long time to complete.

To make up for legal help they cannot afford or obtain, Canadians are increasingly acting as their own lawyers. Hence the growth of self-represented litigants in our courtrooms. In some court, up to 40% of the cases involve self-represented litigants.[10] This places an inordinate

[10] See Andre Gallant, "The Tax Court's Informal Procedure and Self-Represented Litigants: Problems and Solutions" (2005), 53 Canadian Tax Journal 2. In Anne-Marie Langan, "Threatening the Balance of the Scales of Justice: Unrepresented Litigants in the Family Courts of Ontario" (2005), 30 Queen's L.J. 825, the author cites data

burden on the presiding judge and counsel for the other side. It distorts the adversary process on which our trial system is based. And it further delays and increases the cost of justice. Not surprisingly, self-represented litigants do not fare as well as litigants who are represented by lawyers,[11] bringing even further hardship on those already most in need of help. As I have stated on another occasion, "The most advanced justice system in the world is a failure if it does not provide justice to the people it is meant to serve."[12]

A 21st century justice system would retain the civil trial, which continues to function well for many disputes. But it would also look at 21st century realities and provide alternatives. Many of these are already being used and explored, and enjoying some success — mediation, arbitration, and assistance for in-person litigations, to mention only three.

Beyond these palliatives, however, we need to dig deep and ask a more fundamental question — what procedure is appropriate for this particular dispute? Just as you don't use a sledgehammer to crack a nut, not every dispute requires a full-blown trial process with discoveries, experts and week-long hearings in expensive and expensively-staffed courtrooms. A dispute between a landlord and tenant, for example, may be best resolved by a telephone trial presided by a trained adjudicator. The process allows each party to be heard and is cheap and effective — often more effective than a long drawn-out trial. Specialized tribunals increasingly

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compiled by the Ontario Ministry of the Attorney General, which show that in 2003, 43.2 percent of applicants in the Family Court Division of the Ontario Court of Justice were not represented by counsel when they first filed with the court. The average percentage of unrepresented litigants in Ontario family courts between 1998 and 2003 was 46 percent.

[11] Camille Cameron & Elsa Kelly, "Litigants in Person in Civil Proceedings: Part I" (2002) 32 Hong Kong L. J. 313.

[12] Rt. Hon. Beverley McLachlin, P.C., "The Challenges We Face" [remarks presented at the Empire Club of, Toronto, 8 March 2007], online: Supreme Court of Canada http://www.scc-csc.gc.ca/court-cour/ju/spedis/bm07-03-08-eng.asp (citation omitted).

provide rapid justice in a host of areas, ranging from labour law through immigration and refugee matters — all subject to judicial review to ensure that the rule of law is maintained.

The watchword is simple: "Let the solution fit the problem."

Area #4

V. Better use of technology in judicial proceedings

I have already highlighted the need to avail ourselves of 21st century technology in information transmission between courts and carceral institutions in the criminal context. The same applies more broadly to the whole justice system.

Too often, 21st century courts are still operating on the paper-paradigm of the 19th century. While the quill may have been abandoned, documents are still produced on paper and physically sent or taken to the Court House Registry for filing, a process which is replicated for each party involved in the litigation. Transcripts of evidence are reproduced in multiple copies for appeal courts. Judges increasingly use computers to help them write their reasons, but many still do their cutting and pasting the old-fashioned way, with scissors and scotch tape. The paper paradigm, which manifests itself in these and other ways, is slow, expensive and often less effective than the modern electronic paradigm.

At the Supreme Court of Canada, we have introduced electronic filing for documents. Our courtroom has been equipped to allow lawyers and the Justices to use computers in their

presentation. We put the material for our monthly meetings on iPads; instead of heavy volumes of reading material to slug home on the weekend, we take home a slim iPad, with everything we need on it. This, we increasingly realize, is the 21st century way to do business — including court business.

