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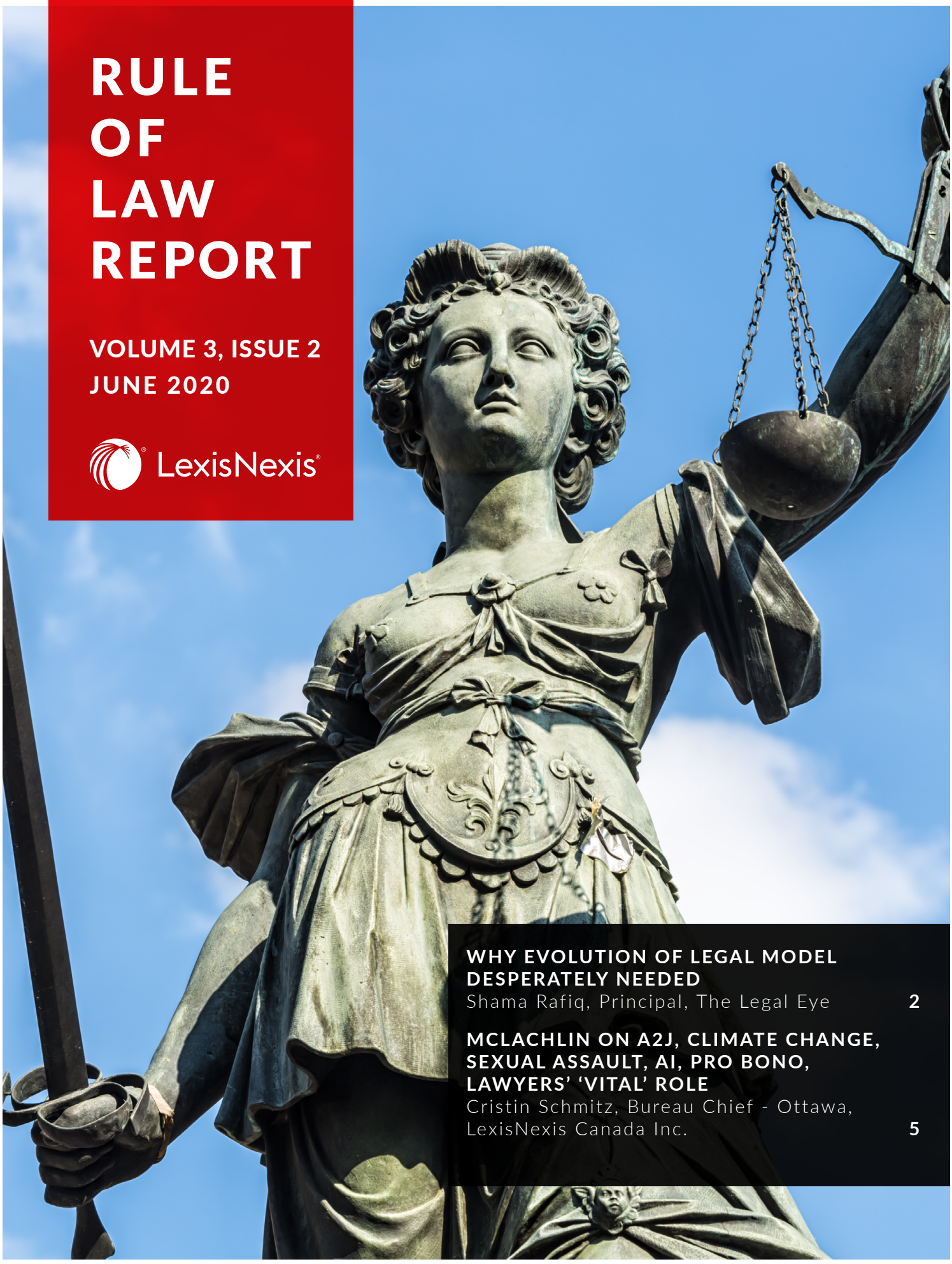

WHY EVOLUTION OF LEGAL MODEL DESPERATELY NEEDED

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When it comes to access to justice, we often forget that the old law firm structures are a major deterrence to ensuring that anyone and everyone has a fair chance to having their day in court.

