

Advocates' Society Gala — 20 February 2020

**Of Robes and Robots: Innovation and the Legal Profession
Remarks of the Honourable Chief Justice Robert Bauman**

Mr. President – distinguished counsel – judicial colleagues. Good evening.

It's my pleasure to be joining you all tonight at this inaugural Vancouver edition of the Advocate's Society gala.

Just as hosting this gala in Vancouver for the first time represents a bold step for this organization, so am I going to be addressing a bold topic tonight: innovation and the legal profession.

I know—having a 70-year-old weigh in on innovation might seem like yet another bold step. But in my career as a judge and, at one point, a lawyer, I've seen quite a few things change in the legal system, and perhaps more stay the same. I want to talk about the need for change we're seeing in this moment, along with some of the innovative solutions that are being proposed to deal with this need. And I want to end by asking a challenging question: what role should lawyers play in a radically reimagined legal system?

Starting with the need for change: so much about the way we are doing things right now is not working. And I'm not being alarmist.

The extraordinary cost of lawyers, the delays in getting matters to court, the increasing number of litigants representing themselves because they can't afford anything else, and the difficulty these in-person litigants face in navigating the law—in the legal profession, we are all-too-familiar with these issues. We're even familiar, thanks to initiatives like the National Self-Represented Litigants Project, with the dramatic sense of isolation, fear, and frustration that the legal system provokes in many people forced to represent themselves.¹

We have a growing number of statistics and numbers to give us detail on our access to justice problem. A report of the Canadian Forum on Civil Justice tells us that while over 48% of people will experience at least one legal problem in a given 3-year period, the vast majority of those people will not turn to lawyers—indeed, based on the CFCJ survey, people are almost twice as likely to try and take advice from the internet as they are to hire a lawyer (33% vs. 19%).² And the results people experience, with or without lawyers, are unsatisfying. 46% of participants in the CFCJ study said they felt the resolution of their legal problem was unfair; 70% said they outcome “did not achieve all

¹ The Utah Work Group on Regulatory Reform, “Narrowing the Access-to-Justice Gap by Reimagining Regulation” (August 2019), online: Utah State Bar <www.utahbar.org/wp-content/uploads/2019/08/FINAL-Task-Force-Report.pdf>.

² Trevor C.W. Farrow et al., “Everyday Legal Problems and the Cost of Justice in Canada: Overview Report”, *Canadian Forum on Civil Justice* (2016) at 9.

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of what they had originally expected”.³ I guess you might feel okay if that was 50%, but almost half of the winners weren’t satisfied either.

The World Justice Project, a non-profit⁴ that works to advance the rule of law, ranked Canada 20th in the world for access to civil justice—far below our ranking on other metrics of the rule of law, such as open government (6th), constraints on government powers (8th), and protection of fundamental rights (9th).⁵ The organization describes civil justice as “whether ordinary people can resolve their grievances peacefully and effectively through the civil justice system”.⁶ The struggles ordinary people face trying to determine and enforce their civil rights fall squarely on the shoulders of us as justice system actors—people with the knowledge and much of the power to change things. The barriers to accessing the law are real and pervasive, and fall along socioeconomic lines. Those unable to access, or fairly access, the tools of our legal system for their own problems rightly lose faith in the system as a whole. The access to justice crisis truly goes to the heart of the rule of law in our society.

In tracing inaccessible justice to its roots, fingers are frequently pointed at the actors most numerous in the justice system—the legal profession. Too often, our legal system is designed around lawyers and judges, rather than focusing on the people the system should serve: those with legal problems who need help resolving them. We need a user-centred approach to reform.

The legal profession itself, some argue, is holding the system back. Culturally, the profession is too stagnant and conservative to ever change, some say; and further, technology has advanced to the point that computers can do what we do anyways. If we want things to change, critics argue, we need a whole different type of person and/or robot to be leading the way.

Now believe it or not, I didn’t show up at the Advocates’ Society Gala—to stand in front of 200 lawyers—to argue that we need a lawyer-free justice system. But if you’ll humour me, I think it’s worth exploring some of these critiques before moving on.

