

Access to Justice: Personal Reflections
University of Saskatchewan College of Law

Silas E. Halyk, Q.C. Lecture

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Remarks by: Hon. Warren K. Winkler, O. Ont., Q.C., LL.D.

Former Chief Justice of Ontario

Students at law, faculty members, colleagues at the bar and members of the judiciary, friends and family of Si Halyk.

Mr. Halyk.

I am immensely honoured to be with you this afternoon as the Si Halyk visiting scholar in advocacy. I have come to know Mr. Halyk as a pre-eminent counsel and a person of profound social conscience. I am extremely proud to be presenting a lecture that bears his name.

I address you today on the single most important issue facing the legal profession as we enter the Twenty-First Century: namely access to justice.

The title of my talk is “Access to Justice: Personal Reflections”.

I deliver my remarks as seen through a number of lenses:

- As a lawyer who has been a member of the bar for more than fifty years.
- As a person who practiced labour and employment law across Canada for some twenty-eight years.
- As a former trial judge for almost fourteen years.
- As a former Chief Justice of Ontario for almost seven years.
- As a person who grew up in a small town in western Canada in a family of modest means who could not have afforded to pursue our legal rights in a court of law, then or now.

My personal experiences, in those roles over my entire lifetime, have informed my perspective on this pivotal, societal issue.

Soon after I was appointed Chief Justice of Ontario in 2007, I began to receive calls from friends asking the poignant question: “What is your legacy going to be as Chief Justice?” To a person, each caller, from various walks of life, urged me to choose a legacy topic quickly, and having done so, to pursue it vigorously.

As my friends pointed out, I now had a bully-pulpit from which I could advance a worthy cause, and I had to take advantage of that. This notion appealed to me because as a westerner from a pioneer family who had arrived in what is now Saskatchewan in 1882 by wagon, I had in me the blood of a reformer.

My great-grandmother and grandmother lived in Swift Current during the Great Depression, where grandmother, who was by then a widow, owned and operated the local hotel. The rest of my mother’s family were farmers in Manitoba and Saskatchewan. Some as far north as Meadow Lake! My aunt Eva lived in Saskatoon.

My father’s family were Danish immigrants who came to Manitoba at the turn of the last century.

As you can see, this is a joyous occasion for me. It is like coming home.

In response to my friends’ admonition, it didn’t take me long as Chief Justice to select a noble cause. I chose one that touched my heart: Access to Justice for the broader middle class.

Access to justice is about the ability of the individual to pursue her rights against the large corporation or government; it is about overcoming a power imbalance when seeking a remedy for a wrong suffered; it is about affordable justice.

Some background will help to explain my choice of a legacy topic.

When I was appointed to the trial court in 1993, I was assigned to class actions. I was designated team leader of a one-person team. Class actions were at that time a new invention in Canadian legal circles, having been legislated into existence in Ontario a couple of years earlier. In 1993 there were just a few decided cases. The only other province with class action legislation was Quebec. I had the luxury of working in a “green-field” area of the law. Little did I know that this judicial assignment would allow me to experience access to justice, first-hand.

One of the enunciated goals of class actions was access to justice. A class proceeding is a procedural tool that enables a group of people who have suffered a common wrong to seek a remedy together rather than having to go it alone.

Access to justice in the context of a class action means the ability to commence a legal proceeding and carry it through to judgment. By grouping a large number of individual plaintiffs together into a class, the force of numbers was intended to enable people who individually otherwise could not afford to take on a large defendant, to do so.

Class actions caught on quickly with the entrepreneurial bar.

Soon I had a portfolio of some 150 cases on my docket. Certain of these cases stand out in my memory because they emanated from mass human tragedies, ones that you read about in the newspapers, or saw first -hand on TV.

Let me pick out a few examples:

- Breast Implants
- Walkerton Water Disaster
- Hepatitis C tainted blood scandal
- Indian Residential Schools

Make no mistake, there were many other cases that you would, I have no doubt, also recognize if I told you about them. But in the little time that I have today I will deal with these four.

Each of these cases involved serious personal injuries to the class member-victims. Some of them involved fatalities. The class sizes ran into the thousands. Many groups were pan-Canadian in scope.

There is a tendency to pay mere lip service to the stated goal of access to justice when certifying or approving a settlement in a class action. The reason for this is that the Class Proceedings Act provides the access to justice element. In other words, once the action is started the goal of access has been met. As I became more involved in the court approval, implementation and oversight of settlements the words 'access to justice' took on an entirely different dimension.

