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Book Review: The Cost of Justice, edited by Canadian Institute for the Administration of Justice

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The Cost of Justice. Edited by CANADIAN INSTITUTE FOR THE ADMINISTRATION OF JUSTICE. Toronto: The Carswell Co. Ltd. 1980. Pp. ix, 160. (\$26.50)

This slim volume contains a selection of papers presented at the sixth Annual Conference of the Canadian Institute for the Administration of Justice held at Toronto on November 14th to 16th, 1979 and devoted to "The Cost of Justice". The theme of the papers is to identify and explore different solutions to the present predicament which the legal system finds itself in, namely, that current litigation costs are so exorbitant that they discourage potential litigants from pursuing their legal rights and that delay in the litigation process is of such a protracted nature that it seriously impairs the quality of justice rendered. These twin enemies of the efficient and fair administration of justice are deserving of the legal community's sustained and undivided attention. Unfortunately, the great majority of the collected papers fail to do more than emphasize the importance and magnitude of the problem to be tackled and offer very few positive suggestions as to how the debilitating ills of cost and delay can be effectively remedied. Moreover, there is a tendency to concentrate on devising increasingly sophisticated schemes to absorb and accommodate the expensive and lengthy character of litigation rather than to isolate and attack the root-causes of the problem itself.

In his opening address, "Alternatives to the Formal Justice System: Reminiscing About the Future", Professor Harry W. Arthurs explores some of the possibilities that exist outside of the formal adjudicative system. In particular, he tries to demonstrate that "things we have forgotten about our past may help us to better administer justice in the future".¹ He advocates a revitalization of conciliation and arbitration schemes, stressing the need to encourage community involvement and the establishment of neighbourhood courts.² The very nature of the formal justice system places limitations upon its ability to handle disputes expeditiously and efficiently. Consequently, Professor Arthurs asks the legal community to reconsider the potential of various informal alternatives to the overloaded and floundering formal adjudicative system:

My plea is for pluralism. Let us accept the limits of our own expertise as lawyers. Let other people try to get on with the job of solving basic social issues. And let us not insist that in the end we know better than they what procedures ought to be followed, what ought to be applied.³

Regrettably, the lead given by Professor Arthurs is not taken up. Many of the contributors, especially those from members of the

¹ P. 2.

² For an excellent discussion of the concept of mediation, see Fuller, *Mediation—Its Forms and Limits* (1971), 44 S. Cal. L. Rev. 305.

³ Pp. 13-14.

Bench, are devoted in large part to a defence of the present system.⁴ The general view is that the present monopolistic system is entirely capable of meeting the challenge and demands of contemporary society once some of the more blatant excesses have been removed and an improved and more streamlined system of court management is introduced. There is a marked failure to grasp the central, if unpalatable truth that the traditional structure and character of the formal dispute-settling process is the major stumbling-block to any meaningful and effective reform. Until this truth is realized and acted upon, any changes that are introduced will result in cosmetic changes only instead of the major surgery that is so urgently required.

A symptom of this conservative approach is evidenced by the increased funding of legal aid programmes⁵ and the introduction of pre-paid legal service plans.⁶ Although both of these developments are of considerable benefit to the disadvantaged groups of society in the short-term, their continued existence and utility over the long term must be seriously doubted. The very need for such schemes is directly attributable to the prohibitive costs and expense that the prospective litigant must incur if he submits his dispute to the formal justice system. Accordingly, a far more efficient allocation of resources would result if the finance and legal ingenuity required to plan, maintain and administer these schemes were used to explore and experiment with schemes intended to re-design and overhaul the existing system.

Having made that point, it is only fair to acknowledge that the work of Professors L.C. Wilson and C. Wydrzynski is deserving of real encouragement and support within the prevailing legal environment. Their paper provides an excellent survey of the nature and difficulties associated with the introduction of pre-paid legal services. Indeed, the authors make a persuasive case for the development of such services by the legal profession:

The nature and function of the lawyer in modern society is changing. Social, economic and political controversy demands the service of the legal profession in many novel and different ways. The profession must remain responsive. It must discharge the social responsibilities placed upon it as a self-regulated entity committed to public service. The system of legal service delivery has been shown to be deficient as a mechanism for ensuring the principle of equality before the law and equal protection of the law. Prepaid legal services plans are a sensible and

⁴ See Cherniak, *Response to Professor Arthurs*, at p. 15 and Howland, *Is the Appellate Court System Cost Efficient?*, at p. 59.