First, many criticisms of the legal profession start by saying the profession itself is culturally resistant to change—that it is part of the problem. And it’s true, we’re not exactly a field of people who love taking risks. British scholar Richard Susskind, an ardent advocate for the use of technology in the courts, claims to have empirically determined that only one profession is more cautious about switching up how they do

³ Trevor C.W. Farrow et al., “Everyday Legal Problems and the Cost of Justice in Canada: Overview Report”, *Canadian Forum on Civil Justice* (2016) at 11.

⁴ World Justice Project, “About Us”, online: <worldjusticeproject.org/about-us>.

⁵ World Justice Project, “Rule of Law Index 2017–2018” (2018), online: <worldjusticeproject.org/our-work/publications/rule-law-index-reports/wjp-rule-law-index-2017-2018-report>. Rankings at 38, 36, 39 respectively.

⁶ World Justice Project, “Rule of Law Index 2017–2018” (2018), online: <worldjusticeproject.org/our-work/publications/rule-law-index-reports/wjp-rule-law-index-2017-2018-report> at 42.

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business—the clergy.⁷ So the good news is, we're not in last place. The bad news is, a study has now shown that a commitment to wearing matching robes on formal occasions can apparently stifle a profession's innovative energies.

Moving to technology, as mentioned, we have had the technological ability to make—continuing the metaphor—better-fitted clothes for some time . . . and yet. And there are other ways in which the legal profession comes across as dated. As one example, email as a method of communication took far longer to become entrenched in some legal spaces as compared to others; it's illustrative that one U.S. Supreme Court justice admitted in the year 2013 that her court had yet to start using email with their clerks.⁸ In the B.C. courts too, we have miles to go in using technology that is already the norm in other spaces. For years, we've had the ability but have not fully adopted online filing — more advanced document management during proceedings — online forms — and more. It's frequently been pointed out to me that everyone from restaurants to dog groomers has an accessible online scheduling system to let you know when they have space for you (or your pooch), yet anyone who's argued a chambers motion lately knows that the courts are not quite there yet.

It's easy to understand, looking at our field, why some people would be trying to usher lawyers out.

And indeed, courts around the world are increasingly trying out different reform initiatives, many of which involve removing lawyers from some legal processes.

Many jurisdictions are aiming to let people access dispute resolution online, and to streamline decision-making through artificial intelligence tools. As Beverly McLachlin said recently, “[i]n a world where more people have access to the Internet than access to justice, online judicial processes are both inevitable and necessary.”⁹

These online initiatives focus on user-friendly forms and portals that encourage little to no help from lawyers. England and Wales, as part of a large-scale court reform initiative, have implemented online systems for processing divorces and other straightforward matters. Here in B.C., of course, the Civil Resolution Tribunal provides online dispute resolution services where not having a lawyer is the norm.

⁷ See Richard Susskind, *Online Courts and the Future of Justice*, (Oxford: Oxford University Press, 2019) at 4, citing Richard Susskind and Daniel Susskind, *The Future of the Professions* (Oxford: Oxford University Press, 2015).

⁸ She stated the court “hasn't quite gotten to email yet”. See Will Oremus, “Elena Kagan Admits Supreme Court Justices Haven't Quite Figured Out Email Yet” (20 August 2013), online: <www.slate.com/blogs/future_tense/2013/08/20/elena_kagan_supreme_court_justices_haven_t_gotten_t_o_email_use_paper_memos.html>.

⁹ Beverly McLachlin, “Access to Justice: Embracing technology through online courts” (10 February 2020) online: The Lawyer's Daily <www.thelawyersdaily.ca/articles/17767/access-to-justice-embracing-technology-through-online-courts-beverley-mclachlin>.

