Access to Justice Panel
Legal Information Society of Nova Scotia
November 22nd, 2012
Justice Michael J. Wood,
Nova Scotia Supreme Court

I would like to thank the Legal Information Society of Nova Scotia for asking me to participate in this panel discussion on a very important topic. My comments on access to justice will be primarily from the perspective of the court and will focus on civil and family matters rather than criminal ones.

The importance of this issue is obvious. Chief Justice McLaughlin has said that without meaningful access to courts the Canadian justice system is a failure. Justice Thomas Cromwell delivered the Viscount Bennett Memorial Lecture at the University of New Brunswick Faculty of Law last year and concluded that at many points in history, the legal profession (including Bench and Bar) had failed to be engaged by the problems of access to justice and was sometimes resolutely resistant to change. We should strive to avoid having that description applied to the current generation of our profession.

Justice Cromwell has chaired the Action Committee on Access to Civil and Family Justice which was established by Chief Justice McLaughlin with the sole mandate of finding ways to meaningfully address the urgent problem of access to justice in civil and family matters. That committee has devoted countless hours to advancing the discussion of this crucial issue.

One way in which access to justice can be improved is the simplification of court processes. This will benefit litigants whether they are represented by lawyers or not. The objective would be to reduce the time and expense of a proceeding without compromising fairness. Proportionality is an important consideration, and by this I mean there should be a balance between the importance of the issue and the legal resources to be devoted to its resolution.

Our courts are a public resource with obvious limitations. These include court space and personnel (both judges and court staff) as well as financial. Currently the costs of administering our courts is paid for primarily by society at large with a small proportion funded by litigants through various court fees.

These resources need to be carefully managed and not wasted. Any suggestion that the courts are a free service to be used without restriction after a party has paid their initial filing fee must be disabused. Judges, lawyers and litigants needs to consider how much of these relatively scarce resources should be devoted to a particular dispute or issue.

Although I have included litigants in this group, it would be unreasonable to expect that they would have the big picture in mind. Their concern is primarily the matter which

brings them to court. It falls to the judges, court administration and lawyers to understand the issue of resource allocation and respond.

How can this be done? From the perspective of the Court, we need to be efficient and provide processes that allow effective disposition of disputes. We need to do this without sacrificing the fundamental principles of fairness and justice. To some extent this is reflected in the revisions made when the current Civil Procedure Rules came into effect in January 2009. These include:

- reduction in the scope of discovery examinations.

- streamlined procedures for claims under $100,000.00 including restrictions on the time permitted for both trial and discovery examinations.

- introduction of applications in court where the hearing is more like a summary trial with affidavits rather than direct examination of witnesses.

The objective of these changes was to develop ways in which disputes could be disposed of more quickly and with less time spent by the parties, their lawyers and judges. In other words, with less expense. Whether this objective has been met is open to debate and is part of the ongoing evaluation of the Civil Procedure Rules and their application.

My personal view is that judges must be more active in effectively managing proceedings in order to ensure that the objectives of the Rules are being met. This could, in some cases, mean restricting the court time which a party can devote to a particular issue or argument. Ideally such limitations would be discussed with the parties and counsel in advance and a consensus reached.

The phenomenon of self-represented litigants is often raised in discussions of access to justice. In many cases these individuals have been unable to find legal representation or if they can find it are unable to afford the cost. It is usually not a matter of choice that the person is engaged in the court system without counsel.

One issue for self-represented parties is whether they can obtain at least some legal advice and representation, even if it is on a limited basis. Legal Aid, *pro bono* work, unbundling of legal services and public legal education are avenues that should be explored to address this problem.

I do not ever expect that self-represented litigants will disappear, nor do I believe that their numbers will diminish. In all likelihood, this segment of the people who appear in court will continue to increase.

What should be done to ensure that their access to justice is protected? First of all, I think care should be taken not to give them special rights not available to others. Just

because they are self-represented should not mean that they get to turn what should be a one-day hearing into a week-long trial. That will drive up the costs for other parties to that litigation who have lawyers and take up court resources that should be available to others.

It is also a reality that these self-represented litigants generally have little prior experience with the justice system. They probably do not know anything about substantive law and are unfamiliar with court rules and procedures. We need to remedy this and there are various ways this might be accomplished.

The Court must make information accessible in a meaningful way. The Court's website provides a single location with information about all levels of court in Nova Scotia. It includes access to an electronic version of the Civil Procedure Rules in both French and English. It also provides court forms in an electronic format which can be filled in and printed from the website. The blanks in these forms have pop-up information balloons indicating what information is to be included in each place.

The site includes links to court decisions and a variety of other resources which can assist self-represented litigants. More content is being added all the time. By March of 2013 a new website will be launched which will be even more user friendly.

To my knowledge, the Courts in Nova Scotia are among the most forward thinking in Canada on issues of public education and access to information. They are consulted by other courts from across the country for advise on these topics. This is due to the direction of the Chief Justices and Chief Judges as well as the work of staff in the Courts' Executive Office. Particular credit should be given to the Courts' Director of Communication, John Piccolo.

We have seen many benefits from this increased public information. Self-represented litigants will usually have the proper forms and will reference case authorities and Rules which are relevant to the issues being raised. Although I believe the Court's website is an extraordinary public resource, there is always room for improvement. I am sure that Mr. Piccolo would be open to any helpful suggestions which you may wish to make.

It is not reasonable to expect that self-represented litigants will arrive in court with an understanding of all of the applicable legal and procedural issues. There will be a broad range of educational backgrounds and experiences. How do you deal with that in the courtroom, particularly if other parties have counsel?

The starting point is that the hearing must be fair. How that objective is met will vary depending on the circumstances. In many cases, counsel for one party will provide informal guidance to an unrepresented party and this can be very helpful. The judge will sometimes give assistance, but there is a fine line to be observed because they must not be seen to lose their status as a neutral decision maker. Having independent

counsel available on a *pro bono* basis or as *amicus curiae* may be helpful in some situations.

The more information and assistance that can be given to the self-represented party in advance, the more effective and efficient the litigation should be. It is in everyone's interest that the resources of the legal system be used to provide service to the entire spectrum of our society on a basis that is just, speedy and inexpensive.

Thank You.