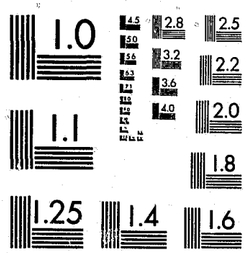

Ministre de la Justice et procureur général du Canada

Minister of Justice and Attorney General of Canada

"Where Next in Law Reform"

An Address
by
The Honourable Mark MacGuigan
Minister of Justice and Attorney General of Canada
to the
Mid-Winter Meeting
of the
Canadian Bar Association

Whitehorse, Yukon
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CHECK AGAINST DELIVERY

My first opportunity to address this mid-winter assembly was a year ago, at your meeting in Banff. On that occasion I talked about the kind of reform I felt was urgently needed, particularly in the areas of criminal law, the Divorce Act, and in relation to the implications of our Charter of Rights and Freedoms. As I recall, I concluded by saying that as lawyers, you and I will be judged not on our fine rhetoric, but on how well we devise and administer a system of law which responds to the needs of people in a humane and just society.

Today I am happy to say we can look back on a year of great, though still partial, achievement in law reform, achievement that will have, when fulfilled by passage of the legislation, a dramatic impact on our entire legal system. With the help of concerned groups and individuals across this country, and especially members of this Association, I have been able to bring forward a substantial range of proposals in areas that have been seriously neglected in the past.

With respect to criminal law, the changes have been described as "sweeping", and I think the description is fairly accurate, since these would be the largest substantive changes in our history.

In some cases the changes are necessary simply because the law must catch up with developments in technology. When our Criminal Code was first drafted, computer crime was not even a gleam in the drafters' eyes; now it is time for the law to recognize that our society is increasingly dependent on computer systems. At one time pornography was primarily a matter of leather-bound books, curiously illustrated by hand and allegedly sold to discreet Victorian gentlemen. Now the law must deal with the ubiquitous presence of video cassettes and satellite technology.

Other changes to the Code are necessary because of the complexity and confusion that have grown up around certain areas of the law. For example, I am proposing the replacement of the maze of antiquated, often unrelated, offences concerning theft and fraud with two general offences, based upon clear and intelligible principles. And I am proposing to resolve the perplexing issue of criminal contempt by spelling out a definition, maximum penalties, and the due process guaranteed to anyone charged with contempt.

I am also providing a new and more rational approach to sentencing. A clear statement of principles will be included in the Code to guide judges in making their decisions, and the range

of sentencing options will be greatly extended and made more flexible. Prison sentences will become the sanction of last resort for judges, to be used where the alternatives --such as community service orders or restitution-- are not sufficient. Experience and research have shown that these alternative sanctions are often far more effective and certainly much less expensive than keeping offenders in costly jail cells.

As you know, we are dealing with many other issues in criminal law, such as impaired driving, soliciting, writs of assistance and safeguards for jurors. One issue that has caused some controversy among members of the legal profession is the new concern for victims of crime.

Victims will be given an enhanced status within the legal system, with the sentencing option of restitution and with the right to present their views in a presentencing victim-impact statement. I know there are those who believe these provisions will introduce the distorting elements of revenge into a system that must remain dispassionate and objective. I feel certain that this would not be the effect of my proposals, which have been carefully thought out to avoid such a consequence. But the real question is whether justice is solely a matter of prosecuting a criminal, or whether it is not also a matter of

righting the wrong a victim has suffered. I think the time has come when we must recognize that the physical, emotional and financial needs of the victim are valid concerns for the criminal justice system.

The time has also come to humanize the divorce system in Canada, particularly for the sake of the children involved. The need is not for quicker divorce, and in fact the new law will lengthen the time required for the more than three-quarters of the divorcing couples who now obtain their decrees absolute in less than the proposed one-year period.

The need is rather for a law which is much less concerned with the grounds for divorce, and much more concerned with the people caught up in the process, including the removal of all disincentives to reconciliation.