Billable hours are the amount of time an employee spent on a client's file, where the client is only charged for time spent on the actual file. Firm policies generally vary on how relevant time is calculated. That being said, clients are generally paying premiums under this regime.

There are various types of clients so it's natural that they have different needs, even when it comes to paying legal fees. Some like the billable structure while others prefer a flat fee. But what about those potential clients who don't even make it past the initial consultation?

> Access to justice is an elementary principle of the rule of law where individuals are able to exercise their rights and have their voices heard. It is more than just having your day in court, it is about having adequate legal representation. "

Traditional law firms don't alter their services for those who are not able to afford the full package. In many family law cases there is a market for those who can only afford to pay a certain amount and for partial services, for example a potential client may walk in with only $5,000 to spare and may need assistance with a factum. In this case, most law firms would not be willing to go beyond the consultation and the potential client would go to court ill-prepared resulting in a failed legal system.

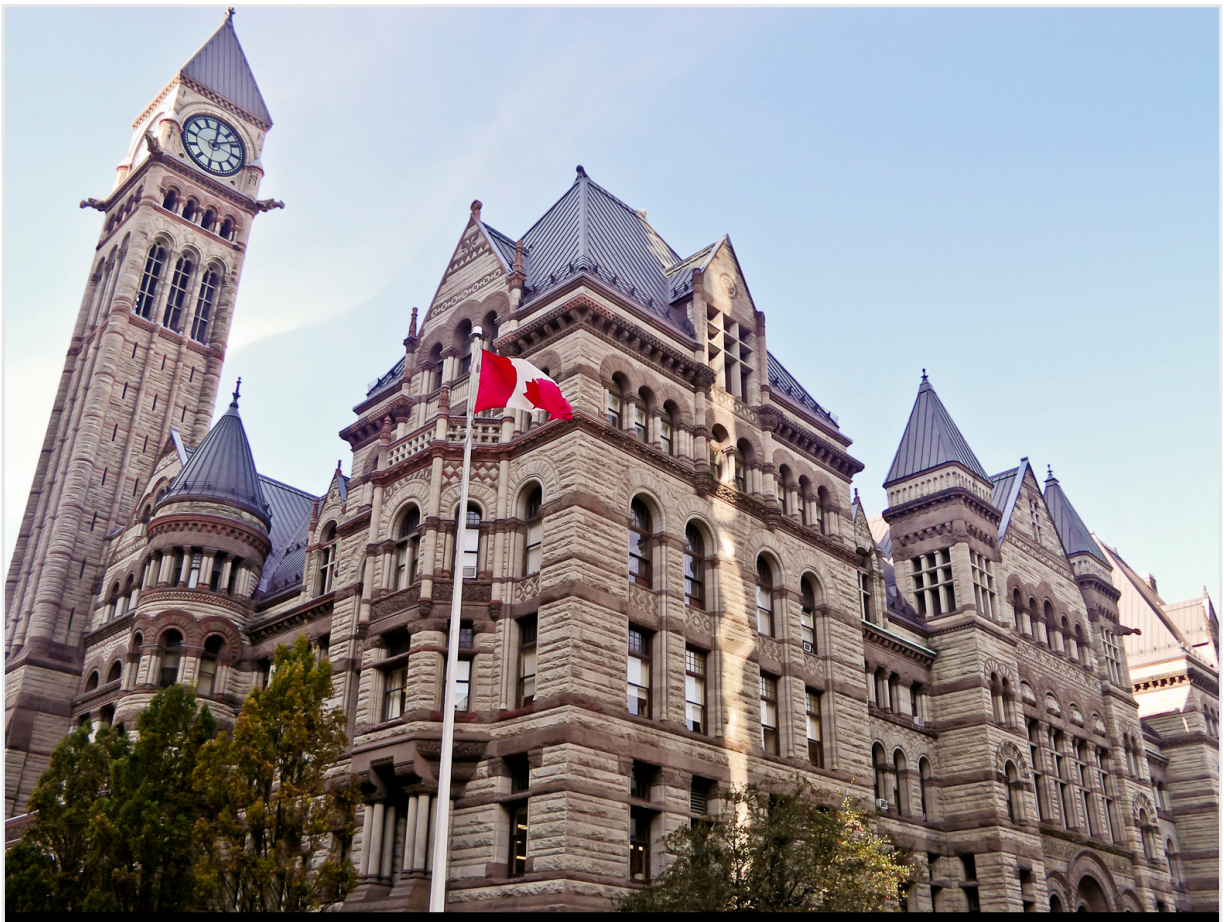
According to the United Nations, one of the major difficulties in accessing justice is the cost of legal advice and representation.