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On the artificial intelligence front, some jurisdictions are making use of more and more advanced forms of knowledge representation and automated reasoning—using computer programs to give legal information and even simple forms of advice. For example, Singapore has proposed an online system for personal injuries claims with an “outcome simulator” to help claimants decide whether to take a settlement offer from an insurer.¹⁰ I gather judges will be called “outcome generators”. At least one Beijing court utilizes an online system of distributing legal information, with a “litigation-guiding robot” that can reportedly answer more than 40,000 different legal questions,¹¹ and artificial intelligence tools that assist with drafting claims and argument. Tech companies are mining factums and written arguments and legal opinions as we speak.

In other areas, the focus is on broadening who can practice law, and how they’re allowed to do so. In Utah, a working group examining the regulatory structure for legal services last year proposed far-reaching reforms, aimed at including far more non-lawyers in the practice of law. The group also recommended that a new regulatory body take over for managing this broader conception of legal services. They proposed these changes be rolled out in two phases. Phase 1 would involve the new independent, non-profit regulator operating in tandem with the bar association, which is currently regulating lawyers—much like we do in B.C., Utah has a self-regulation system. The new regulator will observe the implementation of reforms in a “regulatory sandbox”, or controlled environment. By observing this sandbox, it will be able to collect data, focusing on “the reality of the consumer experience with the law and legal services”¹² while advancing the objective of “a well-developed, high-quality, innovative, and competitive market for legal services”.¹³ In Phase 2, the independent regulator takes over permanently, and self-regulation ends. This regulatory reform proposal isn’t suggesting a full-scale replacement of lawyers, but rather a more expansive view of who should be involved in management and financing, and other non-legal-knowledge driven aspects of legal service delivery.

Two weeks ago, the US-based Conference of Chief Justices heard from the President of the ABA, who stressed the critical need for innovation in the effort to close the nation’s access to justice gap.

President Judy Perry Martinez said this: “We need and are beginning to see bold new ideas to address our nation’s unmet legal needs . . . Given the dire circumstances the public faces when trying to protect their basic rights, doing nothing—and having no

¹⁰ Richard Susskind, *Online Courts and the Future of Justice*, (Oxford: Oxford University Press, 2019) at 172.

¹¹ Richard Susskind, *Online Courts and the Future of Justice*, (Oxford: Oxford University Press, 2019) at 171, discussing the Beijing First Intermediate People’s Court.

¹² The Utah Work Group on Regulatory Reform, “Narrowing the Access-to-Justice Gap by Reimagining Regulation” (August 2019), online: Utah State Bar <www.utahbar.org/wp-content/uploads/2019/08/FINAL-Task-Force-Report.pdf> at 17.

¹³ The Utah Work Group on Regulatory Reform, “Narrowing the Access-to-Justice Gap by Reimagining Regulation” (August 2019), online: Utah State Bar <www.utahbar.org/wp-content/uploads/2019/08/FINAL-Task-Force-Report.pdf> at 16.

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dialogues and conversations among stakeholders; fearing to ask ‘what if’ or ‘why not’— may pose an even greater risk.” Both the Conference of Chief Justices and the ABA have adopted resolutions favouring innovative approaches to the access to justice crisis:

WHEREAS, several states are experimenting with regulatory innovations that are designed to spur new models for legal service delivery that provide greater access while maintaining the quality and affordability of legal services as well as protecting the public interests; and

WHEREAS, these regulatory innovations generally fall within three broad areas including the authorization and regulation of new categories of legal service providers, the consideration of alternative business structures, and the reexamination of provisions related to the unauthorized practice of law; and

WHEREAS, experimentation with different approaches to regulatory innovation provides a measured approach to identify and analyze the best solutions to meeting the public’s growing legal needs;

NOW, THEREFORE, BE IT RESOLVED that the Conference of Chief Justices urges its members to consider regulatory innovations that have the potential to improve the accessibility, affordability and quality of civil legal services, while ensuring necessary and appropriate protections for the public.¹⁴

And Beverly McLachlin recently joined the call: “Business, education and medicine are radically altering the way they provide services to meet these changes and better serve their customers and the public. Why should the justice system be any different?”¹⁵

Many of these alternative legal service delivery initiatives can and should be viewed with optimism. Their results are uncertain, and may not be perfect. However, attempts to improve the status quo are largely preferable to accepting the access to justice crisis as is.

