Access to Justice in Family Law: Thinking Outside the Box

Pacific Business and Law Institute Family Law Conference

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Remarks of the Honourable Robert J. Bauman, Chief Justice of British Columbia

Introduction

[1] Good afternoon and thank you to the Pacific Business and Law Institute for the invitation to join you today.

[2] I was asked to speak to you on the topic of thinking outside the box in family law. I will therefore endeavor to hit upon a few key principles which I see as capable of animating "outside-the-box" thinking, and action, in the realm of family law.

[3] I'll start off with a question: What exactly is…"the box"?

[4] I can tell you this: it's a much better time to be a circle or a triangle right now. The box has garnered for itself a terrible reputation in the past few decades. Infamously right-angled, uniform, rigid and closed, the box is the shape no one wants anything to do with these days.

[5] In the family law context, "the box" probably looks something like this: a family experiences a legal problem; the family members identify the problem as a legal problem; the family members obtain legal advice; one or more family members apply to the courts to fix the problem; the courts provide a solution. Another version of the box might include in addition the opportunity to reach a mediated solution at some point along the trajectory.

[6] Speaking from the point of view of the judge, the box can at times look like an effective, if perhaps expensive and time-consuming, process. Other times, the box looks like a torture chamber. I am not trying to engage in hyperbole; the fact is that for some

proportion of litigants, the family justice system is rife with delay, expense and emotional turmoil. Finally there is the category of family members who -- and I find this very concerning -- the courts never see, not because they have found a satisfactory solution on their own, but because they have gotten lost along the way, for example, by not identifying their issue as a legal issue in the first place or by not having the means to access the courts.

[7] I don't want to overstate the situation. No one reasonably expects the experience of family separation or family violence to be easy or straightforward. Family law has been given the task of addressing complex, difficult circumstances in an accessible, fair and effective way -- not an easy task, to be sure.

[8] Which brings me back to my topic -- how might we get away from "the box" in order to better support families for whom the box is not working? Put another way, how might we start thinking about and approaching things differently?

[9] I believe the question has many answers, but I will focus my remarks on three principles that I believe are capable of opening up some paths forward: compassion, reconciliation and creativity.

Compassion

[10] Compassion is a concern for others. At its root, compassion means "suffering together". I have heard it said, "People will forget what you said, people will forget what you did, but people will never forget how you made them feel."[1] Judges are often told that a litigant is able to accept a verdict he or she didn't want, so long as the litigant felt heard and felt that the hearing was fair.

[11] To me, compassion is a close cousin to empathy, and asks us to try to see the matter from the other person's perspective -- or to use the language Access to Justice BC has adopted -- to put the litigant or the *user* of the system at the centre.

[1] Attributed to novelist Maya Angelou and others.

[12] Take the simple example of court forms. We need to be asking, what is it like from the user's perspective to file an application? The legal profession-centric approach has been to ensure that the judge has all the information needed, and that it is presented in a uniform manner. The expectation has been that the litigant's lawyer will identify the appropriate form, accurately complete it and file it on behalf of the litigant.

[13] What types of things has applying "the box" this way neglected to consider? The most obvious one is that the litigant might not be able to afford a lawyer. Other barriers might include: visual impairment, literacy challenges, internet connectivity problems, English being a second language, the inaccessibility of legal vocabulary, the cost of the filing fee, and the list goes on.

[14] There are a number of things already being done to move the user's experience closer to the centre of the system. I'll mention just one: legal services unbundling.

[15] The unbundling of legal services acknowledges that litigants often can perform certain steps themselves and can afford to pay a lawyer to assist them with certain other steps, but that many litigants cannot afford a traditional full retainer (that is, legal representation from beginning to end). Mediate BC has (in collaboration with other organizations) taken on a Family Unbundled Legal Services project that has resulted in, among other things, the establishment of a publicly available roster of lawyers willing to provide limited retainer services.[2]

[16] We have learned from past users of the system that it used to be extraordinarily difficult to find a lawyer offering unbundled legal services. Looking at the problem from the user's[3] perspective, the Mediate BC project has ensured that there is now an easy way to look up and contact such lawyers. The project attracted the attention of Access

[2] https://sites.google.com/view/bfur

[3] "User" as defined in this project includes lawyers and clients. The project gathered input from both types of user through interviews, surveys, etc.

to Justice BC, which decided to take on unbundling as an initiative to support promotion of the Mediate BC project and to build on it in other parts of the civil justice system.[4]

[17] I understand you will be hearing more about unbundling today, so I won't say much more, except that I have high hopes that this project will result in a better experience for users of the family justice system.

