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OF JUSTICE AND ITS SCALES: LOOKING BACK ON (ALMOST) FORTY YEARS OF ROD MACDONALD'S SCHOLARSHIP ON ACCESS TO JUSTICE

*Alana Klein**

Introduction

Many of you in the room today are jurists—law students, former law students. Many of you are working or have worked in community-based legal clinics. Think back to your original law school admission essay. I am sure this audience's essays were diverse, and of course you may or may not remember yours. But I would bet that a great majority of you expressed something like this: "This world is a messed up place. I'd like to make it better. Somehow—I am not quite sure how—I want to make my difference through law." Maybe, then, at some point in the first year of your studies, you got cynical. "Wait a second," you may have thought, "so much of what law is doing and communicating doesn't really seem to be touching on society's greatest injustices at all."

The person who understood that feeling in the most profound way here at McGill was Rod Macdonald. He certainly was that person for me as a student, as he is for me now. Indeed, since joining the faculty in the early 1980s, before, through, and after his deanship from 1984 to 1989, Professor Macdonald has been the intellectual and moral compass for so many of us here. Today, I am going to talk about how Rod Macdonald's work offers us intellectual, legal, and, importantly, personal tools to cope with that feeling in our collective struggle toward justice.

But first, I'd like to beg your indulgence—and indulgence may be needed here, because I am asking you to let me read a poem written by my own grandfather. It is, however, so very pertinent here. A. M. Klein

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was a Ukrainian Jew living in Montreal when he wrote this in 1940 (so, mid-World War II).

A Psalm of Justice, and Its Scales

By A.M. Klein

One day, the signal shall be given me;
 I shall break in and enter heaven, and,
 Remembering who, below, held upper hand,
 And who was trodden into misery, —
 I shall seek out the abominable scales
 On which the heavenly justice is mis-weighed.
 I know I am no master of the trade,
 Can neither mend nor make, clumsy with nails,
 No artisan, — yet am I so forespoken,
 Determined so against the automaton,
 That I must tamper with it, tree and token,
 Break bolts, undo its markings, one by one,
 And leave those scales so gloriously broken,
 That ever thereafter justice shall be done!¹

Of course, this poem is about taking down heavenly justice—divine, religious justice. Those of you who know Rod Macdonald's work know that it is very much earthbound. Yet this poem touches on the themes of Rod's past and ongoing work in access to justice in so many ways: in its embrace of justice without, despite, or often in opposition to what he calls official law;² in its parallel recognition of the justice we can find and build, often more readily, in the everyday;³ and in its notion that the layperson—"no master of the trade"—so determined against the "automaton"—the disconnected, unthinking imposition of norms—would be active in replacing the false justice with an earthly one that is meaningful on the ground.⁴

¹ AM Klein, "A Psalm of Justice, and Its Scales" in *Complete Poems Part 2: Original Poems, 1937–1955 and Poetry Translations*, ed by Zailig Pollock (Toronto: University of Toronto Press, 1990) 516.

² See e.g. Roderick A Macdonald, "Justice is a Noun, but Access isn't a Verb" in *Expanding Horizons: Rethinking Access to Justice in Canada: Proceedings of a National Symposium* (Ottawa: Department of Justice of Canada, 2001) 45.

³ See e.g. Roderick Alexander Macdonald, *Lessons of Everyday Law* (Montreal: McGill-Queen's University Press for the Law Commission of Canada and the School of Policy Studies, Queen's University, 2002).

⁴ See e.g. Roderick A Macdonald, "Whose Access? Which Justice?", Book Review of *Access to Civil Justice*, ed by Allan C Hutchinson, (1992) 7:1 CJLS 175.

I hope I can flesh out these connections today. My goal is to share with you how Rod Macdonald, over his career, reconceived the meaning of access to justice, and how the insights and challenges he gives us affect our work together in clinical practice and in clinical legal education. This is a daunting task for thirty minutes.

Fortunately, Rod's own work helps me out here. Like many powerful ideas, his theories about access to justice can be expressed in so many different ways: concrete, conceptual, simple, complex. In fact, Rod purposely frames his own ideas at many different levels of abstraction.⁵ He doesn't do this just to help me as a student of his work; rather, Rod Macdonald writes for different audiences—theorists, policymakers, lawyers, searching students—because the very substance of his message requires it to be useful in all the possible ways and to the broadest of audiences.