For individuals who are unable to afford full legal services, this can be very disadvantageous for them. Not only does this slow down the courts as individuals have to be guided on the rules and how to proceed by both judges and court personnel, but it is costly for taxpayers.

Recently, there have been many cuts to the legal aid program resulting in already overburdened duty counsel to now also represent those accused who need legal aid. Although the reasoning behind these cuts is to save taxpayers money, the reality is that under this new regime, those accused will not have their day in court in a timely manner and many may choose to plead guilty to crimes they didn't commit to avoid having to represent themselves in a trial.

The argument made by former Ontario Attorney General Caroline Mulroney's press secretary Jesse Robichaud that if there is duty counsel present at bail hearings then having another legal aid lawyer come in for a minimal time is pointless, shows how little the government cares about low income earners.

The challenge we face today is twofold. We have a government that will not support its low-income earners and law firms that choose to turn a blind eye to low-income earners. As a general rule, lawyers do not want to deal with a client if they will not be paid, but if they do not open up to other ways where they can still provide services, they will lose out on an already big rising market.



Walk into any criminal courtroom in Toronto and one can see how flooded they are.

That's why we in the legal profession must evolve as people's needs are now different. The goal is simple: to help people in need by changing the old law firm structure so that there is access to justice for everyone. It's a simple idea that will take its time to cultivate because the reality is that as law firms strive to make changes, the legal system is slow at adapting to these changes.

MCLACHLIN ON A2J, CLIMATE CHANGE, SEXUAL ASSAULT, AI, PRO BONO, LAWYERS' 'VITAL' ROLE

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The Charter may offer an avenue for combating climate change, former Chief Justice of Canada Beverley McLachlin says as climate litigation ramps up here and in the rest of the world.

"I think the main obligation, constitutionally, for tackling this major problem rests with the federal government and the provinces — but courts are part of the picture because the [Charter s. 7] right to life, liberty and security of the person is something that all of us are entitled to, and climate change may tie into that," Canada's former top judge suggested in a wide-ranging LexisNexis Canada webinar on access to justice Oct. 10 ("A Conversation with Beverley McLachlin on Access to Justice" is available on demand here).

Against the backdrop of climate change lawsuits launched by youths against governments in Canada and internationally, McLachlin commented that "courts have long been used to monitor environmental processes and vet developments that may have a negative impact on the environment. Now we're seeing people starting to bring lawsuits on a broader basis to protect the environment — it will be very interesting to see how the courts deal with them."

Speaking generally, the chair of the national Action Committee on Access to Justice in Civil and Family Matters said that the Charter is a vehicle for change and enhancing access to justice.

She pointed, for example, to the Supreme Court of Canada striking down court hearing fees that obstructed people from getting their day in court: *Trial Lawyers Association of British Columbia v. British Columbia (A.G.), [2014] S.C.J. No. 59, 2014 SCC 59*.

"Justice is a basic right and the courts have said so under the Charter," said McLachlin, who wrote that majority ruling. "So I think the Charter can be used to provide access to justice, and beyond that it can be used — and we've seen this — to help people gain more control over their lives, to get rid of injustices in the law that are holding them back or keeping them down."

McLachlin addressed a host of diverse questions, with access to justice dimensions, that were posed to her by *The Lawyer's Daily* and by the lawyers who registered for the one-hour LexisNexis webinar conversation.

Among other things, she expressed her views that: an Indigenous jurist will be appointed to the Supreme Court of Canada "soon and I look forward to that day"; it's "usually a mistake to eliminate judicial discretion in sentencing"; the Criminal Code "shouldn't be jigged" every time the federal government changes; mandatory arbitration clauses are sometimes being "misused"; and using artificial intelligence (AI) to decide cases risks incorporating racial or other biases.

