

CONSTITUTIONS AND JUDGES:
CHANGING ROLES, RULES, AND EXPECTATIONS.

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July, 7, 2011

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In 1929, overturning the Supreme Court of Canada's decision that "Persons" in the constitution excluded women, Lord Sankey, on behalf of the Privy Council, directed the Court to interpret the Canadian constitution as a "living tree capable of growth and expansion", and in a "large and liberal", not a "narrow and technical" way. The Supreme Court of Canada has, in recent years, taken this direction very seriously in its interpretation of the *Charter of Rights and Freedoms* and has, as a result, reminded us of Isaiah Berlin's aphorism that there is no pearl without some irritation in the oyster, since there is no doubt that this large and liberal interpretation has by now produced some large and liberal irritation.

This is not surprising since the *Charter* represents the constitutional protection of "rights" and "rights" is a subject about which the public has many opinions. There is a story about the eminent New York intellectuals Diana and Lionel Trilling. Someone asked a friend of theirs if they had a view of the river in their apartment near Columbia University. "Of course", came the reply, "the Trilling's have a view about everything". As does the public about rights.

Since you too have a version of our *Charter* in your *Human Rights Act*, I thought it might be of interest to tell you how Canada has responded to the constitutionalization of its rights. When examining the impact of the *Charter* on the legal system, I turn instinctively to musical models. The interrelationship between judges and legislatures is not as cerebral as a Bach fugue, though

undeniably contrapuntal; not as passionate as a Brahms symphony; not as mischievous as Prokofiev; and not as arcane as Schoenberg. It is Mozart – at times lyrical, at times profoundly moving, at times simple, at times complex. But the notes are always in perfect harmony towards a common cause. And the cause is rights. Yet there is inevitable fear when something as policy-laden as rights is constitutionalized and judicialized. People worry about governance and whether the right institutions are doing it.

I graduated from law school in 1970 and have seen many changes in the justice system since then, some of which I'll mention later in this lecture. But the one that to me is the most intriguing, is the change in the way people talk and think about their rights and, in particular what role judges have in developing and protecting them. In fact, people talked about that topic hardly at all in those days. Since the *Charter of Rights and Freedoms*, however, they talk of little else. It has been a very vigorous public conversation, with an astonishing array of verbal artillery raising fundamental issues about the role of the courts in a constitutionalized democracy.

So why was the public asking so many questions? I think that a lot of the public's discourse and curiosity had its source in the sixties, which had hosted such breathtaking social changes. The election of John F. Kennedy at the beginning of the decade sent a message of change and youth and difference all around the

western world. The riots in the ghettos, the civil disobedience spawned by Vietnam War, the flower children who resisted everything but non-conformity, and the general impatience with everything that had gone before, were all translated by the late sixties and early seventies into a demand for dramatic revision of all aspects of the social contract.

In Canada, children demanded both more and less from their parents, women demanded more from everyone, persons with disabilities demanded access, minorities demanded an end to discrimination, aboriginal people demanded self-government, and Quebec demanded independence. It was very clear by the end of the sixties that no institution would be untouched by the performance appraisals from this new generation, and it was also clear that every appraisal would likely find every institution wanting. It was impossible not to respond to the demands for change, and it was impossible to ignore the cry that what appeared to work for some was no longer working for many.

My generation, I suspect, will go down in history as the transition era. It is in the nature of transitions that they are difficult. And it is particularly difficult for *this* transition era because of the contemporaneous transitions in the world around us. What we have in this transition is a proliferation of responders and responses: the courts responding to shifting social realities; the economy responding to

shifting political realities; the political environment responding to shifting economic realities; and individuals responding to all of the above.

Let us pick just one area, family law, to see how much of a tidal wave of reform this generation has seen. We went from separate property to equal property to pensions as property. We went from *dum casta* clauses to casual connections to clean-break theories and finally to support as compensation. We went from women upon marriage having to quit the paid labour force, to the overwhelming majority of mothers with children under six being *in* the paid labour force. We went from no divorce to over a third of Canadian families divorcing. We went from pre-marital virgins to accessible birth control to the sexual revolution to surrogacy and reproductive technology. We abolished the unity between husband and wife, introduced the constructive trust, extended it to common law relationships, extended common law relationships into spousal relationships, and extended spousal relationships to same sex couples.