But, in assessing initiatives to improve access to justice, we have to look critically at what these initiatives can and can’t fix about the current legal system.

As an overall point, all of these reforms will take time. Even Susskind, who has argued “unhuman systems” will be able to act “at a higher standard than human beings” in the coming decades, admits this.¹⁶ In setting out a checklist of guiding factors for implementing changes to the legal system, he notes “Continuity of staff” is important; we need to plan for some continuity in who works in the justice system, he says, because

¹⁴ Conference of Chief Justices, “Resolution 2: Urging Consideration of Regulatory Innovations Regarding the Delivery of Legal Services” (5 February 2020), online: ccj.ncsc.org/~media/Microsites/Files/CCJ/Resolutions/02052020-Urging-Consideration-Regulatory-Innovations.ashx.

¹⁵ Beverly McLachlin, “Access to Justice: Embracing technology through online courts” (10 February 2020) online: The Lawyer’s Daily www.thelawyersdaily.ca/articles/17767/access-to-justice-embracing-technology-through-online-courts-beverley-mclachlin.

¹⁶ Richard Susskind, *Online Courts and the Future of Justice*, (Oxford: Oxford University Press, 2019) at 274

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“humans should be expected to still be around in the 2020s”.¹⁷ So we should have another ten years at least—are you all reassured?

Further, dispensing legal advice through artificial intelligence can simplify some proceedings, but there are aspects of our access to justice crisis AI can't help. As the U.K. House of Lords Select Committee on Artificial Intelligence recently observed, “if too many political decisions are delegated to machines, the feelings of powerlessness and exclusion felt by some could be further amplified.”¹⁸ For people who feel like the system is rigged to suit lawyers and judges, receiving advice from machines that think like lawyers and judges may not be overly comforting. Or, to quote one of the witnesses before that committee, “the most challenging point relating to AI and democracy is the lack of choice that is offered to the population at large about the adoption of technology. It is, to say the least, undemocratic”.¹⁹ In pursuit of efficiency, we should not lose sight of the importance of including and responding to users of that system. For our system to function, litigants must feel that their voices have been heard and their perspectives included. AI can be helpful for some, but a truly accessible system can't assume AI will meet the needs of all.

In addition, court systems that make it technologically easier for people to represent themselves, and the law easier to understand, may not address what many self-represented people identify as the hardest part of the process: the emotional impact. In the 2013 National Self-Represented Litigant Report, one of the resources self-represented people said would be most helpful to them was a mentoring service to offer “moral support” on dealing with litigation;²⁰ similarly, one of the hardest things about self-representing, many said, was simply the fact that the contested dispute being discussed was your own.²¹ So many of the disputes the court system deals with are emotionally devastating for the people involved, and making self-representation more technically accessible won't alleviate that burden. Returning to the Canadian Forum on Civil Justice report I mentioned earlier, 42% of the participants in that study—a large majority of whom, you'll recall, said they were dissatisfied with the result they'd ended up with in their legal issue—said they thought the outcome might have been better if

¹⁷ Richard Susskind, *Online Courts and the Future of Justice*, (Oxford: Oxford University Press, 2019) at 304.

¹⁸ Select Committee on Artificial Intelligence, “AI in the UK: ready, willing and able?”, *Report of Session 2017–19, UK House of Lords* (16 April 2018), online: <publications.parliament.uk/pa/ld201719/ldselect/ldai/100/100.pdf> at 83.

¹⁹ Written evidence from Leverhulme Centre for the Future of Intelligence (AIC0182), quoted in Select Committee on Artificial Intelligence, “AI in the UK: ready, willing and able?”, *Report of Session 2017–19, UK House of Lords*, (16 April 2018) <publications.parliament.uk/pa/ld201719/ldselect/ldai/100/100.pdf> at 83.

²⁰ Dr. Julie Macfarlane, “The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants: Final Report” (May 2013), online: <representingyourselfcanada.com/wp-content/uploads/2016/09/srreportfinal.pdf> at 11, 118, 121.