By eliminating the necessity of adversarial proceedings the new law will enhance the possibility that couples may try to resolve their differences through counselling or mediation.

A third area of reform that I mentioned last year concerns the implications of the Charter of Rights and Freedoms. The Charter is undoubtedly the most significant legal achievement of our generation . More than any other law it demonstrates

the potential of law as an instrument for social justice and equality.

The Charter gives expression to our overriding concern for the protection of rights and freedoms against abuse by the State, by corporations, or by other people. But this concern must now be backed up by a concerted effort to ensure that the promise of the Charter is fulfilled. At the very least this means we must ensure that our laws are consistent with the letter and the spirit of the Charter.

My Department has undertaken an extensive review of existing federal legislation, and as a result we have prepared the first in a series of bills to amend our laws. The Charter-conformity legislation is ready to be introduced, and I hope to present it in Parliament in the very near future. It will deal primarily with powers of entry and inspection, seizure and forfeiture provisions contained in a number of federal statutes, and specific issues that are raised by individual statutes. The amendments will be an important step towards giving full effect to the Charter: they will provide greater procedural and substantive safeguards for Canadians and reduce the need for challenging legislation in the courts.

These three areas -- criminal law reform, divorce reform and Charter-consequent reform -- are highlights of the substantial results achieved over the last year, along with the amendments to the Federal Court Act I outlined to the CBA Annual Meeting in Quebec City. But there are a number of on-going reform initiatives that are also of great significance, especially the project in administrative law reform focusing on the decriminalization and rationalization of regulatory enforcement procedures.

So we are well on the way to accomplishing a great deal in terms of substantive law reform, reform that goes a long way towards ensuring a realistic legal system which can respond to the evolving requirements of our society. But as I said earlier, law reform is a business that is never finished. When we look at our legal system as a whole, I think we are forced to conclude that, while much has been done, much remains to be done. I should therefore like to turn to the future and focus upon some of the problems that seem to me to be most urgent.

While there are many substantive areas of the law that require attention, I think the most pressing problems we face in the coming years will require a more basic re-examination of our entire legal system. A legal system is made up of more than just

the laws of the land; it includes as well the institutional system of the courts and related services, the various professional organizations that provide the personnel to run the system, and the educational institutions that initiate the professionals into the mysteries of their profession.

The complex system is intended to serve a purpose. At the very least it should provide a service for resolving conflicts, settling disputed claims, and adjusting family and business relationships. If people find that the system cannot provide this service effectively they will receive little comfort from even the most well-constructed laws in the books.

There is reason to believe that this is exactly what many people are finding when they try to use the legal system. The courts are the very heartland of our law -- it is there that people really experience the law in action and are affected by it most directly. All too often what they see is a system approaching paralysis, plagued by enormous backlogs and delays. All too often they are affected by the law's inaction, not the law in action.

I am certainly not the first to flag this problem; it has been raised time and again by many people in this room today,

and by countless others outside of the legal profession. But I am afraid it is rapidly approaching the dimensions of a serious crisis. In the worst situation, in Quebec, someone who launches a civil action may have to wait up to seven years for trial of the action in the Superior Court.

The sheer weight and volume of these delays may result in a travesty of justice. Harassed judges may be forced to resort to set rituals and perfunctory dispositions simply because they have no time to dispense individual justice in the individual case. Civil litigants may be forced to settle for considerably less than they might be awarded by the courts, simply because they cannot afford to wait indefinitely for justice to be done. Conflicts may thus be resolved by default, not by law and reason.

This is a problem that cannot be resolved simply by increasing the number of judges. What is necessary is a fundamental re-examination of the legal process as an instrument for responding to human needs. If the courts are to maintain a meaningful and relevant function in our society there must be a concerted effort to reform and streamline our legal system as a whole.