We moved from children being given to the least blameworthy spouse to children being given to the best parent. We gave children lawyers to speak for them, and we gave them the possibility of being given to both parents jointly. We went from the tender years doctrine to the best interests principle. We gave children access to the criminal courts to prevent their sexual exploitation from

people they had trusted and we stopped caring whether their parents were legitimate.

We saw women's shelters, increased violence, the debate about "recovered memories" and "mommy tracks", the spread of Aids, multiculturalism, political correctness, deficit preoccupations, the rise of religious fundamentalism, the *Charter of Rights and Freedoms*, Quebec and western nationalism, free trade agreements, global pressures, Microsoft, Reality TV, and the cultural interminability of U2, the Rolling Stones, and Newt Gingrich.

It is quite a picture. Any art gallery would be proud to hang it in its post-modern section. But just one glance at the cluttered canvas, at the different textures and colours and shades, at the sharpness of some of the images and the haziness of others, and we instantly understand why people today are so confused about how they and their law are supposed to respond to all these realities in the social environment after having spent a century ignoring them. And on top of all this we added demands that the right to social pluralism be recognized.

So this is the historical, social and cultural background for the public's conversations about what they think judges should be doing. The debate over the appropriate scope of the judicial role is not new, but what is surprising about its more recent incarnation is the anxiety raised over issues most judges have long

considered truisms. And the anxiety, it seems to me, clearly springs from the constitutionalization of rights in the *Charter* 30 years ago, an event that brought most of the judicial myths out of the closet, dusted them off and paraded them even though the styles no longer fit. The primary magnetic myths to which the public has become so attracted, are those which hold that judges should only interpret, not make law; that “biased” means having opinions; that the courts have become “politicized”; and that the courts should pay more attention to public opinion.

Let’s start by acknowledging that the question in almost all judicial decision-making comes down to a question of how you frame the issue, and how you decide which of the available choices should be given more or less weight.

The classic story of Max Brod, Franz Kafka’s best friend and lawyer, is a story frequently used by professors of jurisprudence to show how the framing of the issue can affect the outcome. Kafka’s last request was that his unpublished manuscripts all be burned unread. Brod not only read them, he published them. That is how we came to have available to us, among other works, Kafka’s novel, *The Trial*. Brod wrestled with that he called his “conflict of conscience”, and decided that the works were literary treasures worthy of public access and, therefore, worthy of publication in defiance of Kafka’s last wishes.

Was Brod right? Whose perspective decided: Kafka's as testator, or Brod's as literary executor? Did it matter that Brod was a lawyer? Was he entitled to decide the literary merit of the work? Does it matter whether he was right or wrong about its quality? Did Brod do the public a favour publishing the book? Is the public interest relevant to this issue? In other words, in interpreting the relevant language, law and human behaviour, can there be any doubt that there is often more than one valid, principled judgment available?

That leads us to our first myth, namely, that judges should not make law, they should only interpret it. This is entirely unrealistic. Almost every time judges interpret, they make law and, implicitly, weigh competing values. Long before we had a *Charter*, we had judges taking values into account when they interpreted statutes or phrases or legal entitlements. When we consider the following examples, we see how difficult it is to say that these judges were not reaching legal conclusions based on their understanding of, or sympathy, or antipathy for current social values.

The judge who in 1873 said "the paramount destiny and mission of women are to fulfill the noble and benign office of wife and mother"; the judge who in 1915 thought admitting women to the legal profession would be a "manifest violation of the law of . . . public decency"; the judge who said in 1905 that fault-based support laws were desirable because wives "ought to be preserved from

imminent temptation”; the court that said in 1929 that the word “Person” includes women; the courts that said in 1949 that sanctity of the contract and restrictive covenants to precedence over the rights of Jews to purchase property; the court that said in 1939 that freedom of commerce took precedence over the rights of Blacks to be served beer; and the entire history of common law. That was all law making, it was all weighing and applying values and policy, and it was all before the *Charter*. And not one of the judges who decided them was ever accused of unduly making law, or of being politicised, or activist, or of having an “agenda”. So what has changed is not so much what judges do, but how what they do is described by people who are unhappy with their decisions.