Most of the larger class proceedings settle. It seemed natural to me, therefore, that the notion of access to justice ought to be enlarged, expanded upon beyond merely the right to bring a suit, to include access to the benefits provided to the class.

It was important to me that the claims process by which the victims accessed their benefits be carefully scrutinized by the court from this perspective. Equally important, the claims process had to be monitored after court approval to ensure that ready access continued to be made available to victims. Access to justice depends on the victim's ability to access his or her benefits with relative ease.

Makes sense. Sounds simple. But it wasn't so simple in practice.

Let me demonstrate what I mean by reference to the cases I have selected as examples.

Breast Implants:

- A medical implant device. Caused serious harm to recipients. Leaked, poisoning their bodies and deforming them.
- Case settled as against manufacturers. At approval hearing, filed affidavit of proposed settlement administrator.
- Insurance company.... not present at hearing

- Adjournment to allow officer of company to appear for questioning. Staff couldn't have "adjuster mentality" i.e. deny claims. Needed special training and compassionate approach. Not about denying claims. A claims process not an insurance claim on policy.
- Administrator agreed and was approved.
- Decided to remain seized of oversight of settlement administration.

Hepatitis C:

- Tainted Red-Cross blood supply acquired from prisoners in jails in the U.S.
- Transfused blood infected victims with Hep C.
- Settlement reached with Federal Government.
- At the approval hearing there were only two people in the body of the court, a man and little boy. The man asked to speak. He told me that he had been infected with Hep C from a transfusion and had infected his son. They had come down from Ottawa to attend the hearing. I had an epiphany! I appointed Bill Dermody, a lawyer from Hamilton, to represent them. I adjourned the hearing and sent out a fresh notice to victims inviting them to attend. Dermody would represent them also. When the hearing reconvened several months later the courtroom was packed. People had come from across Canada: by Greyhound, train, carpool, any way they could. I invited them all to speak. Families spoke together, mothers and fathers with their children, husbands and wives, they all told their stories. I had many boxes of Kleenex on the bench for the three days that they told their heart-wrenching personal experiences. I cried my eyes out.
- This served two very important purposes. First, the victims had an opportunity to tell their stories. Secondly, I learned from them what they had gone through.
- The settlement was approved. It provided for three administrative judges responsible for supervision of settlement: B.C, Quebec and Ontario.
- To date 14,000 claims approved since its inception in 1999.
- \$823 million paid out. \$1.3 billion in fund at present.
- Drug cost: \$180,000 for 24 weeks!

Walkerton Water Disaster:

- Largest fresh water disaster in Canadian history. Water runoff from barnyard entered town water supply infecting it with E. coli. The water treatment plant did not operate properly to prevent the disaster.
- 7 people died and some 6,000 were affected.
- Saw on TV from Pincher at Dad's funeral.
- Class action: 7 defendants.
- Certification-Mediation. Settled.
- After approval, settlement required revisions ie. Class members put in bands so no need individual assessments.
- Backlogs. Lawyer resources. Ongoing mediations of claims.
- Numbers are not public but some 10,000 claims made and the amount paid out would likely build a new hospital for the town of Walkerton.

Indian Residential Schools:

- This class proceeding arose out of the operation across Canada of what became known collectively as the Indian Residential Schools. The program is widely acknowledged as a flawed failure and the most serious blight on the history of our great country.
- This case was in my repository of class proceedings, for years remained dormant.
- Decision of the Ontario Court of Appeal in a case called *Cloud*, gave the IRS case new life. After arduous negotiations a settlement was reached between Canada, the Churches who ran the schools, and the Class members.
- My role as case management judge. Deal breakers for the government were that there had to be 9 approval hearings in nine jurisdictions across Canada and the government had to be the administrator of the settlement.
- The settlement contained important elements of compensation: a common experience component; an Independent Assessment Process to deal with individual harm suffered by former residents, sexual or physical abuse.

- Significantly, the settlement also provided for a Truth and Reconciliation Commission whose mandate was to deliver a report after hearing from victims. You all have heard about this Report by now.

As case management judge I scheduled the nine approval hearings and I scheduled myself to preside over the first hearing in Toronto.