⁵ See McMurtry, *Public Accountability in Relation to the Cost of Legal Aid*, at p. 75; Lafontaine, *Legal Aid Delivery Systems in Quebec*, at p. 81; Lazar, *Legal Aid in the Age of Constraint*, at p. 89.

⁶ Wilson and Wydrzynski, *Access to the Legal System: The Emerging Concept of Prepaid Legal Services*, at p. 105.

practical method by which the needs of the average-income consumer can be met. The enormous power of the law, and the position of influence and privilege which the profession occupies within society, place on the profession as a whole a heavy obligation to serve the ends of true justice. Prepaid legal services provides an opportunity to discharge this important responsibility.⁷

Nevertheless, despite the socially responsive and sympathetic character of such schemes, they are built on insecure foundations for it is surely much better to prevent a problem from arising than to develop legal remedies for it after it has arisen.

The only paper to make a concerted attempt to examine and evaluate actual schemes to improve the efficiency and efficacy of the courts is by Paul Nejelski.⁸ Although he focuses upon the ways in which existing court organization and procedure can be improved so that citizens are not deprived or discouraged from exercising their legal rights because of the litigation cost and delay, he puts forward a package of proposals that might effectively result in a less expensive and more expeditious process of dispute-settlement without impairing the quality of justice rendered. He pinpoints five areas that must be dealt with in order to implement his strategy:

1. Instead of striving for a unitary model of civil procedure, special procedures should be devised so as to provide different treatment for different cases;
2. An increase should be made in incorporating the tremendous advances made in communications technology in recent years;
3. A greater application of modern management and organizational techniques to the administration of the court system;
4. The implementation of a scheme of mediation by non-judicial personnel; and
5. The imposition of a stricter regime of professional conduct that places greater primary responsibility on lawyers for the expeditious prosecution of his client's case.

In this regard, the Canadian legal community must be prepared to exhibit the same commitment and willingness to introduce and experiment with a wide range of innovative reforms as their American counterparts. It is vital that the initial stimulus for such change should come from the legal profession itself.

On a lighter note, the collection of papers closes with an after-dinner speech delivered by Sir Robert E. Megarry. After an amusing, if slightly overblown introduction by Trevor Anderson,⁹ the English Vice-Chancellor offers the reader "A Free Fantasia of a Visiting Englishman on the Theme of the Cost of Justice".¹⁰ Although he

⁷ Pp. 117-18.

⁸ Reducing Costs and Delay for the Consumer in the United States, at p. 23. Mr. Nejelski is the Staff Director of the American Bar Association's Action Commission to Reduce Court Costs and Delay.

⁹ Introduction of Guest Speaker, at p. 141.

¹⁰ P. 147.

presents his thoughts in a very informal and casual manner, lacing them with his own brand of legal anecdotes.¹¹ There is much in his speech that repays reflection and overshadows in its perception many of the formal papers delivered at the Conference. In fact, his remarks provide an adequate summary of all the topics that were discussed at the Conference and those that were neglected.

Apart from reaffirming the general desirability of making increased use of informal processes such as conciliation and mediation, Sir Robert puts forward the idea of a four-tier court structure; each tailored to suit the needs of disputes of varying complexity and size. There would be the Tuxedo System, the Business Suit System, the Jeans System and the Naked System; the attempt to accommodate all disputes within one unitary system is misguided and ultimately counter-productive. Each system would be characterized by its degree of elaborateness, formality and professional involvement.

In conclusion, then, these papers are of a very mixed quality and serve to illustrate yet again that law is much too important to be left to lawyers alone. Nevertheless, the success of the Conference can only be judged by the extent to which the ideas and reforms proposed are actually implemented and pursued in practice. At least, the papers present hope for the future and are rich in ideas when compared to the poverty of the *Final Report* of The Royal Commission on Legal Services in England.¹² However, the task of reducing excessive cost and delay in the justice system cannot be underestimated and its successful completion must not be achieved at the expense of the quality of justice rendered.

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¹¹ *Miscellany-at-Law* (1955) and a *Second Miscellany-at-Law* (1973).

¹² (1979), Cmnd. 7648.

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¹ The conference was sponsored by the National Legal Center for the Public Interest, described in the preface as "a nonprofit center that engages in nonpartisan legal research".