Asked what she thinks of predictions by legal futurists that AI, competition and the lack of affordability of legal services will eventually decimate the legal profession, particularly lawyers in small non-specialized firms, McLachlin was skeptical.

"I have a personal point of view, which not everybody may share, but I think the best chance for justice is when lawyers are involved, at least at critical points," she explained.

"Futurists may have evidence I'm not aware of, but I have a hard time accepting that … an increasingly complex society is going to need fewer lawyers. Because whenever you have a complex situation, you have complex disputes; you have complex interweaving of interests. And you know who's best at sorting those out? Lawyers," she responded. "Because lawyers are trained to take messy situations, be they small ones, large ones, in-between ones, and sort out rights and wrongs, and sort out arguments, and put some sort of form on these difficult situations. That is what lawyers do better than anyone else."

"Will they do it in the same little corner office?" she queried. "I don't know. But I think those skills that lawyers bring , including upholding the justice system, are going to remain vital to our society."

Asked whether lawyers, as beneficiaries of a monopoly, are doing enough — and should be obliged to do more — pro bono work to help those who can't afford their services, McLachlin replied, "quite frankly, I've been very impressed at the amount of pro bono that individual lawyers and law firms are providing; at how they have built pro bono into their practices; and how this has increased over the last decade or so. I find that very, very impressive."

> As for mandatory pro bono, she suggested rather that "what we need to do is change the culture — and we are changing the culture, I believe — so that every lawyer says: 'I have this great privilege of practising law. I can make a living with it… I and my fellow lawyers are the only people who can do this. With that comes a responsibility to make sure that people get legal representation when they need it. "

"And I think that is more and more accepted by the legal profession and that's what we can do, is make that acceptance a general rule," she advised. "And then we won't have to worry about the word 'mandatory' — or how we're going to police it — and all of those other difficult issues."

McLachlin suggested lawyers can contribute to improving access to justice in various ways, whether or not they have the resources or ability to perform pro bono work in their particular circumstances.

For example, a busy parent raising children can go to her children's school and talk about the importance of the justice system. She can work within her profession to increase access to justice. "And if she has a little time she can go to a pro bono clinic, or she can go to a meeting where fellow lawyers talk about it," McLachlin said. "She can contribute to a [non-governmental organization].

She can give some money, if she has sufficient, to some group that is working with Indigenous people, or the needy people, in our jails — to keep kids out of jail and keep them on the right track," she said. "And best of all, she can just say 'I'm there for access to justice, and I'm going to practise it as much as I can in my day-to-day work, and do whatever I can to promote it outside my day-to-day work.' "

McLachlin expressed solidarity with new lawyers who are working all hours to pay off their law school debts and who may find pro bono work out of reach. "You do what you can, and I completely understand that not everybody is in a position to give money to support an NGO, or to work, or to give their evenings and actually do on-the-ground work," she said. "There may be times in your life when it's very difficult. There may times when it's easier. But I think you should always do what you can to support better justice for everybody."

McLachlin invited lawyers to send in their proposals and ideas, and law firms to contribute financially, to the Beverley McLachlin Access to Justice Fund that was launched in September. The capital fund dedicated to improving access to justice is aiming to raise $10 million.

"I have long felt that we have a need for more sustained funding for access to justice projects," she said. "Most of these projects are underfunded. Many of them lurch from crisis to crisis, and this makes it very difficult to develop sustained models of helping people and to do research into how we can improve access to justice. So we're hoping that different groups who care about access to justice will put their proposals forward and that the independent panel that will vet the applications will be able to provide funding that will really help to advance access to justice in Canada."