Reconciliation

[18] Any effort to think outside the box in family law needs to confront Canada's historic relationship with Indigenous peoples and, in particular, the devastating impact of the Indian Residential Schools.

[19] There are several complex aspects to the impact of the Indian Residential Schools. I cannot adequately address these in my time today, but I will focus this part of my remarks on part of the "Calls to Action" emerging from the Truth and Reconciliation Commission's work.[5]

[20] There can be no doubt that the justice system needs to reduce the number of Indigenous children in care. What is being done about this and how might we think about and approach the issue in a different, more effective way?

[21] In the words of the Truth and Reconciliation Commission, reconciliation requires *constructive action* on addressing the destructive impacts of colonialism.[6] Our traditional approach has failed, and as the Native Courtworker and Counselling Association of BC has said, what is needed is to put in place the elements for successful *collective impact*:

[4] https://accesstojusticebc.ca/initiatives/unbundling/
[5] http://www.trc.ca/websites/trcinstitution/File/2015/Findings/Calls_to_Action_English2.pdf
[6] http://www.trc.ca/websites/trcinstitution/File/2015/Findings/Principles%20of%20Truth%20and%20Reconciliation.pdf

committed leadership on a common agenda; shared measurement systems; mutually reinforcing activities; continuous communication; and a backbone support organization.[7]

[22] Last week we heard an announcement that the BC Aboriginal Justice Council has entered into an Indigenous Justice Strategy Memorandum of Understanding with the Attorney General and Minister for Public Safety and Solicitor General. From what I understand, the themes of the MOU are collaboration on pursing a culturally relevant justice system, including by addressing the overrepresentation of Indigenous children in care. The new MOU seems to hit some of the collective impact elements, and we will see what unfolds next.

[23] Going back to the reconciliation report's calls to action, we hear themes of keeping families together; ensuring appropriate training for professionals in the system; making data about the children in care publicly available; supporting Aboriginal governments; developing culturally appropriate parenting programs; and more.

[24] It can be seen that reconciliation in the realm of family law is not about any one step or solution that needs to be accomplished. It is about folding reconciliation into virtually all aspects of the system. Put simply, reconciliation has not been part of "the box" -- or at least not sufficiently so -- and that needs to change.

Creativity and Innovation

[25] I turn now to creativity. The words "creativity" and "innovation" are often heard in conversations about improving the justice system. The idea is of course that there are creative solutions out there that -- if only we can find them -- will stop us from re-treading old paths and repeating old errors.

[26] An important premise underlying the efforts of Access to Justice BC is that the justice system needs to start trying out innovative ideas without fearing the risk of failure. Embracing innovation means listening to outside voices, disruptive voices,

[7] http://nccabc.ca/wp-content/uploads/2016/06/Better-Outcomes-Strategy-Framework-Final-2.pdf

including ideas that might make us uncomfortable. When the stakeholders within the status quo resist new ideas and change, it can become important to "resist the resistors". (And I say that with some trepidation, speaking as someone who might reasonably be characterized as a resistor in some contexts.)

[27] In Canada and beyond, a number of exciting initiatives are underway, and I want to offer a few examples:

- **legal services delivery** --

    - Maritimes-based law firm Pink Larkin announced earlier this month that it has hired a lawyer for the distinct purpose of providing pro bono services on "poverty law" matters;[8] this model is, I understand, new in Canada and shows a powerful commitment by a law firm to improving access to justice.

    - Regulatory reform has explored the use of paralegals to perform certain legal services -- this is a large topic unto itself and we do not have time today to delve into it, but I want to acknowledge the work done by our law society and others to consider the use of paralegals as a tool to improve access to justice.