At the beginning of the Settlement Approval hearing a woman in the body of the court asked me if she and her fellow victims would be permitted to tell their stories. I agreed. I suggested that she go first. She said that she had grown up on a northern reserve. One day her parents took her and her brother, aged about six or seven, into the woods and hid them telling them not to come out until they came to get them. Soon after their parents returned to their cabin a black car drove up. Two men in suits got out and went inside. They were the priest and the Indian agent. There was a lot of shouting and wailing. Then her parents came and got them from their hiding place. They were put in the car and taken to the residential school. When they arrived she and her brother walked up the stair and at the top was a sign pointing one way for girls the other for boys. She went one way and her brother the other way. She never saw her brother again.

Main problem with the settlement was the naming of the Government as the administrator:

- History as provocateur.
- Perception...gov't defended certification vigorously.
- Adversarial defendant including attempting unilateral process for claims.
- In principle, could any defendant be an administrator?
- Agonized, no alternative so I approved the settlement, subject to conditions and sent the settlement back for changes and for the Government to accept my terms.
- The 8 other courts adopted my reasons.

- The Government accepted the changes so the settlement had to come back for final approval. The nine courts sat together in Calgary. Six judges en banc and three by telephone conference call.
- The administrator was required to demonstrate for the judges that the claims process could work as promised. This was done in Calgary for three days.
- This was an historical event in Canadian judicial history: it was unprecedented in Canada for courts to sit outside their provinces and sit together.
- To make the administration functional, the courts appointed two supervisory administrative judges, Brenner CJBSC and myself.
- Settlement is known world-wide for sheer size, complexity and historical significance.

Largest class action to present:

- Estimated class size 79,000
- 38,000 IAP applications.
- 31,000 applications resolved
- Over 23,000 hearings and decisions averaging 113,000 dollars.
- 2.7 B dollars paid out through the IAP, over 4 B dollars if you include the common experience payments.
- 107 adjudicators in IAP process. Dan Ish, Dan Shapiro, Si Halyk.
- All this under court supervision.

Lessons Learned

What lessons did I learn from these and other tragic cases?

- You need to “know the class”. Make-up of the class. What they suffered and current state. Where they reside? How many are there? Demographics? Do they suffer from disabilities? Knowing the class members informs everything else in the case.
- Are they vulnerable? Emotional vulnerability.

- What difficulties will they likely have in accessing the benefits? Intellectual, physical, emotional, geographic?
- Does the settlement mechanism and staffing accommodate these?
- Is the administration neutral, independent and impartial? Will the administrator be proactive in helping people access the system and pursue claims?
- Is the settlement structure manageable? Group claims into bands.
- Do class-counsel have the necessary resources to handle the claims?
- Does the court have the necessary resources to supervise the settlement administration?
- Does the settlement provide controls for the conduct of lawyers?
- Victims have a deep seated distrust. We must work to earn their confidence. Does the settlement viewed holistically bring credibility to the process?
- Finally, victims need to be able to tell their story. This is the only way to bring closure to what they have suffered. Does the settlement process allow for this?
- We need to show respect for victims thus need to be good and sincere listeners.
- Appeals, there must be appeals. Who will hear them? What volume is there likely to be?

I reiterate, in the context of class actions, access to justice not only means that the class have access to the courts to seek a remedy for the wrong suffered by them. It also means that a settlement must have a claims process which provides access to justice to the class members by making the benefits easily accessed.

When I set out on my adventure into the yet scarcely defined field of class actions in 1993, the role of the court supervision of settlements had not been conceived of let alone defined. Lawyers shared the view that once a settlement was approved by a court – a statutory

requirement – their obligation ended, as did the courts' involvement. Indeed, no one seemed to question this!

I disagreed. When the issue came before me, I decided that the court supervisory jurisdiction, the courts oversight role, continued unabated until the settlement was completely paid out and finalized, as did the duty of class counsel.

The Job of a Supervisory Judge

What's it like administering a class action settlement? If there is an analogy that is apt, it is to running a large insurance company. The job of the supervisory judge is like that of CEO. It is a hands-on job. It involves almost daily work, putting out fires and trouble-shooting, making decisions and doing tasks that must be done if the settlement is to stay on track.

I learned this the hard way, on a case by case basis, by trial and error. It is fundamental that our courts ensure, not only that the settlement itself is fair, but that the claims process is also fair and continues to be run fairly.

My experience with these heart wrenching cases during my judicial career, informed my appreciation of what access to justice means to the ordinary Canadian. That is the reason I began speaking about access to justice in the first place when I became Chief Justice.