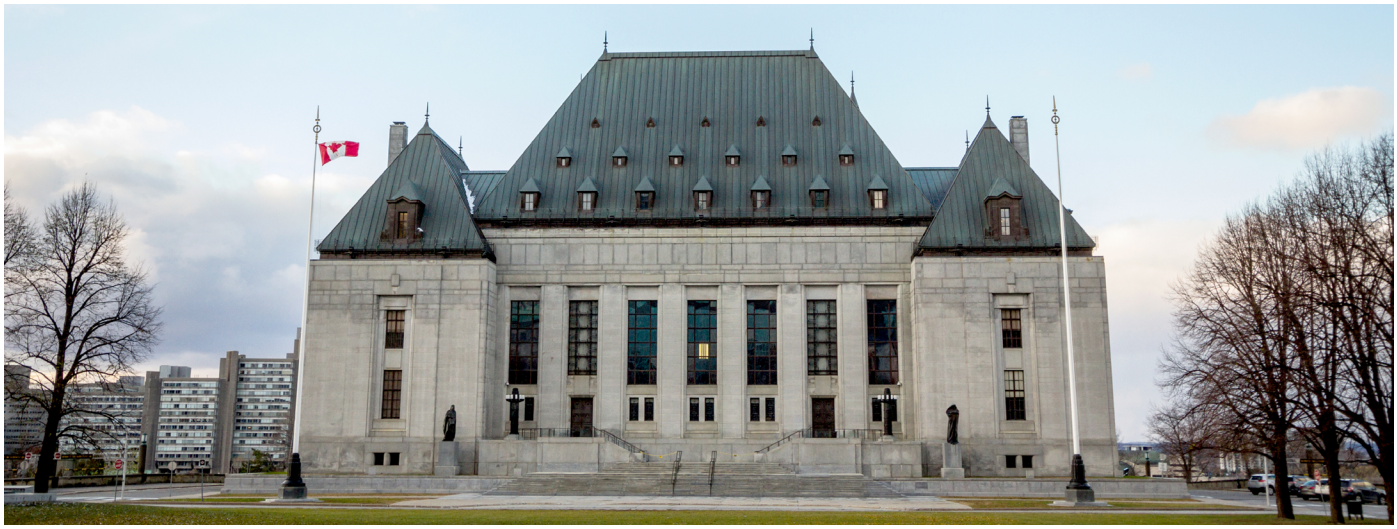
In the light of persistent underfunding of legal aid, including a 30-per cent cut this year by the Ontario government, McLachlin reiterated her strong view that "it is really part of their constitutional responsibility for the administration of justice that provinces provide adequate legal aid, particularly in cases where a person's liberty is at stake, but also in family cases. … I'd like to see provinces take these responsibilities really, really seriously."

She acknowledged that the Canadian Bar Association and others in the legal profession have been pressing governments for decades to provide stable and adequate funding for legal aid — without great success so far.

Still, the profession should continue to speak out to the public and to governments, she urged. That includes continuing to make the strong business case (legal aid spending saves money) and that

it is “essential to having our courts run well,” in addition to legal assistance being constitutionally required in cases where the liberty of the accused is at stake. “It actually makes good economic sense,” she said. It’s a matter of convincing citizens because citizens will then tell the politicians ‘This is important for our country. You’re wasting our money … if you don’t provide legal aid.’ ”

McLachlin agreed governments should also undertake substantive law reforms that promote access to justice — even when such reforms may not be popular or vote-getters. Reforms to enhance the quality and efficiency of the law and justice system used to be recommended federally by the law reform commission, which was abolished in the mid-1990s as part of deficit-slashing.



“The same arguments I make for legal aid on economic savings probably work for law reform,” McLachlin suggested. “Our law needs to be as clear and effective as it can, and I think that requires looking at the law on an ongoing basis and saying, ‘Oh there’s a problem, it’s surfacing there. We need to fix that up.’ … They’re often very minor fixes and it … makes it easier for everybody to do business, everybody to get justice and simplifies the administration of justice — reducing costs ultimately.”

If the law is opaque to citizens, and sometimes even to judges, “there’s a failure of access to justice,” she added. “So we need to have, I think, some dedicated way of looking at where revisions to the law are necessary.”

Asked whether the justice system strikes the right balance in providing justice and fairness to both complainants and accused in sexual assault prosecutions, McLachlin said “it’s much better now” than the “pretty grim” situation that existed before reforms in the 1980s which aimed to bar the rape myths and “massive invasions of privacy” that (largely) women have had to contend with.

