

**Remarks of Mary Eberts for Workshop D.4**

***Whither the Right to Counsel?***

***CBA Envisioning Equal Justice Summit***

***Vancouver, B.C. April 25-27, 2013***

I would like to thank all of the organizers of this Summit, and Melina Buckley in particular, for inviting me to participate – and then for arranging that these remarks of mine can be read out at the workshop when I was unable to attend in person. I am recovering in Toronto from one of the joys of grandmotherhood: namely, getting a respiratory infection from one’s grandchild during an otherwise idyllic weekend that fully lived up to all of the positive billing about the grandmotherly role. I would also like to express my admiration and gratitude to Melina for the amazing background research that she has done for this Summit, and indeed, on the whole right to counsel issue over the many years that CBA has faithfully pressed this cause. She has contributed so much to our understanding of the issue, and to the arsenal of tools we have at our disposal for doing this fight. For fight it is, to secure a right to funded counsel, and I salute the CBA for embracing the challenge and staying with it for so long.

A cynic might suggest that lawyers fighting for the right to state funded counsel is just lawyers looking after our own interest, and I am sure that many have said this over the years. They could not be more wrong.

I agree with Chief Justice McLachlin when she says that access to justice, meaning the broad availability of legal services, is crucial to the rule of law. I have argued that lawyers’ services need to be widely available for our law-based representative democracy to work, to continue to renew its legitimacy, and to maintain its ability to elicit the consent of the governed. Lawyer’s services must be available not just to reign in excesses of government power, but also to assist individuals to participate in the routine application of the law that knits together the fabric of our society.<sup>1</sup> The importance of legal services in upholding the rule of law has, indeed, become even stronger with the development of expanded and more inclusive concepts of the rule of law, whose dimensions now include “respect for minority rights, reconciliation of Aboriginal and non-Aboriginal interests through negotiations, and fair procedural safeguards for those subject to criminal proceedings...”<sup>2</sup>

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<sup>1</sup> In “‘Lawyers Feed the Hungry’: Access to Justice, the Rule of Law, and the Private Practice of Law,” forthcoming (2013) 76:1 *Saskatchewan Law Review* 91 at 97. The classic formulation of the rule of law has three elements: the law is supreme over officials of the government as well as private individuals, and thereby preclusive of the influence of arbitrary power; the rule of law requires the creation and maintenance of an actual order of positive laws which preserves and embodies the more general principle of normative order; and the exercise of all public power must find its ultimate source in a legal rule: *Reference re Succession of Quebec*, [1998] 2 SCR 217 at 258, discussed in *Lawyers Feed the Hungry* at 97

<sup>2</sup> *Henco Industries Ltd. v. Haudenosaunee Six Nations Confederacy Council* (2006), 277 DLR (4<sup>th</sup>) 274 at 311, discussed in *Lawyers Feed the Hungry* at 97-98

Despite her many public statements about the crucial importance of access to justice, the Court presided over by Chief Justice McLachlin has taken a very conservative approach to recognizing a right to funded counsel.<sup>3</sup> This position reflects the Court's view about its own institutional role, or competence, in the constitutional order. In their joint reasons in the *Little Sisters*<sup>4</sup> case, dealing with advance costs, Justices Bastarache and LeBel acknowledge the stark consequences of the standard rule in civil matters that each party must bear his or her own costs, subject to any post-litigation costs awards<sup>5</sup>: "For parties with unequal financial resources to face each other in court is a regular occurrence. People with limited means all too often find themselves discouraged from pursuing litigation because of the cost involved."<sup>6</sup> Bastarache and LeBel JJ. emphasize that these problems are serious, so serious that "this Court cannot purport to solve them all through the mechanism of advance costs awards."<sup>7</sup> They caution: "Courts should not seek on their own to bring an alternative and extensive legal aid system into being. That would amount to imprudent and inappropriate judicial overreach."<sup>8</sup>

It is abundantly clear that the Court is leaving to political authorities the questions of whether and to what extent access to counsel will be available to persons without the means to fund their own legal representation in the usual way.

There is virtually nothing in the Court's jurisprudence that would motivate the political authorities to provide generous, or even adequate, funding for legal assistance. The Court's substantive position on the right to counsel leaves politicians with almost complete discretion as to whether to provide what can only be regarded as a "benefit", not a right. Legal assistance thus competes for government resources with programs that are undergirded by rights, or with benefits programs that have more political appeal for the government in power.