Of course, legal procedure is a matter largely within provincial jurisdiction. But as Minister of Justice I am committed to doing all that I can to create an overall climate for effective reform. I hope that the procedural reforms I have introduced relating to the criminal law will help to create such a climate, as well as being necessary in themselves. Trials will be required to begin within six months of the accused's first court appearance. Where there is a preliminary inquiry it must also begin within six months of the first appearance in court. The trial of cases following a preliminary hearing must start within six months of the date of the committal for trial. In addition judges will be authorized to convene pre-trial conferences to clarify issues that might otherwise lead to procedural delays; the pre-trial conference will be mandatory in jury trials, and judges will be able to determine questions of law such as the admissibility of evidence before the jury is selected.

Ultimately, the problem of reducing court delays and backlogs will require a wide range of measures --such as rules for pre-trial disclosure of evidence in criminal cases, judicial enforcement of the rules, the convening of a disclosure court as in Montreal and generally improving the use made of court time.

These kinds of measures have often been resisted, particularly by members of the legal profession. Many argue that such measures restrict the strategies of counsel and in so doing interfere with basic elements of our adversary system.

My first response to this argument is that interference with the adversary system may not be a bad idea, if it is properly controlled. The adversarial principle has for many years been overemphasized in our legal system. For example, I believe that it is generally out of place in family law, and that is why I have eliminated the requirement for adversarial proceedings from the process of divorce.

I do not deny that the adversary process will always remain a central part of our system of justice. But even where it is a valid approach to conflict resolution there often should be limitations on its operation -- for example, by restricting the time that a lawyer may take to deal with a case. In the absence of such limitations the system is open to abuse. As Chief Justice Warren Burger said in an address several weeks ago to the American Bar Association:

> "For some disputes trials will be the only means, but for many claims trials by contest must in time go the way of the ancient trial by battle and blood. Our system is too costly, too painful, too destructive, too inefficient for a truly civilized people."

He added that the legal profession has

> "become so mesmerized with ... the courtroom contest that we tend to forget that we ought to be healers of conflicts ....Should lawyers not be healers? Healers, not warriors? Healers, not procurers? Healers, not hired guns?"

These words carry some rather harsh implications about our profession. Fortunately they do not, in my view, apply equally to this country. But I do think that they contain a relevant warning against losing sight of the fundamental goals of our system of justice.

Too often people come away from contact with our legal system convinced that it is unable, or unwilling, to serve their needs. And this brings me to a second area where reform is urgently needed: the growing distance between our system of justice and the people it is intended to serve.

The urgency of this problem was underlined at the People's Law Conference in Ottawa last May. I organized this conference of over 400 participants, mostly lay people, because I wanted to find out what people outside the legal profession think about the law. I am happy to say that the results of the conference will

soon be available to the public in the form of a paperback, which I commend to the consideration of all who care about the future of the law.

What I discovered at the conference is that there is a virtual "crisis of confidence" in our legal system. This crisis has many causes, but two general themes emerged at the conference that are of primary importance. People are disturbed, and indeed intimidated, by a legal system that is never explained to them and appears to be incomprehensible. And they are genuinely frustrated by the lack of opportunity to participate effectively in the process of law reform. These two points are, in fact, related -- if people are to have a meaningful role in the legal system they need information. At present they have not been given even the basic conceptual vocabulary necessary to comprehend, participate in and evaluate what is, after all, their own system of justice.

If we are interested in an effective system of justice we cannot afford to ignore this public perception. People have a right to understand how the law and its procedures bear upon their personal, economic and social affairs. And they have a right to participate effectively in the system. If we deny them this right we will inflict great damage on the quality of law and

justice. As the President of the Canadian Bar Association wrote in the February 1984 issue of The National:

> "The danger is that unless we rise to the challenge of providing information about the legal system, an increasingly sophisticated public is almost certain to grow cynical about our legal processes and the Canadian legal system as a whole."

That is why the demystification of the law must be one of our main priorities for the future. As a direct result of the People's Law Conference I am initiating a comprehensive program of public legal education and information, the first national program of its kind to be attempted in Canada.