    - The CBA has been doing a lot of work on "legal futures" and I would just note a report released last month that offers a number of research-based recommendations for improving accessibility, quality and profitability for lawyers delivering, among other things, family law services: the report is authored by Noel Semple, and is available on the CBA website.[9]

- **empirical research** -- believe it or not, applying empirical research methodologies is innovative when it comes to legal studies. A number of

[8] https://pinklarkin.com/pink-larkin-welcomes-vince-calderhead/
[9] http://www.cba.org/Publications-Resources/Resources/Futures/Accessibility-Quality-and-Profitability Full title, "Accessibility, Quality and Profitability for Personal Plight Law Firms: Hitting the Sweet Spot" (August 23, 2017).

individuals and organizations are trying to change this; just to give a few examples:

- A2JBC has developed a measurement framework aimed at establishing a shared frame of reference for justice system stakeholders to monitor and evaluate the impact of projects and initiatives.[10]

- The Canadian Research Institute for Law and the Family and the Canadian Forum on Civil Justice have launched a new study on the cost of resolving family disputes;[11] this, I anticipate, will build on a lot of other very interesting work the Canadian Forum on Civil Justice has been doing to evaluate the cost of civil justice more broadly.

- UVic Law's Access to Justice Centre for Excellence is working towards the development of a research framework, which aims, among other things, to address challenges involving justice system data.[12]

[28] Even the Court of Appeal has shown itself willing to try out untested processes to see if they make a difference. One simple example is family law case management. In January of 2004, the Court became concerned about delays in certain family law cases involving children. In response, the Court initially assigned a case management judge who was responsible for monitoring appeals involving children. When deadlines were missed, an appearance was required and deadlines were set, bringing more accountability to the process. The program was adopted not because the Court *knew* it would fix the problem, but because we *wanted to try* to fix the problem. As it turned out -- thirteen years on -- we have gone through various iterations of the family law case management program, in response to what we have learned from litigants and counsel. And that, I think, is one of the critical points: we shouldn't be afraid to try things, or to

[10] https://accesstojusticebc.ca/wp-content/uploads/2017/08/A2JBC-Measurement-Framework.pdf
[11] https://www.thelawyersdaily.ca/articles/4411/canadian-research-institute-studying-cost-of-resolving-family-law-disputes
[12] https://static1.squarespace.com/static/5532e526e4b097f30807e54d/t/577fd67d6b8f5b3cacc88fec/1467995775940/Final+Report+May+2016+BC+Research+Colloquium+July+7+%282%29.pdf

risk failure, as long as we are prepared to respond to what we learn and to pursue continuous improvement.

[29] Before moving on, I wish to add my view that any discussion about creativity and innovation in the justice system should include an important note of caution about preserving what is good and, indeed, what is constitutionally required in our justice system. Families have the right to have their matters adjudicated by an independent, impartial judiciary. We can create innovative processes and dispute resolution mechanisms that may improve litigants' experiences and improve justice outcomes, but these processes must not become barriers or hurdles that keep people from accessing the courts when needed. Social impact and innovation thinkers (for example, Al Etmanski) believe in the need to combine the old, the new and the surprising; we need to remember that not everything old is bad.

Conclusion

[30] To conclude, I want to repeat that there is no single solution to the problems in our family justice system. While doing more with less is sometimes possible, the fact is that the family justice system is not going to thrive unless we invest in it. The basic infrastructure and the legal principles are in place but, unfortunately, the family justice system has not been treated as a priority, and has not embraced the tools and, I'd say, the culture shift that is needed to ensure a robust system. However, I believe progress can be achieved by applying principles of compassion, reconciliation and creativity.

[31] To go back to the metaphor of the box: judges, lawyers and others working in family law need to be honest about whom "the box" is best serving. "The box" might offer a level of security and certainty to some, but is not necessarily serving the public well, at least not in a significant proportion of cases. The goal of a fair and effective family justice system -- which requires more than simply being expedient and inexpensive -- is worth striving for, even if it involves making changes and even if it involves some discomfort.

[32] In closing, thank you again to the conference organizers and I look forward to answering any questions you might have.