Besides, values and social realities change over time. Judges should not be shy about acknowledging this. In 1776, when the American Declaration of Independence pronounced that all men were created equal, many of the framers of the Constitution had slaves, and women could not vote. In 1633, Galileo was forced to apologise publicly for spreading news of the evidence revealed by his telescope – that the earth revolved around the sun, not the other way around as the Church had taught for centuries. And, in 1938, the then editor of *Saturday Night* magazine, said “The business of women is to keep house and keep quiet”. Truths change over time, and judges cannot be hesitant to acknowledge these changes.

Weighing values and taking public policy into account does not impair judicial neutrality or impartiality. Pretending we do *not* take them into account, and refusing to confront our personal views and be open in spite of them, may be the bigger risk to impartiality. It is of course fundamental that judges be free from inappropriate or undue influence, independent in fact and appearance, and intellectually willing and able to hear the evidence and arguments with an open mind. But neutrality and impartiality do not and cannot mean that the judge has not prior conceptions, opinions or sensibilities about society's values. It means only that those preconceptions ought not to close his or her mind to the evidence and arguments presented. We must be prepared, when the situation warrants, to experience what Herbert Spencer called *The Tragedy of the Murder of a Beautiful Theory by a Gang of Brutal Facts*. In other words, there is critical difference between an open mind and an empty one.

Nor do I think the tendency to use labels or epithets instead of analysis is particularly enlightening in examining how the courts interpret rights. Provocative phrases may all too easily become shorthand ways to avoid thinking through rights issues.

Two of the labels which are least helpful are that the courts are becoming "politicized" or that they are becoming "activist". The courts are becoming nothing they have not always been: reviewers and interpreters of the rules to which

society, through the legislature, has proclaimed itself subject. In Canada, the *Charter* is the klieg light that exposed this judicial reality, it was not the instrument of a new judicial norm. The relationship between courts and legislatures in the interpretation of public values has not substantially changed with the *Charter*, only the public's interest has. In the 19th century, for example, the British Prime Minister, Lord Salisbury, felt sufficiently moved to rebuke Lord Halsbury as follows for the House of Lords' routine declawing of social welfare and labour legislation: "The judicial salad", he said "requires both legal oil and political vinegar, but disastrous effects will follow if due proportion is not observed".

And in the 1930's, President Roosevelt was so incensed by the U.S. Supreme Court's striking down of his New Deal legislation that in 1937, just two weeks after his second inaugural, he introduced his court-packing Judicial Reform Bill, only to withdraw it discreetly six weeks later when Justice Owen Roberts switched sides to help form a pro-New Deal Majority.

But courts *preventing* rights like those in the era of Lord Halsbury, or in the era of Roosevelt's court-packing plan, were rarely dismissed as being politicized, even though they were no less "activist" than later courts which *expanded* them. If it is clearly appropriate for courts to deal with the interpretation of rights, one wonders why they are deemed to be "politicized" or "activist" only when they interpret them expansively.

And if one feels that this interpretive role has potential for interfering with the Parliamentary supremacy which emerged triumphant from Glorious Revolution of 1688-89 overthrowing the obstructive Stuart Kings, it was ever thus. The interpretive judicial function, whether of statute or common law, has always necessarily involved the shifting of normative considerations, not only because laws derive from and operate in a social system and culture of values, but because judges do too. Insofar as the shifting of legal choices is the shifting of policy values, judges, in interpreting law, do consider and always *have* considered, in addition to logic and precedent, the values or policy implications their legal conclusions represent.