Rod Macdonald's work on access to justice started from the same frustrated place in which I left you at the beginning of this talk: the recognition that our law is not relevant or meaningful to most people's struggles for justice in our society. So he began, as many of us do, by working on ways to make sure that it's not just those who hold the upper hand already who are able to know and rely on what law provides.

Indeed, in the 1970s, Professor Macdonald's work on access to justice was mainly in the area of public legal education, through what was called the Community Law Program at Windsor's Faculty of Law.⁶ The projects were great, and innovative for their time. There were community forums, posters, flyers, pamphlets, brochures, videotape dramatizations (like one explaining welfare law and workman's compensation; another, what happens in law when a marriage breaks down) to be broadcast on cable TV, all designed to lessen the gap between those who knew and could use the law and those who didn't. This was access to justice: knowing about the law, understood here as the rules made by courts and legislatures.

By 1989, Professor Macdonald was chairing a Task Force on Access to Civil Justice struck by the Quebec Minister of Justice to review the entire civil justice system in Quebec. The task force made no fewer than 131 detailed recommendations, running what was then the access-to-justice gamut: better access to legal aid; redesigned state institutions like small claims court and the administrative tribunals; the promotion of alterna-

⁵ See e.g. Seana C McGuire & Roderick A Macdonald, "Tales of Wows and Woes from the Masters and the Muddled: Navigating Small Claims Court Narratives" (1998) 16 Windsor YB Access Just 48 at 84 [McGuire & Macdonald, "Wows and Woes"].

⁶ RA Macdonald, "The Community Law Program at Windsor: An Interim Report" (1976) 10 Law Society of Upper Canada Gazette 344; RA Macdonald, "The Community Law Caravan" (1978) 12 Law Society of Upper Canada Gazette 78.

tive dispute resolution; and what was the farthest frontier of access to justice at the time, “preventive law”. This included legal information hotlines, plain language legislation and contracts, and the increased use of obligatory standard form contracts (like the one you were supposed to have used for your lease when you were a student here at McGill), all measures designed to prevent legal conflicts from arising in the first place.⁷

Around the same time, through the 1980s and 1990s, Professor Macdonald began to develop the key insight that resonates through the rest of his work on access to justice. He has expressed this insight as a criticism of the work he himself did chairing the Task Force on Access to Civil Justice,⁸ but in fact he had been developing the theory all along. It goes like this: We started off worrying about access to justice because we were worried about the uneven distribution of justice in our society. But our projects to remedy this problem are all focused around giving more access to official law. If we, as jurists and citizens, focus only on giving folks more knowledge about and more access to official law, what we are doing isn’t really providing access to justice at all. Justice has become conflated with law, and law with state law.⁹

That slippage—from justice to official law—doesn’t come without costs. To paraphrase Professor Macdonald, instead of teaching judges and lawyers about what the public needs, we co-opt the public into thinking that they can’t get justice without judges, lawyers, and official law. Moreover, this focus on equal access to official law obscures the fundamental question whether our law is just in the first place.¹⁰ And, he noted, if you think our official institutions for vindicating legal rights—the courts, for example—are out of reach for most people, well, the places where this official law gets made—legislatures—are even more so, to say nothing of the

⁷ *Rapport du groupe de travail sur l’accessibilité à la justice : Jalons pour une plus grande accessibilité à la justice* (Quebec City: Ministère de la justice du Québec, 1991) at 487–503.

⁸ Roderick A Macdonald, “Access to Justice and Law Reform #2” (2001) 19 Windsor YB Access Just 317 at 319–20 [Macdonald, “Access to Justice #2”].

⁹ Roderick A Macdonald, “Access to Justice and Law Reform” (1990) 10 Windsor YB Access Just 287 at 304 [Macdonald, “Access to Justice #1”]. See also Roderick A Macdonald, “Access to Justice in Canada Today: Scope, Scale and Ambitions” in Julia Bass, WA Bogart & Frederick H Zemans, eds, *Access to Justice for a New Century: The Way Forward* (Toronto: The Law Society of Upper Canada, 2005) 19 at 102, 104–07 [Macdonald, “Scope, Scale and Ambitions”]. In these passages, Macdonald calls on us to “expand our field of vision” (*ibid* at 102) to get at the root causes of access to justice.