Let me go one step further. There are many powerful disincentives weighing against government's readiness to provide funded legal assistance. A citizenry with limited access to legal services will be much less able to require accountability from government, or to challenge government exercises of power. For some governments, this lack of accountability is seen as desirable. Here are just a few examples.

Three times in recent years, the Supreme Court of Canada has identified racism against Aboriginal peoples in the criminal justice system.<sup>9</sup> In the most recent of these cases, *R. v. Ipeelee*, it notes that the overrepresentation and alienation of Aboriginal peoples in the criminal justice system worsened immediately after amendments to the *Criminal Code* in 1996 that required courts to be sensitive to the

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<sup>3</sup> See the background paper by Melina Buckley, *Overview of Canadian Bar Association and US National Civil Right to Counsel Litigation* Prepared for Workshop D.4, April 2013, at 1, 3-8

<sup>4</sup> *Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue)*, [2007] 1 S.C.R. 38 ("Little Sisters")

<sup>5</sup> The rule is articulated this way by the Chief Justice in *Little Sisters* at para. 103

<sup>6</sup> *Little Sisters*, para 44. (concurring in by Deschamps, Abella and Rothstein JJ).

<sup>7</sup> *Ibid.*

<sup>8</sup> *Ibid.*

<sup>9</sup> *R. v. Williams*, [1998] 1 SCR 1128, *R. v. Gladue*, [1999] 1 SCR 688, and *R. v. Ipeelee*, [2012] 1 SCR 433

so-called *Gladue* factors in the lives of Aboriginal accused persons when passing sentence.<sup>10</sup> Justice LeBel in *Ipeelee* insists that application of the *Gladue* factors is required in every case involving an Aboriginal offender.<sup>11</sup> The history of these provisions makes clear that, left to its own devices, the criminal justice system will not apply these factors; one of the only ways to fulfil Justice LeBel's requirement is for counsel to insist that it be done. The routine processing of Aboriginal offenders through the criminal justice system, without application of the *Gladue* factors, will continue if such counsel are not provided, but what government is going to go out of its way to ensure that there are sufficient resources for this purpose? The cost of the whole system will be kept as low as possible without the officious meddling of such counsel, without the need to establish expensive "*Gladue*" courts, without the need for Crown Attorneys to prepare this aspect of a sentencing file. A government concerned with cost, not justice, will opt to withhold funded counsel; it makes economic sense.

Just this month, a Toronto restaurant refused to seat a hearing-impaired man and his companions unless the man left his service dog tethered outside.<sup>12</sup> Publicity generated by this insult revealed that another restaurant in this same chain had behaved the same way. The outraged customer planned to bring a complaint to the Human Rights Tribunal of Ontario to highlight the discrimination against him; a recent study documents that most complainants before the Tribunal appear without counsel, while most respondents appear with lawyers.<sup>13</sup> It is, perhaps, bad enough that a person with a disability would have to bring proceedings at his own expense to enforce the anti-discrimination provisions of the *Ontario Human Rights Code* in such an obvious case. But it gets worse. It was subsequently revealed that the restaurant chain had contravened a provision of the *Accessibility for Ontarians with Disabilities Act* requiring businesses to implement customer accessibility policies and report them to the government by the end of 2012. The government of Ontario was caught unawares by this incident, and was unable to say how many businesses had actually filed their reports. "We still have work to do," said a spokesperson for the Ministry.<sup>14</sup>

In these two examples, government is not delivering what the legislature has already determined is necessary in order to advance justice for disadvantaged minorities, and the difficulty of accessing legal services insulates government from accountability for its poor performance. What of the many examples of government, or private, action which actively undermine or thwart existing legislative protections for vulnerable workers, that are not followed up on because there is no private individual with sufficient means to go to court or a tribunal to enforce the law, like employment standards, health and safety, and equal pay for work of equal value laws? By not providing the means to enforce legislation already on the books to protect the vulnerable, including the economically marginal, the government is able to take political credit for the fine sentiments of the legislation without exposing itself and its backers to the unpleasantness of enforcement activity that would bring real accountability, and the financial costs of compliance.