It is worth remembering too the transcendent truth that while both courts and legislatures are entitled to enforce rights, only the courts have the institutional characteristics that best offers the possibility of responsiveness to minority concerns in the face of majoritarian pressures, namely, independence. Only courts have the independence from electoral judgment to risk controversy in enforcing rights. Controversy attracts attention. Attention attracts criticism, and the favourite criticism of courts in the enforcement of rights is the suggestion that they have become “politicized” or “activist”, when in fact all they have done is perform the interpretive duty assigned to them by the legislature.

And that in turn obliges us to consider whether controversy is such a bad thing? Most Canadians, would probably think so at first blush. Our former Prime Minister Mackenzie King, who helped develop Canada's allergy to controversy, was described by Frank Scott in the poem "W.L.M.K." as follows:

He blunted us.
 We had no shape
 Because he never took sides,
 And no sides
 Because he never allowed them to take shape.
 He skilfully avoided what was wrong
 Without saying what was right,
 And never let his on the one hand
 Know what his on the other hand was doing.

If argument or debate is crucial to our national or personal intellectual development, and I believe it is, controversy, properly appreciated, can be an excellent teacher. Through controversy we can learn not only the views of others, but our own. It is a way to discover, in public, who we are, what we think, and what we believe in.

This was emphasized in an excellent essay called "On Controversy" published a few years ago by Robert Fulford, a distinguished Canadian journalist. Fulford showed how much Canada learned about culture from the controversy surrounding the National Gallery's 1990 acquisition of Barnett Newman's painting Voice of Fire. The painting had been on loan from Newman's widow since the

Gallery's opening show in 1988. Two years later, the gallery bought it for \$1,760,000, creating a furor over such an expenditure for what looked like a bunch of simple stripes.

Much of the criticism came from people who had not actually seen the painting, but whose attention was nonetheless captured by its cost. But whether or not their opinions were valid, did not, for Fulford, alter the fact that their utility lay in the debate they generated, a debate that shed light on the National Gallery, Barnett Newman, and cultural policy in Canada. In other words, controversy can be healthy if it constructively directs our attention to important matters.

I think the same can be said about many judicial controversies, namely, that it is increasingly the case that through controversy, judges are revealed to the public and the public's opinion is revealed to us, often constructively directing our mutual attention to important matters. Out of the ashes of controversy can emerge the phoenix of awareness – public awareness of who the judiciary is and what it does, and judicial awareness of who the public is and why what it thinks, matters.

But this does not mean that public opinion offers unalloyed illumination for judicial guidance. Society is horizontal and it is vertical, and it is practically impossible to know what "consensus" means. In Edith Wharton's *The Age of Innocence*, the van der Luydens and Mrs. Manson Mingott were the custodians and

interpreters of social norms in Old New York. They were the self-appointed and accepted arbiters of what passed for public opinion at the time. Judges have no such omniscient oracles of prevailing social opinions. Nor should they.

Public opinion, in its splendid indeterminacy, is not evidence. It is a fluctuating, idiosyncratic behemoth, incapable of being cross-examined about the basis for its opinion, susceptible to wild mood swings, and often unreliable. Part of the task, in fact, may be to reach a conclusion *despite* the perceived, prevailing public opinion. When we speak of an independent judiciary, we are talking about a judiciary free from precisely this kind of influence. As Lillian Hellman once said: "I will not cut my conscience to fit this year's fashions".

In framing its opinions, the public is not expected to weigh all relevant information, or to be impartial, or to be right. The same cannot be said of judges.

But although judges are not accountable to public opinion in the same way as are elected officials, this does not mean that they are not accountable. While they may not be accountable to the public's *opinion*, they are nonetheless accountable to the public *interest* for independent decision-making based on discernable principles rooted in integrity. Performing the task properly may mean controversy and criticism. But better to court controversy than to court irrelevance, and better to court criticism than to court injustice.