¹⁰ *Ibid* at 97.

public officials who may not always do their work fairly and as they are supposed to.¹¹

In fact, by conflating access to law and access to justice, we are assuming, without verifying, that the public has some desperate desire for “access to the system, however imperfect it may be.”¹² And at the same time, as we press only for justice according to official law, we “driv[e] a wedge between ordinary individuals’ sense of injustice and the abstract justice of official law.”¹³

Based on this key set of insights, Professor Macdonald, in his work on access to justice, kept busy with two main projects. First, he spent much of his time and efforts doing and encouraging empirical research on what legal institutions were really doing for many Canadians. For example, he and Seana McGuire, one of his doctoral students, examined the demographics and satisfaction of the users of small claims court.¹⁴ Of course, small claims court is lauded as an access to justice initiative for its simplified, inexpensive process and exclusion of costly legal representation. Macdonald and McGuire asked two basic questions: Who was using small claims court? And were they satisfied?

What Macdonald and McGuire found about the demographic makeup of plaintiffs was fascinating. Nearly twice as many claimants were male as were female.¹⁵ They were more likely to be educated and employed.¹⁶ They were more likely to be professionals and business people claiming debts for goods or services than employees or consumers trying to “use the court to police businesses that might ... exploit them.”¹⁷ Ironically, he found, *one sixth* of small claims court plaintiffs were lawyers suing their clients for nonpayment.¹⁸ In fact, aside from the absence of big corporations, there was little difference between the socio-demographic profiles of

¹¹ Macdonald, “Access to Justice #2”, *supra* note 8 at 319.

¹² Macdonald, “Access to Justice #1”, *supra* note 9 at 302.

¹³ *Ibid* at 336.

¹⁴ Seana C McGuire & Roderick A Macdonald, “Judicial Scripts in the Dramaturgy of the Small Claims Court” (1996) 11:1 C.JLS 63; Seana C McGuire & Roderick A Macdonald, “Small Claims Courts Cant” (1997) 34:3 Osgoode Hall LJ 509; McGuire & Macdonald, “Wows and Woes”, *supra* note 5.

¹⁵ McGuire & Macdonald, “Small Claims Courts Cant”, *supra* note 14 at 521.

¹⁶ *Ibid* at 523–24.

¹⁷ McGuire & Macdonald, “Wows and Woes”, *supra* note 5 at 86. See McGuire & Macdonald, “Small Claims Courts Cant”, *supra* note 14 at 546.

¹⁸ *Ibid* at 549.

plaintiffs in small claims court and in civil courts.¹⁹ So much for even the “access” side of access to justice!

More interesting still was the information gathered on satisfaction. Macdonald and McGuire found that the repeat players, the white, the male, the educated ones, were more likely to win and were more likely to be satisfied independently of winning their cases.²⁰ And, unsurprisingly perhaps, they found that the people most likely to be dissatisfied with their experience in small claims court—even independently of winning or losing—were the ones who were least familiar with the process, the few disenfranchised who actually make it to small claims court.²¹

The authors noted that different lessons could be drawn from this work. We could develop a sort of sociological critique of small claims court as yet another instance of professionals and business-minded masters fashioning and using institutions to their advantage—as a debt-collection agency.²² We could look at the precipitating causes of the dissatisfaction and underuse by the disenfranchised, and we could fix them. Here, some problems included things like delay, opening hours, and difficulty with enforcement of judgments.²³

But merely adjusting things like cost, delay, and opening hours would in fact amount to what Macdonald has called treating the side effects of the previously prescribed remedy.²⁴ This warrants further explanation. You might have noticed, Macdonald has urged, that certain groups are more vulnerable to lack of access to justice than others. These are the same groups of people with low voter turnouts; who tend not to be included in the wealth-generating aspects of the economy; who are not involved in public legal consultation; who are underrepresented in the health care system.²⁵ This means that solutions for lack of access to justice need to be addressed not only at the level of formal institutions of justice (for that is just one place of systematic exclusion) but at all the social, economic, and psychological levels that prevent access to *all* our state institutions. In other words, in addressing the “disease” of lack of access to justice, we must look at all the factors that lead to that disease, rather than simply

¹⁹ *Ibid* at 548.

²⁰ McGuire & Macdonald, “Wows and Woes”, *supra* note 5 at 57–64.

²¹ *Ibid* at 77–82.

²² *Ibid* at 86.

²³ *Ibid* at 84–85.

²⁴ McGuire & Macdonald, “Small Claims Courts Cant”, *supra* note 14 at 549.

²⁵ See Macdonald, “Scope, Scale and Ambitions”, *supra* note 9 at 106–07; Roderick A Macdonald, “Community Based Socio-Legal Services” (2007) 2:2 Focus Justice 31.

tweaking the cure we have historically relied on to address the problem of injustice.