²¹ Dr. Julie Macfarlane, “The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants: Final Report” (May 2013), online: <representingyourselfcanada.com/wp-content/uploads/2016/09/srreportfinal.pdf> at 98.

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they'd had help.²² Having someone on their side can make people feel as if they've been heard, and justice has been done.

Finally, changing up the regulation of legal service delivery is promising in some ways, but too has its limits. Whether a given legal service should be labelled well-developed, high-quality, and/or innovative will inevitably be a disputed question; what may be innovative for some may be harmful to others. Stringent, consistent, and knowledgeable regulation is essential to maintaining public confidence in a system that governs the outcomes of people's deeply personal disputes. Further, encouraging innovation in service delivery runs the risk of developing legal service models that outstrip our ability to understand and therefore regulate. UBC Professor Cristie Ford's research argues that "innovation, almost by definition, is a profound and direct *challenge* to regulation in all its forms", and that expanded market innovation often poses a challenge for regulators.²³ Automated reasoning processes that outstrip the understanding of users and regulators may save time and money, but pose a significant risk of unjust outcomes. Use of so-called "black box" algorithms to determine questions of, for example, who should get parole or what areas of a city should be policed has led to machine-amplified racial and class bias. A 2018 study from my alma mater, the University of Toronto, raised red flags about the use of these types of predictive analytics in immigration decision-making and the significant potential for human rights abuses.²⁴ We know from these and other examples that effective regulation requires detailed knowledge and understanding of the human intelligence being regulated, and that applies to machine intelligence as well. Creating a more innovative legal market is laudable, but in doing so we cannot outstrip our capacity to assess, and argue about, the inherent justice and injustice of what we are doing.

Considering some of the benefits and challenges that this new world of innovation could bring takes me to the question I posed at the beginning: what do lawyers have to offer amidst all this? I believe that, at its root, the legal profession's enduring offering is that capacity to discuss justice and injustice, and do it well. Put simply, the legal profession offers a tradition of excellence in advocacy. Regardless of what radical changes might come down the line for law—including some desperately needed ones—we will continue to have a need for compelling advocates, in the courtrooms and the boardrooms of our nation and beyond.

Advocacy goes right to the heart of what lawyers add to society. Advocacy is determined work: it requires intense organization, compelling delivery, and thoughtful

²² Trevor C.W. Farrow et al., "Everyday Legal Problems and the Cost of Justice in Canada: Overview Report", *Canadian Forum on Civil Justice* (2016) at 11.

²³ Cristie Ford, "Innovation as a Challenge to Regulation" *The Regulatory Review* (12 March 2018), online: <www.theregreview.org/2018/03/12/ford-innovation-regulation/> [emphasis in original].

²⁴ Petra Molnar and Lex Gill, "Bots at the Gate: A Human Rights Analysis of Automated Decision-Making in Canada's Immigration and Refugee System", *International Human Rights Program, University of Toronto Faculty of Law* (September 2018), online: <ihrp.law.utoronto.ca/sites/default/files/media/IHRP-Automated-Systems-Report-Web.pdf>.

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responses to one's detractors. Excellent advocacy is courageous: it requires lawyers to put forward the best version of a case they can, to deliver even unpopular opinions or unsavory facts with poise, to be prepared for criticism and rise to the challenge. Excellent advocacy is what clients want when they hire a lawyer: someone to go to bat for them.

Susskind endorses "outcome thinking". He uses the example of the manufacturer of power tools that tells its new recruits that they sell holes rather than drills, because it is holes their customers actually want. So the analogy leads to this: clients do not really want lawyers and judges, they want just, fair outcomes to their disputes. But this makes the point for advocacy—excellent advocacy is what leads to those outcomes and therein lies the enduring value of our profession.

And it's what so many of us love. Those of you who were driven to enter law because of your passion for document review—the robots might have you beat. But for the rest of the bar, focusing on advocacy in all its myriad forms may give you value long into the 2030s, when human lawyers may or may not be otherwise obsolete.