Which brings me back to Canada. Our constitutional entrenchment of the Charter was designed to both represent and create shared, unifying national values of compassion, generosity and tolerance. It is the mirror in which we see our rights reflected and obliges us to ask "Are we the fairest of them all?". But it is also true that if Isaiah Berlin was right that there is no pearl without some irritation, the Charter is by now a whole necklace. When we got the *Charter of Rights and Freedoms*, we got a completely new judicial mandate. To the constitution's division of powers, it added rights: civil rights, like the freedoms of religion, association and expression; the right to counsel; and the right to security of the person. And human rights, like equality, linguistic rights, aboriginal rights and multiculturalism. What Canada got with the *Charter* was a dramatic package of guaranteed rights, subject only to those reasonable limits which were demonstrably justified in a free and democratic society, a package assembled by the legislature, which in turn, it bears repeating, assigned to the courts the duty to decide whether its laws, policies or practises met the constitutional standards set out in the *Charter*.

In the first decade of *Charter* adjudication, our Supreme Court was energetic. It struck down Sabbatarian and sign laws, said equality meant more than treating people the same, and decriminalized abortion. It ventured fearlessly into the overgrown fields of the law and cut a wide path for other courts to follow. The

public cheered. Even the media cheered. It was clear that the sixties and seventies had generated a public thirst for rights protection, and *Charter* adjudication in the Supreme Court in the eighties was beginning to quench that thirst. In that first decade, when the Charter was young and almost universally adored in English Canada, it seemed that it would deliver on every nation-building promise that had inspired it. It was the noble risk that had paid off.

In the second decade, however, when the *Charter* was in its teens, parts of the nation started to rebel. Almost imperceptibly at first, when the *Charter* became an adolescent, public pride in its grasp seemed to turn into strident fear over its reach. That is when we got panic attacks about the fate of democracy. What had always been seen as a complementary relationship between the legislature and the judiciary, was recast as a competitive one.

The critics made their arguments skilfully. In essence, they turned the good news of constitutionalized rights, the mark of a secure and mature democracy, into the bad news of judicial autocracy, the mark of a debilitated and devalued legislature. They called minorities seeking the right to be free from discrimination, special interests groups seeking to jump the queue. They called efforts to reverse discrimination, "reverse discrimination". They pretended that concepts or words in the *Charter* like freedom, equality and justice had no pre-existing political aspect and bemoaned the politicization of the judiciary. They trumpeted the rights of the

majority and ignored the fact that minorities are people who want rights too. They said courts should only interpret, not make law, thereby ignoring the entire history of common law. They called advocates for equality and human rights “biased”, and defenders of the *status quo* “impartial”. They urged the courts to defer to legislation, unless they disagreed with the legislation. They said judges are not accountable because they are not elected, yet held them to negative account for every expanded right. They claimed a monopoly on truth, frequently use invectives to assert it, then accused their detractors of personalizing the debate.

And to what end? To stop the flow of rights streaming from the courts. But the criticisms would prove to be a finger in the dike. They could stop neither the flow nor the people along the shore cheering the progressive currents.

And here is the irony of where we find ourselves today. We spent the last decade of the last century listening to a chorus moaning over the fate of a majority whose legislatively endorsed wishes could theoretically be superseded by those of judges, only to learn in poll after poll that an overwhelming majority of that majority is happy, proud and grateful to live in a country that puts its views in perspective rather than in cruise control; who prefers to see judicial rights protection as a reflection of judicial integrity or independence rather than of judicial trespass or activism; and who understands that the plea for judicial deference may be nothing more than a prescription for judicial rigormortis.

I think that by adding the Charter in the last 30 years to the public's arsenal of rights protectors, we not only thereby added more rights, but undoubtedly also added expectations that more needs will be treated as rights and not merely as aspirations. And thirty years from now, those demands in turn will lead, as now, to people who criticize the courts for doing too much – or not enough. But as we grow more comfortable, as we should, with the inevitability of the criticisms, the more both the courts *and* the legislature will comfortably do what they are supposed to do without looking over their shoulders, confident in the knowledge that the rights business is booming and that there is more than enough to go around.