In fact, returning for a moment to the small claims court studies, the most dissatisfied plaintiffs were upset about things that went much deeper than costs, delay, and the like. Certainly those were problems. But their more fundamental complaints related to matters including not having an adequate opportunity to express their views, and being patronized and demeaned by clerks, judges, mediators.²⁶ They bemoaned that the system was impersonal, bureaucratic, narrow.²⁷ They expressed personal embarrassment and shame at having gotten into a mess and at not being able to fully understand what was being said to them once they brought it to court.²⁸

Among the stickiest stories from that project was one about a thirty-eight-year-old single nurse who came to court claiming that she paid five hundred dollars for a cat that was worth fifty. In Macdonald's words, "She came to court well prepared with documents, photographs, books and the cat."²⁹ In her mind, this was a case about predatory breeders overcharging naive customers. The cat was evidence. I'll omit her full report, but essentially, as soon as she saw the judge look at the cat, she knew her goose was cooked. Effectively, she was the crazy cat lady. And she did indeed lose her case. She is hardly among society's most marginalized, who are unlikely to turn up in small claims court at all.

Addressing this kind of dissatisfaction won't come from adjusting the rules of small claims court, or from explaining to people in advance that they shouldn't bring cats into the courtroom. The problem is the social, economic, and political structures of society that keep judges and those who live far from official law from being able to speak meaningfully to one another.

But, Macdonald says, this is "no cause for despair": to characterize those "missing plaintiffs" as being denied access to justice may be premature. We don't know *why* the young, the poor, the consumers, and the non-professionals are not using these kinds of state institutions. It could be because they don't think their most pressing problems are legal ones, or because our institutions don't recognize their pressing problems as legal ones. Or maybe some people's ideas of what justice is differ greatly from

²⁶ McGuire & Macdonald, "Wows and Woes", *supra* note 5 at 86.

²⁷ *Ibid* at 80.

²⁸ *Ibid* at 77–78.

²⁹ *Ibid* at 78.

the ideas of lawyers and judges—and those people are seeking their justice elsewhere.³⁰

And so, Macdonald developed a theory that he called critical legal pluralism. It is the idea that official law, as a top-down projection of authority, often resonates with few, addresses few, and is not sufficiently oriented to building a just social order.³¹

When we look at plaintiffs in the small claims court as simply plaintiffs or litigants, we fail to recognize that they are in fact actors in different institutions all the time—sometimes they are plaintiffs in small claims court; but sometimes they are members of a teachers union, members of a family, members of a religious community. They seek justice in all of these places, and build law in all of these places. The reason why most people don't benefit from the legal system as we might have hoped or imagined comes from the official legal system's "inability or refusal ... to make space for and reflect the living law of everyday human activity."³²

Our job, if we are measuring access to justice, is to ensure that we learn as much as we can about these different sites where people strive to produce justice; then, if we need more justice, we can learn about the justice people actually seek in order to make our official system more sensitive and responsive.³³ And so Professor Macdonald urged a new conception of law: one that is not just a state invention, but one that people, in all their complexity, participate in building all the time in different places. In other words, our access-to-justice task is not to monopolize civil disputing within state institutions and then frame it according to some abstract notion of justice. Rather, it's to "facilitate the diversity of ways by which people live, negotiate, manipulate, and debate the parameters of their normative relations with each other."³⁴

Thus, it's not that small claims courts (as just one example of official law) are bad, necessarily, though on some interpretations they may be. It's more that in terms of getting people access to *justice*, rather than law, they are often beside the point. We might need to spend our time and money getting to know people's needs and seeing how they can be understood and met in a variety of settings.

³⁰ McGuire & Macdonald, "Small Claims Courts Cant", *supra* note 14 at 550.

³¹ For more thorough expositions, see e.g. Martha-Marie Kleinhans & Roderick A Macdonald, "What is a *Critical Legal Pluralism*?" (1997) 12:2 CJLS 25; Roderick A Macdonald, "Recommissioning Law Reform" (1997) 35:4 Alta L Rev 831.

³² Macdonald, "Access to Justice #2", *supra* note 8 at 319.

³³ Roderick A Macdonald, "Theses on Access to Justice" (1992) 7:2 CJLS 23 at 44.

³⁴ McGuire & Macdonald, "Small Claims Courts Cant", *supra* note 14 at 551.