Moreover, it is the reason I took these class action settlements that I had been supervising as a trial judge with me when I became Chief, even though it was not part of my new job. I felt that I had acquired the institutional knowledge and I should carry on with these cases in the interests of the class members. I felt a responsibility to them.

Other substantive areas of interest from standpoint of access to justice

In short order as I settled in as Chief Justice, I began to look beyond class actions, to look forward and backward in time, in my career, to expand the topics for my public discussion of access to justice.

Soon after my appointment, I was invited to address the Ontario Bar Association on the topic of wrongful dismissal. I zoned in on the issue of access to justice in that area of the law. I felt wrongful dismissal suffered from abuses that cried out for reform.

I began my speech with a personal experience.

One morning I was walking up York Street to the Court House when a man who was approaching me stopped, looked at me and said: “Don’t you recognize me?” It took a few seconds for me to do so. He had been a client when I was in practice. He had been the president of a large company. The reason I didn’t recognize him was that the person I had known was tall, thin, well-tailored and well groomed. He had been confident and poised. The man I now spoke to was chubby, in a dowdy suit, untidy hair, grey complexion, unshone shoes and what really capped it off were the frayed cuffs of his worn shirt.

I invited him for coffee. I asked him to tell me what had happened to him. He said he had been fired by his company, and many allegations of cause asserted against him. He couldn’t tell his family, but when the company car disappeared they knew. The company stalled and didn’t offer him a settlement package. He had to litigate. He couldn’t get a job at his level so after almost a year he took a job far below his former job on the management ladder. The family lost their house. The stress almost broke his family apart. After almost two years the company dropped all of the allegations of cause and he agreed to a settlement out of desperation much less than he should have gotten. He was a ruined man. His family was in ruins as well. The damage in personal terms was irreparable and inexcusable.

Wrongful dismissal almost always involves a power imbalance as between plaintiff and defendant. A wrongful dismissal action pits an individual who has just lost their job against their former employer. If the former employer engages in strategic delay or raises meritless defences, this can lead to improvident settlements. The dismissed employee's financial and emotional resources are often drained.

My speech that evening struck a chord. The OBA established a task force to delve into the concerns I raised. This in turn led to a full, formal report. I am told that this study, which was the focus of a full-blown OBA debate, created a greater sensitivity toward the vulnerable plaintiffs in dismissal cases.

In a culture shift by the bar, counsel began resorting to more widespread use of early mediation, aimed at saving litigation costs and reducing the stress of protracted litigation. The alteration in attitude also stressed the importance of lawyers not being complicit in ill-motivated strategies and the responsibility of counsel to discourage clients from doing so.

A few years later I was invited to deliver the Donald Wood Lecture at Queen's University on employment law. I chose access to justice in the field of grievance arbitration as my topic. My speech entitled "Grievance arbitration, back to the future," was critical of the trend away from quick, simple, cheap and final grievance resolution, toward slower, more complex and more costly arbitration, thus denying rather than advancing access to industrial dispute resolution.

Queen's published the paper. It went pan-Canadian, or as the young people say, went viral. My thesis was taken seriously by all stakeholders. A constructive debate ensued. The parties self-reflected and looked for solutions. Governments, unions, employers and academics studied the paper and put the topic on agendas for discussion from a policy perspective. Partially as a result of this debate, there has been increased use of expedited arbitration, and med-arb, shortening hearings, cutting down back-logs, delays and cost, and in the result, improving access to justice in the workplace.

In my role as Chief Justice I embarked on a program of visits around Ontario with a view to encouraging a dialogue with members of the bar and users of our justice system. It came as no surprise that family law was first on the list when it came to public dissatisfaction with our justice system.

It seems that almost everyone has a family member, friend or acquaintance with a family law problem. Their experience with the justice system was invariably bad.

Family law cases are often bitter and acrimonious. This lengthens proceedings and increases costs. In such instances, the family's finances are soon depleted, well before the case is concluded. Frequently the parties end up self-represented creating an access to justice issue.

The culprit in family law, not unlike other areas of the law, is strategic delay, refusal to disclose in a timely manner, power imbalance and other mainly process issues.

The role of counsel must be to help contain the effect of emotion on the proceeding, rather than exacerbate it.

I am the first to admit that I am not an expert in family law. But I do know something about dispute resolution. Also, I learned a great deal about family law from the experts in the field and from experienced family law lawyers. I found out that there has been no shortage of dialogue or studies on the need for family law reform. This didn't hold me back, I added my voice anyway.