We will never stop the debates over the role of the *Charter*, the qualifications of its interpreters, or the muscularity of its remedies. Nor should we even try. Constitutionalizing rights is a mark of a secure and mature democracy, as is the controversy surrounding them. No less is the *Charter* secure and maturing, because rights themselves are works in progress. But at least there is progress.

So where are we now? Where we are now is where we've been placed by the crash of four planes.

We realized to our horror that while we were riveted on hanging chads and butterfly ballots, terrorists were next door learning how to fly commercial airplanes

into buildings. In less than two hours on the morning of September 11, we went from being a Western world luxuriating in conceptual conflicts, to being a western world terrorized into grappling with fatal ones.

I think what irrevocably shocked us about the horror of September 11, was how massively it violated our assumptions that our expectations about a just rule of law were universally shared, at least to the extent that they would be respected in North America. Whether these expectations were reasonable is not at issue. They were genuine. We felt safe. We no longer do.

What does this mean for the perception and reality of the independence of the judiciary. To begin with, it means that we in the justice system are expected to deliver justice, and to protect rights and freedoms in the turbulence created by a public that is feeling particularly raw, a public with a heightened sense of injustice and a heightened thirst for justice.

Does that impose new responsibilities on judges? I would argue that it does not.

In its vulnerability, the public will seek to have its confidence in justice restored and confirmed, which will, I think, likely lead the public to the justice path that is represented by the impartial and independent application of the rule of law, a path that creates the expectation that despite the intensity of the agitations of the

moment, the justice system will continue with integrity to perform its time-honoured role as the arbiter of disputes between the individual and the state, between states, and between individuals.

The public is likely to be apprehensive and raw for a long time. And that in turn means that judges, as members of the justice profession, will have to be vigilant for a long time: vigilant that we are neither over nor under-reacting; vigilant that we are paying closer attention to the law and the evidence than to our own fears or misconceptions; vigilant in remembering that compliance with public opinion may jeopardize compliance with the public interest; and vigilant that our independence and impartiality are not cauterized by controversy. Vigilant, in short, that we do our best to keep doing our jobs properly. And that means that judges have to continue to keep the public confident in the possibility that no matter what, rights and freedoms will be pursued and protected.

But no matter the issue, the role of judges will continue to be the independent and evolutionary determination of what justice demands, guided by the fundamental values and principles of constitutional democracy and by a determination to do so with the integrity history rewards and the future requires.

But I do have a deep and lingering concern I want to close with, and it is not about judges, it is about the way the justice system delivers justice. It is, in short, about the bigger picture in the 'access to justice' frame.

When I was in first year university, everyone told me to take Philosophy with Professor Marcus Long. In the very first class, he asked: 'If a tree falls in the middle of a forest and no one hears it, does it still make noise?' I turned to my best friend Sharon and said 'I'm outta here.'

Now that I'm older and don't have the answers to everything the way I thought I did when I was 18, I realize what a wonderfully instructive metaphor Marcus Long's question is. If you can't hear something, you don't know about it, and if you don't know about it, then it probably doesn't exist for you. And if it doesn't exist for you, there's no need to do anything about it.

But that doesn't mean the tree didn't fall and make a noise. And it doesn't necessarily mean we can ignore it. It may have caused a lot of damage, and the longer you leave that damage, the harder it'll be to fix. So what's the noise our profession can't ignore? The sound of a very angry public.

And it's a public that's been mad at us for a long, long time. Like the character from the movie *Network*, I'm not sure they're going to take it anymore. And frankly, I'm not sure they should.

I'm talking of course about access to justice. But I'm not talking about fees, or billings, or legal aid, or even pro bono. Those are our beloved old standards in the "access to justice" repertoire and I'm sure all of you know those tunes very well. I have a more fundamental concern: I cannot for the life of me understand why we still resolve civil disputes the way we did more than a century ago.

In a speech to the American Bar Association called "The Causes of Popular Dissatisfaction with the Administration of Justice", Roscoe Pound criticized the civil justice system's trials for being overly fixated on procedure, overly adversarial, too expensive, too long, and too out of date. The year was 1906.