It is important to note that Professor Macdonald's theory of critical legal pluralism permeates all of the work he does. Rod Macdonald's work on secured transactions, for example, draws on and builds the very same theoretical framework.³⁵ I won't go into detail here—certainly the points about access to justice are challenging enough—but I just felt that I should let you know that the principles are the same: ask, first, what we are looking to achieve; second, recognize that there are multiple ways to achieve it; third, recognize that there are good reasons why different communities will want to achieve those ends in different ways; and fourth, don't ever lose sight of the public order issues at play.

In the short time that I have with you, I would like to conclude with a discussion about where this leaves us, as seekers of justice, particularly for those who are most marginalized from it. I will begin by summarizing the lesson. In the spirit of getting those lessons out there, I am annotating them with hashtags. The hope is that, going forward, you can recognize these ideas, see how they fit in with your work and what you do, and be more conscious of how these ideas are reflected in our discussions throughout the day and beyond.

1. *#justicefirst*: In the work that we all do, every day, keep the ultimate focus on justice; don't think that by providing people with access to law, you are providing justice.
2. *#beyondofficiallaw*: To resolve issues of access to justice, we must go beyond the official legal system, beyond rights conferred by the state, to see that there are multiple places where justice is found or denied.
3. *#everydaylaw*: We must look for, and be able to understand, the ideas of justice found and created in everyday life and the law of everyday social interactions. This is where human conflict takes place and is constructed, well before it is transformed into a legal problem.
4. *#diversity*: Everyday law is as diverse as the multiple communities to which we all belong. On the supply side of access to justice, this means that those who are the most marginalized have the greatest access to justice challenges. On the demand side, it is increasingly clear that there is no one-size-fits-all solution to access to justice. Strategies must be multidimensional and involve piecemeal, local initiatives that are able to take into account the everyday law of the most marginalized.

³⁵ See generally Roderick A Macdonald, "Article 9 Norm Entrepreneurship" (2006) 43:2 Can Bus LJ 240.

5. #disses: Yet, if we don't adapt to that diversity, if we continue to promote a law structured around the needs and expectations of a privileged few, the excluded ones are disempowered, disengaged, disenfranchised, disrespected.³⁶
6. #empower: Moreover, unless we address the root causes of that disempowerment—the social, the economic, the political—we will never be able to create space within official law for those diverse and marginalized groups. Achieving true access to justice requires changing the distribution of social power so that citizens can participate in lawmaking and administration, whether in official institutions, non-state institutions, or, ideally, both. It is only through that realignment of power that we can hope for a law that mirrors citizens' own conceptions of justice.
7. #legaleducation: All this means that public legal education is a double-edged sword.³⁷ At its worst, it increases the reach of official law—the law from on high—and increases citizens' reliance on it. At its best, however, it could make the official system more responsive and just, if it is about educating citizens and officials about how to overcome exploitation and pathologies in everyday human interactions.
8. #empiricalresearch: The good kind of legal education, for the reasons we have set out, requires information about the needs of the public—especially those groups most excluded from access to justice. Too often, our ideas about access to justice have relied on unproven assumptions—like the notion that small claims court is responsive to the needs of everyone, not just white men. Or this idea that the public is clamoring for “access to the system, however imperfect it may be.”³⁸ Or even the idea that demographic changes in representativeness of the judiciary will overcome the disempowerment of marginalized groups.

Where do these general lessons about reconceiving access to justice leave the community legal clinic? The community legal clinic is, in many ways, very well placed to contribute to this much more ambitious conception of access to justice. Not necessarily alone, of course. Changing the very distribution of social power isn't a small task. But community legal clinics have the capacity to seek out understandings of the everyday law of the most marginalized groups they serve; to better understand the root

³⁶ Roderick A Macdonald, “The Fridge-Door Statute” (2001) 47:1 McGill LJ 11 at 15.

³⁷ Macdonald, “Scope, Scale and Ambitions”, *supra* note 9 at 97.

³⁸ Macdonald, “Access to Justice #1”, *supra* note 9 at 302.

causes of the pathologies that end up getting framed as legal problems; to be motivated to seek the changes in substantive law; to point out when governments are doing more harm than good; and to enhance their clients' access to institutions where law is made and administered. Yes, this is a challenge. It requires clinics to divert scarce time and energy from putting out fires to seeking out and responding to the sources of those fires. In truth, clinics are doing that work anyway, and have always been. Let that work, too, be recognized as the access to justice project it so clearly is.