Another 19th century judicial paradigm that we need to reflect on is the "in-person" paradigm — the paradigm that assumes that every witness — no matter what the nature of her evidence or how difficult it may be for her to travel the sometimes long distances between her court and her home — to attend the court in person. Where credibility and the right to test the evidence by cross-examination are in issue, personal attendance in the courtroom may be necessary. But where the issue is less critical, what is wrong with allowing a witness to testify electronically? In some of our rural and remote areas, judges are allowing witnesses to testify by video or even Skype. As technology improves, so will our ability to reduce costs, delays and adjournments through the use of technology.

At the same time, we must be careful not to adopt technology for technology's sake. The primary goal of our justice system is to resolve the litigants' disputes in an impartial and efficient manner. Technology, to be useful, must advance that goal. A courtroom laden with computers may appear modern, but it will not serve the interests of justice if those computers do not make the process more efficient, or worse, bog down the entire process with useless technological complexity. If we want to develop the courtroom of tomorrow, we must be very diligent in seeking that technology which serves to advance our needs.

Area #5

VI. Communication with the Public

I have been speaking about how the justice system can and is modernizing internal processes, to bring them into the 21st century. In concluding, let me turn the spot light to communications between the justice system and the broader public.

Canadian courts and tribunals, with rare exceptions, operate on the open-court principle. The courts are the peoples' courts, and the public has a right to know not only what they decide, but how the hearing process is conducted. It is vital that Canadians have confidence in their institutions. Foremost among those institutions are the courts. And confidence depends on transparency. People must be able to see what is being done, and be assured that it is being done with integrity, independence and an appreciation of Canadian values.

The old-fashioned 19th century way of respecting the open-courts principle was to allow the public and the press to come to the court house to see what is going on. But for many Canadians, physically attending the proceedings may be difficult. Why, they ask, don't the courts use modern technology to make their proceedings available to television broadcasters, or better yet, stream them on the web?

There may be good reasons why criminal trials should not be televised or webcast. Cameras in the courtroom may impact on witness and jurors, and negatively affect fairness and

dignity of the proceedings. For many, the O.J. Simpson trial still stands as a warning against the show-biz distortions televised trials.

This said, I believe that where they will not impact adversely on the process, bans on televising and web-casting are undesirable. The Supreme Court of Canada has allowed its hearings to be televised for more than 23 years and for several years has webcast its proceedings so that the public can follow along, should it wish to do so. We have encountered no problems and while watching a complex court argument at 3 AM is not everyone's idea of how to enjoy an insomniac right, and while our ratings do not pose a threat to late night cinema, to my surprise we have a loyal following of people who watch our hearings and argue about what we should decide over morning coffee at Tim Hortons. What could be better for the Canadian justice system, and public appreciation of how it helps preserve Canadian values?

What then of communications from people in the courtroom to the outside, by texting or "tweeting"? Different courts are developing different protocols on tweeting from the courtroom, aimed at allowing maximum communication while preserving courtroom decorum.

Should courts themselves be tweeting 140 character-long summaries of their decisions? That is debatable. Should courts be delivering reasons on YouTube? That is what the Supreme Court of the U.K. is now doing and apparently getting a lot of hits. These are just some of the questions being posed.

What is clear is that 21st century electronics are here to stay, and will play a role in how Canadians follow court proceedings in the years to come.

VII. Conclusion

I began with this question: does Canada have a horse and buggy justice system? The answer to that question is “no”: we have a good justice system that has moved a considerable distance towards modern solutions for the effective treatment of prisoners and the mentally ill, and to find approaches to dispute resolution that fit the issues at hand. We are using technology more effectively and our courts are increasingly open and accessible to the public. Yet, we can do better.

The justice system has some distance to go to pull itself fully into the 21st century; this cannot be denied. But I, for one, take comfort in the progress that has been made in the last decade. Judges and lawyers, spurred on by the public and the press, are acknowledging the need for a modern effective justice system that not only produces just results, but serves Canadians as effectively and fairly as possible. And they are taking steps to meet that need.

Thank you for your interest in these issues, which touch us all profoundly.