1906 was 3 years after the Wright Brothers' maiden flight at Kitty Hawk, 10 years after *Plessy v. Ferguson* told blacks that segregation was constitutional, 8 years before the most cataclysmic war the world had ever fought, a generation before rural North America became urbanized, and two generations before its governments became decidedly distributive.

But consider what's happened to the rest of our reality since then:

The horse and buggy of 1906 have been replaced by cars and planes; morphine for medical surgery has been replaced by anaesthetics, and the surgical knife by the laser; caveat emptor has been replaced by consumer law; child labour has been replaced, period; a whole network of social services and systems is in

place to replace the luck of the draw that used to characterize employment relationships; the phonograph has been replaced by the compact disc player, the hegemony of the majority has been replaced by the assertive diversity of minorities; and adoring wives have been replaced by exhausted ones.

And yet , with all these profound changes over the last 105 years in how we travel, live, govern, and think, none of which would have been possible without fundamental experimentation and reform, *we still conduct civil trials almost exactly the same way as we did in 1906*. Any good litigator from 1906 could, with a few hours of coaching, feel perfectly at home in today's courtrooms. Can we say that about any other profession?

If the medical profession has not been afraid over the century to experiment with life in order to find better ways to save it, can the legal system in conscience resist experimenting with justice in order to find better ways to deliver it?

Justice may be blind, but the public is not.

Professionalism is more than about being judges and lawyers, it's about *why* we're judges and lawyers. And we're judges and lawyers to serve the public. The public is our audience, the people for whom we perform the justice play. They don't direct us, but they're very interested in what's happening on that stage. If they stop clapping, we're in big trouble. We have to figure out if it's because of

the script, the props, the cast, or all of the above. We know we'll always have an audience, because the play is called *The Rule of Law*, and the public's attendance is mandatory. Since we don't give the public a choice about whether they have to attend, we have to care about whether they like the performance. And let's face it, we've had lousy reviews for decades.

Why? Because the public doesn't think it should take years and several thousands of dollars to decide where their children should live, whether their employer should have fired them, or whether their accident was compensable. They want their day in court, not their years. How many lawyers themselves could afford the cost of litigating a civil claim start to finish?

We can't keep telling the public that this increasingly incomprehensible, complicated process is in their interests and for their benefit, because they're not buying it any more. The public knows judges and lawyers are really the only group who can change the process. They simply can't understand why we won't. When we say, "It can't be done", and the public asks, "Why not", they want a better reason than "Because we've always done it this way".

We can't talk seriously about access to justice without getting serious about how inaccessible the result, not the system, is for most people. Process is the map, lawyers are the drivers, law is the highway, and justice is the destination. We're

supposed to be experienced about the best, safest, and fastest way to get there. If, much of the time, the public can't get there because the maps are too complicated, then, as Gertrude Stein said, "There's no there there". And if there's no "there there", what's the point of having a whole system to get to where almost no one can afford to go.

Even alternate dispute resolution mechanisms, hailed at first as the expeditious alternatives to cumbersome court procedures, are themselves turning into procedural mimics of the court system. Arbitrations all too often end up being almost as lengthy, complex, or expensive as a court case.

Our monopoly puts us in a fiduciary relationship with the public. We should be on the front line of reform, looking at the system from the ground up where the public lives, and start from scratch instead of nibbling around the system's edges, satisfied by bite-sized pieces of reform.

So let's be bold and acknowledge that the public has judged our relationship with incremental change to have been largely Sisyphean. The tinkering at the edges may have been a necessary rehearsal, but it hasn't exactly been the hit with the public we thought it would be.

I think it's finally time to think about designing a whole new way to deliver justice to ordinary people with ordinary disputes and ordinary bank accounts.

That's what real access to justice needs, that's what the public is entitled to get, and that's what our professionalism demands. Justice must be seen to be believed. And getting people to believe in justice is what the legal system is supposed to do.

So there you have it, a brief sketch of how judges live in the house of justice, and a plea for renovating every floor in that house so the public gets better and more effective access to it and the rights it protects. Now all we need are the right architects. . .