The program has three components. I will be establishing an Access to Legal Information Fund, to support and extend the network of non-governmental groups across the country who offer their own public legal education programs at the community level. There was a general consensus at the conference that a major part of our efforts should be directed towards enhancing the efforts of community-based groups to provide community access to legal information. The fund will also be used to encourage established public legal education groups to prepare specialized information for disadvantaged groups, the handicapped and minorities.

I will also be creating a permanent capacity within the Department of Justice to inform the public about federal laws, and in particular about law reform initiatives. With this in-house capacity we will be able to ensure an effective national distribution of information on the law to the general public and to the specific groups who may be directly affected by reform initiatives.

As a third component of this program, I will be supporting research and development on public involvement in the process of law reform. The Law Reform Commission of Canada has recently undertaken a series of initiatives to improve its public consultations, and Justice will be working closely with the Commission in this respect. The research will address such issues as the role of public education in law reform and effective ways to integrate public consultations in to the management of reform projects.

This program has tremendous potential for making a permanent impact on the way people think about our legal system. In a sense, it is a very experimental program, and I shall be looking to the Bar for advice and assistance. I might mention that in

the near future I shall be organizing a workshop of the legal profession, public interest groups and legislative drafters on these issues.

This program will not succeed without the active assistance of everyone involved in the legal system. And ultimately I think we must see it as part of a more broadly based change in our whole approach to questions of law reform. In the future, the only kind of legal system which will work effectively in a changing society is one that can respond effectively to the needs that people face in their everyday lives. And such a system cannot take the needs of the people it serves for granted.

Both of these issues -- the need for procedural reform and the need for greater public involvement in the legal system -- suggest that our thinking about the law has been too restricted. Perhaps we have focused too closely upon traditional notions of the content of law, without attending to the functioning of the law in actual practice. And this points to a fundamental and disturbing fact. Despite an almost universal acknowledgement of the sociological dimension of law, and of the central importance of law as an instrument of social justice, we have not yet come to terms with the social context in which the law operates.

Ultimately, the practical task not only of the legislator but of everyone involved with the law is to design a system that actually works in society. And for this we need to know more than what the law says; we need basic empirical research of a kind that has been seriously neglected in the past. In many cases we simply do not know if a specific law is achieving its intended objective, let alone how it affects people's interests in unintended ways. When we do discover that a law is not working properly, we often don't know why it is so or how to correct it.

We are just beginning to deal with these questions of social verification, and they are leading us to the very frontiers of law reform. If we are to fully understand the complex interaction of law and society, I believe that we will be forced to extend our vision beyond a narrowly defined legal tradition, and we must be prepared to welcome innovative approaches to traditional problems.

On the one hand, these innovations may have dramatic implications for the way law is practiced. So far the legal system seems to have resisted the impact of developing technology in information and communications, but this is changing even today. Computer technology is being applied to caseflow management in the courts, and courts have even held sessions via satellite.

On the other hand a growing appreciation of the social context of law may force us to re-define the theoretical foundations of our legal system. As we come to understand more fully the social roots of such problems as wife battering or racial discrimination, we will find it more and more difficult to maintain the hard and fast distinction between "legal" and "social" problems. As I have said, we are dealing here with the frontiers of law reform -- perhaps the most difficult and challenging frontiers we have had to face as a society. I suspect that as the future unfolds there will be many more challenges to come. Our responsibility is to meet those changes with integrity and vision.

In the address I referred to earlier, Chief Justice Burger said:

> "The story of justice, like the story of freedom, is a story that never ends. What seems unrealistic, visionary, and unreachable today must be the target even if we cannot reach it soon, or even in our time. If we ever begin to think we have achieved our goals, that will mean our sights were set too low or that we had no concern for our profession or the public interest."

Let us not be accused of either trying or caring too little. Let our reach be far, even if it exceed our grasp, for as the poet would have it, that way lies heaven.

END