"In the '80s Parliament did a whole revamp and it's a great revamp and it works pretty well," McLachlin said. "Could we do more? I'm sure we could."

She continued, "we should do everything we can to ensure that complainants can come forward in the knowledge that the system is understanding them [and] that the system is there to support them. And that starts with the first … encounter with the law and the police. … And all the way along, the whole system should be geared to provide encouragement and support because no matter how many rules we have to try to make it easy and fair, the fact is it's going to be really tough, and people will want to opt out, or give up, at a certain point. So I believe that if we provided that kind of supportive mechanism, it would really help."

McLachlin also praised the #MeToo movement. She urged women to speak out about what has happened to them and how it hurts them.

"This whole area was cloaked in silence and there was this unwritten social rule that women couldn't talk about violence done to them, whether it was in the home or outside the home," she noted. "The young women today are saying: 'Enough, we can talk about the wrongs that are done to us in this area of sexual conduct, just as we can talk about the wrongs done economically, or by a car that strikes me on the road, or somebody who says something bad about me through the law of defamation.' "

"I think that's a really important development," McLachlin stressed. "So I am hopeful that with those efforts, we will be able to make the needed improvements in this area of the law."

Asked whether repealing or softening mandatory minimum penalties (MMPs) — which disproportionately affect Indigenous offenders — would improve Indigenous peoples' access to justice, McLachlin responded: "I think it's probably evident from my rulings when I was on the bench that I think it's usually a mistake to eliminate judicial discretion in sentencing. And it impacts particularly hard on juveniles and Indigenous youth, because when you set up a mandatory minimum … what you're basically doing is preventing the judge from looking at the background of that person, from looking at why they got where they were, from looking at how serious a threat they are to society. You say to the judge: 'You've got to approach the sentence with total blinkers on. You have no say.' And so all the other things the *Criminal Code* says to do, like take into account the *Gladue* provision, take into account the Indigenous background, the judge can't do it. Well you know, there's a blatant contradiction there in our *Criminal Code*. That can't be good."

She added that effectively condemning many young people to a lifetime of revolving prison doors "can't be good for society; costs a lot of money; it wastes tremendous potential. So I am very concerned about this situation."

Asked whether ideology should be kept out of the *Criminal Code*, McLachlin replied that crime can't be divorced from morality. However the Code sets the aims of the criminal justice system as rehabilitation, deterrence and a degree of retribution. "I think [the Code] should be as neutral a document as possible, and it certainly shouldn't be jigged every time you have a change of government, to represent this view or that view," she remarked. "Ultimately the goals of the criminal justice system should be pretty consistent. … I think most judges would say it's really, really important to have the *Criminal Code* … work in a way that results in convictions for wrongdoing, but doesn't unnecessarily condemn young people to a life sentence in jails."

McLachlin expressed her hope and confidence that an Indigenous jurist will "soon" be appointed to the Supreme Court of Canada. "We need to have a Supreme Court … that reflects … the diversity of Canadian society," she reiterated.

The ex-judge said it is fair to raise questions about the risks involved — such as racial and other biases creeping in — as tribunals and governments start to use AI in their decision-making processes. Calling AI "an interesting idea," she observed "so far I'm not convinced that we … will replace human judges. … Perhaps I'm prejudiced because I was one, I still like the idea of a human judge."

McLachlin spent 37 years on the bench, sitting at every level, before retiring in 2017 and joining Toronto's Arbitration Place as a mediator and arbitrator,

Asked whether the frequent use of mandatory arbitration clauses (e.g. in consumer contracts and in some personal service contracts) — is throwing up a new barrier to justice, McLachlin answered "definitely it can be misused." As an example, she cited the scenario of a multinational company requiring a customer to resolve his individual dispute about its service privately, in a foreign jurisdiction chosen by the company.

"No individual is going to do that, even if they had the money, because for the small amount involved in their particular contract dispute, it doesn't make sense," McLachlin remarked. "So mandatory arbitration clauses have been used in that way, and the courts are finding ways to get around that."

[1]https://go.lexisnexis.ca/McLachlin-Webinar

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