I proposed a multi-track procedure, a triage judge to decide the appropriate track, and a default position of mediation. I advocated a 'wholesale revision' of family law rules and procedure. Despite this perhaps overly dramatic approach, I cannot report any tangible success, or even anything that comes close to positive change. My only consolation is that my voice resulted in plenty of constructive discussion that is ongoing as we speak.

Family law touches more members of the public than almost any other field of law. Innocent children are often the collateral victims in these sad disputes. Because of the huge toll these

disputes take on society in general and individuals in particular, we must re-double our efforts to bring about much needed change to the way family law is delivered.

At the Winkler Institute for Dispute Resolution at Osgoode Hall Law School, one of our projects is small claims courts. Often the litigants are self-represented. Ease of access is therefore of great importance. There have been many improvements and one such constructive change has been the increase in monetary jurisdiction of small claims courts.

Let me conclude on a positive note. Access to justice has seen significant improvement in the areas of class proceedings, personal injury, small claims, wrongful dismissal, and grievance arbitration. On the other side of the ledger, we must continue to seek major reform in the manner in which we deliver justice in the area of family law.

If there is anything that will restore one's confidence in our justice system, it is to look into the eyes of the people who have suffered as a result of a mass tragedy, leaving them helpless, and see their relief and gratitude when they are told that their claim has been resolved and that they will be looked after.

None of the victims of Breast Implants, Hep C, Walkerton or Indian Residential Schools would have seen a penny of compensation, if it were not for the class proceedings, the work of the lawyers, the administrators, the adjudicators, and so many others participants.

We owe all of these people a vote of gratitude for their unending effort to provide quality and accessible justice to people who would otherwise be unable to access our justice system.

What about the future?

Speaking strategically, if we are to make a difference in enhancing access to justice for the ordinary Canadian, we must focus on specific areas of law where we can identify problems that

we have a chance to resolve. Making a difference also requires a generous dose of ingenuity and courage. Harbingers of reform and change are not always popular.

The affordability of legal services is not a new problem. It is an old problem brought forward under a new name, 'access to justice'. When I was a fledgling lawyer in the mid-nineteen sixties, the cost of legal services was a front-line issue. Two decades later, I headed up a Canadian Bar Committee on Pre-paid legal services. Same issue: lawyers have been tackling this issue for decades. Fifty years later we are still troubled by this societal problem.

If we are to maintain credibility with the public, we must not only "talk the talk", we must "walk the walk". We cannot continue to speak in abstract terms about access. The bar is set much higher than that. We must produce meaningful, tangible, and practical change in the way we deliver justice to the public we serve.

I am compelled, however, to add a word of caution. Access to justice is largely a procedural concept, although it intersects with substantive law as do most procedural notions. They are joined at the hip: procedure is a mechanism by which substantive justice is delivered. If we become fixated with access to justice to the extent and degree that we lose sight of the substantive implications, we run the risk of impairing the substantive rights. Ultimate justice flows, not from procedural law, but from the substantive law. If we over-compensate on the procedural side under the rubric of access to justice, we could inadvertently deliver access, not to justice, but to injustice. I raise this concern specifically in the context of summary judgment.

We owe a sacred trust to the public to provide a justice system that is not only fair, but one that is also accessible. A justice system that is not accessible is in reality no justice system at all.

And, if the justice system fails the ordinary citizen by not being accessible, it will not be long until the Rule of Law goes by the wayside as well.

The stakes are high, for if we fail, we shall as surely as day follows night, slip hopelessly into anarchy!

In closing, I am often reminded of the obligation we have as lawyers to provide accessible justice to the public by the words of Canada's favorite poet, Leonard Cohen, in one of his less well known songs: "Heart with no Companion".

It goes like this:

Tho' your promise count for nothing

You must keep it nonetheless

You must keep it for the captain

Whose ship has not been built

For the mother in confusion

Her cradle still unfilled

For the heart with no companion

For the soul without a king

For the prima ballerina

Who cannot dance to anything.

This song is about the intersection of hope and promise. It is about the promises we as lawyers have made to our fellow citizens. It is about the hope that our fellow citizens hold that we will make good on those promises.

So keep our promise we must.

"Tho your promise count for nothing you must keep it nonetheless."

I thank you so awfully much for you kind hospitality in having me here as your guest.

- **Warren Winkler, January 2016**