And I think this is important to remember: excellent advocacy skills are incredibly important in the boardroom as well as the courtroom. Often we focus so closely on the great trials—the exciting cross-examination moments, the big reveals, the captivating jury addresses—when there is so much important advocacy happening without anyone getting near those spaces.

I've talked about some of the ways in which the legal profession has dragged its feet on changing. But I also want to talk about some of the great advances we've seen because of advocacy in the past few decades. In my day job as an appellate judge I can tell you that oral argument—oral advocacy—is critically important. We read and think an awful lot before we go into the courtroom on an appeal but it is there, so often, where advocacy makes a difference to our view of a case and the outcome of the appeal.

We've seen the rise of innocence projects, including the founding of Innocence Canada (formerly known as the Association in Defence of the Wrongly Convicted), whose efforts have led to such high-profile exonerations or acquittals as those of David Milgaard, Guy Paul Morin, and Steven Truscott. We've seen determined advocacy lead to the expansion of these initiatives into student clinics at numerous law schools. These initiatives are filling a much-needed role in examining and safeguarding against wrongful convictions, and demonstrate a key part of the soul of advocacy; courageously taking on unpopular cases, and doggedly following them to the end.

Another inspiring example of advocacy in the past few decades has come through the efforts of those Indigenous lawyers and allies who have made incredible efforts to address the ongoing harms of colonialism in this country. From compensation and awareness for the immense human tragedies of residential schools, to the establishment of rights in the Constitution, to pushing for meaningful understanding and

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interpretation of those rights, lawyers have advocated within the Canadian legal system to correct and redress injustices, and to push for recognition of the plurality of Indigenous legal orders coexisting on this land. It is particularly impressive given that many Indigenous advocates are working within legal and cultural norms that are not their own. I, and many other lawyers from a settler background, have learned a lot thanks to efforts of these advocates. We are still at the early stages of figuring out the coexistence of colonial and Indigenous law and rights, but this is the power of talented advocates at work.

Of course I must mention the increasingly expansive pro bono efforts made by so many in the profession. Lawyers are increasingly taking on large-scale litigation, as well as expanding legal service availability to people who might never otherwise access it. People who can't afford lawyers still deserve to access just results; they deserve someone to go to bat for them. The justice system is operating that little bit better thanks to this work. And I want to thank in particular some of you who participate in our Court of Appeal's pro bono project and thank Access Pro Bono too. These efforts are making a real difference in our Court. As we all know, pro bono is not a solution to the justice system's failings—to paraphrase a section of the Utah report, history has shown we cannot volunteer or donate the access to justice problem away.²⁵ But as we work towards bigger changes, these efforts to fill the gaps are invaluable.

While the prospect of making big changes to the way we do things may seem overwhelming, I am confident the legal profession remains not only relevant but essential in the face of these changes.

After all, all of the debates around innovation and the legal profession that I've just talked about feature great advocacy. Critical and courageous lawyers are getting the profession to expand our use of unbundled services, online portals, and artificial intelligence—convincing even the most risk-averse among us that it's time to switch things up. Maybe those advocates will tackle the issue of the robes soon enough. And at the same time, compelling advocates are helping us avoid and lessen the inevitable mistakes and even failures of innovation. We need vigorous debate on whether the sandcastles in the regulatory sandbox are achieving what they're meant to. Lawyers continue to play a key role in addressing the flaws of the legal profession itself with courage and determination.

At the end of the day, we need and will continue to need people who can listen carefully, respond thoughtfully, and disagree civilly; who can identify the real issues, marshal the relevant facts, and offer persuasive and compelling submissions towards a fair and just outcome. In short we need excellent and dedicated advocates. I've appreciated my many years of working with people who are just that, and I appreciate

²⁵ "The Utah Work Group on Regulatory Reform, "Narrowing the Access-to-Justice Gap by Reimagining Regulation" (August 2019), online: Utah State Bar <www.utahbar.org/wp-content/uploads/2019/08/FINAL-Task-Force-Report.pdf> at 4.

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being in a room with so many of you tonight. Thank you, and enjoy the rest of your evening.