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<sup>10</sup> *Ipeelee* at para. 62. See discussion at *Lawyers Feed the Hungry*, at 98

<sup>11</sup> *Ipeelee* at para. 87

<sup>12</sup> Laurie Monsebraaten, "Eatery in hearing-dog flap flouted accessibility act," *Toronto Star*, April 23, 2013, at GT4

<sup>13</sup> Ontario Ministry of the Attorney General, *Report of the Ontario Human Rights Review 2012* (Toronto: Queens Printer for Ontario, 2012) at 46, discussed at *Lawyers Feed the Hungry*, at 99

<sup>14</sup> Monsebraaten, *op. cit. supra* note 12

What of situations where there is no legislation on the books, or where government is repealing beneficial legislation? With the defunding of the Court Challenges Program in 2006, we lost the most important source of public funding for major *Charter* challenges involving equality rights. Ironically, the Supreme Court's recent decision on public interest standing now incorporates into the test for standing the requirement to consider the resources of the plaintiff.<sup>15</sup> Only those who can marshal the resources to pass this scrutiny will be able to challenge legislation which withdraws benefits from the disadvantaged, or imposes new burdens on them.

And, finally, where will Aboriginal peoples get the resources to participate in all of the tables at which Canada is now to pursue the process of "consultation, negotiation, accommodation, and, ultimately, reconciliation of aboriginal rights and <sup>16</sup>other important, but at times, conflicting interests?" Canada's participation, but not that of Aboriginal nations, is funded by the public, exacerbating the centuries-old privilege of the colonizer. How on earth will Aboriginal peoples get a fair deal in such circumstances?

The legal system, and its jurisprudence, provide us with a map of what our society considers important. Women represented by woman lawyers, funded in large measure by legal aid, put women's concerns in the family law domain, onto that map in the 1980s. When there is no legal aid, and thus inadequate access to the machinery of the law for people to assert their rights and organize their relations with other individuals and with the state,

The rights and interests of those without the means to litigate – or to engage in negotiations and other legal processes – will sooner or later be hardscaped out of the legal system and the political order; they will simply not register nor play a part in the collective articulation of our goals, and the collective shaping of our social and governmental institutions.<sup>17</sup>

Keeping these interests of the vulnerable on the public agenda is the reason why there must be a robust public commitment to funded legal services. We are poorer as a nation and a society if only the concerns of the economically and politically dominant are reflected in our law.

We are told that the individual and collective labour of lawyers in delivering *pro bono* services will compensate for the unavailability of funded legal services from government, and ensure that people who need legal services will get them. The profession has responded to this challenge by establishing organizations to mobilize the *pro bono* efforts of lawyers and law students, by amending the rules of professional conduct to permit limited retainers and other ways of trying to build bricks without straw, and by promoting legal education services and products. This busy-ness in a good cause does nothing to

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<sup>15</sup> *Canada (Attorney General) V. Downtown East Side Sex Workers United Against Violence Society*, 2012 SCC 45, at para. 37, discussed at *Lawyers Feed the Hungry* at 100.

<sup>16</sup> *Henco*, at para. 45, discussed at *Lawyers Feed the Hungry* at 98

<sup>17</sup> *Lawyers Feed the Hungry* at 100

ensure that there is a healthy *public* commitment to the interests and concerns of the disadvantaged. It lets governments off the hook too easily.

Moreover, in my view, the *pro bono* efforts of the legal profession, however, well-motivated, simply reproduce the power imbalances and injustices faced on a daily basis by the clients of these efforts. In creating these *pro bono* organizations, the well-off in the profession, whether judges with generous salaries and pensions, tenured law professors, or secure practitioners who have the wherewithal to serve as governors of the profession, are essentially organizing and deploying the labour of the legal proletariat: students, those struggling to become established in practice, and so on. These volunteers join the ranks of the low-paid legal aid lawyers, and the practitioners who eke out a living serving the disadvantaged, in delivering needed services. The recent Law Society decision in Ontario to address problems in securing articles by instituting an unpaid period of service in lieu of articles during which candidates will have placements serving the disadvantaged, is just the most recent example of this exploitation of the legal proletariat in the name of access to justice.<sup>18</sup>

Andrew Orkin, a distinguished Ontario practitioner with a strong record of contributing legal services, has likened *pro bono* services to a sort of legal food bank. They alleviate hunger for some on a daily or monthly basis, but absorb the energy of those who provide the services, so that they have little energy left for challenging the conditions that create the hunger.<sup>19</sup>

I welcome the CBA's continuing efforts to challenge the conditions that create the hunger for affordable legal services. I believe that we will achieve success in these efforts only by exposing to public view the fact that governments have a vested interest in foreclosing access to affordable legal services, because such access increases government accountability for what it does, and what it does not do, and ensures that the interests of all of us, rich or not, will be taken into account when policy is made and priorities determined.

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<sup>18</sup> Discussed in *Lawyers Feed the Hungry*, at 104-108

<sup>19</sup> *Lawyers Feed the Hungry*, at 102