ACCESSING JUSTICE IN THE FAMILY COURTS OF NEW BRUNSWICK

Justice Raymond Guerette*

[Justice Guerette delivered these comments at an Access to Justice panel at the University of New Brunswick, on October 28th, 2011. The panel followed the thirty-third Viscount Bennett Lecture by The Honourable Justice Cromwell.]

Thank you Professor McCallum (Panel Chair).

My remarks this morning are intended to reflect the situation in our Family Courts, and the possibilities at our disposal to dramatically improve the process and improve access to those who must resort to the Court to solve their marital issues.

Many experts in the family law community and leading jurists, such as Chief Justice McLaughlin of our Supreme Court, have expressed concern over the ability of ordinary citizens to access our Courts. More and more, we are seeing litigants representing themselves, and that in itself is causing considerable disruption and delay in the Court system.

Why are so many complaining about access to justice? They are complaining for many reasons, principally because hiring lawyers can be an open-ended situation where the cost is simply out of their reach. The fact is that litigation is very expensive.

People have an understandable fear that the legal system and their lawyers are going to vacuum their wallets. I hasten to add, however, that it is not the lawyers that are at fault. They are merely following the Rules of Court and going along with a process that is essentially adversarial. They are merely going with the flow and doing what is expected of them.

But it is not only costs. There are other reasons related to process. The system requires forms - Notices of Applications, Divorces, Affidavits, Motions, Financial Statements (9 pages), etc., - all of which are legitimately required, at least

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to some degree, but which serve to thicken the threshold requirements for entering the judicial system.

It is just too complicated for many people, and as many of you know, there is a substantial number of people who have difficulty reading and understanding the forms.

This aspect alone is intimidating for most people, and has caused innumerable delays because they are unaware of the requirements demanded by the process. For most cases, a simple entry form would suffice.

Another reason is the reluctance to enter into another fractious and emotionally searing debate, where old wounds are reopened and children are again caught up in the crossfire. So, they put off resolution. When it finally comes to Court, the issues may be so big and emotionally charged that the case becomes almost unmanageable.

And lastly, I would add that our one-size-fits-all model does not allow for the expeditious resolution of relatively small issues, such as visitation difficulties, variation of child support orders where there is loss of employment, or where procedural difficulties are hampering the orderly preparations for trial.

These relatively small issues are mixed in with the larger cases, which means they wait their turn to be heard. Time can be a deterrent.

Ask any family law practitioner what question always comes up in the first interview, and they will tell you it is: "How long is this going to take?"

In summary, the average litigant finds the process to be a nightmare. The complicated procedures, the adversarial approach and of course the costs, all add up to frustration and general dissatisfaction.

So what do we mean when we say "Access to Justice". In my view, it should mean "Access to Solutions".

Traditionally, it has meant solutions after a trial and a judgment (usually a long way down the line). But it doesn't have to be that way. We can deliver solutions in other ways and much faster.

But first, we need to accept that family law cases are not like other types of litigation. It is not over when it's over.

The emotional scars, the unhappiness and the obligation to relate to the other spouse after trial, in order to permit access to the children, all of this can carry on for many years. Solutions need to rest on a foundation of respect, trust, and cooperation. The adversarial system does nothing to promote those values.

In a recent article in "The Canadian Journal of Family Law", Professor Nicholas Bala of Queen's University Law School, (a well-known and respected authority in family law) along with Rachel Birnbaum, Associate Professor in Social Work at the University of Western Ontario, and Justice Donna Martinson of the B.C. Supreme Court said, and I quote:

> Traditional adversarial approaches used by the court for civil litigation has not worked well for family law cases. Understanding the difference between family cases and other types of litigation is essential for an appropriate response to family disputes.[1]

The authors relate that what we have now is a "tiered" service approach to family justice. First, we offer parenting information and parenting courses. Then, we try mediation. If that fails, a judge may be involved in settlement negotiations. But if that fails, the case is scheduled for trial.

In January 2009, a task force set up by the government of New Brunswick entitled "Access to Family Justice", composed of experienced family law practitioners, recommended a "triage" approach where cases are assessed early and referred to appropriate resources in the hope that it would lead to early settlements.

Coming back to the authors mentioned previously, they approve of this approach. This is what they say:

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[1] Nicholas Bala & Rachel Birnbaum & Justice Donna Martinson, "One Judge for One Family: Differentiated Case Management for Families in Continuing Conflict" (2010) 26 Can J Fam L 395 at para 1 (QL).

> The triage approach makes better use of scarce resources, allows far faster resolution and avoids involving a family in potentially intrusive and expensive processes that are not likely to result in a resolution.[2]

And there is a footnote to that quotation, almost half a page in length, citing numerous studies and authors who have come to the same conclusion.

What is meant by early intervention? It means getting people, either before or after the commencement of proceedings, to attend what I would refer to as a "first event" where the issues are explored and an attempt is made to resolve the issues then and there. If unable to do so, the case is triaged to mediation or, in high-conflict cases, it is set on a case management track.

Most people are reasonable and, given an opportunity to talk things out with the assistance of their lawyers and professionals, can come to a resolution that best responds to their interests and the needs of their children.

In Toronto, these "first events" are often chaired by a judge. It is almost like a settlement conference in first instance. Judges there tell me it is working extremely well and that many cases don't go any further.

In Western Australia, the Columbus Pilot Project in 2010 was developed using essentially the "First Event" model but with some case management added. The model uses an interdisciplinary management team to give as much assistance to the parties as possible, in the early stages.

The Project managers reported a 50% increase in settlements at an early stage and a significant reduction in the number of court appearances and time spent in the judicial system.

If Access to Justice means anything to the average person in the street, it means an early solution, at minimum cost, with the least amount of conflict. This is what we have to aim for.

But this cannot happen if we remain in the same adversarial mode. We need to change the paradigm, but more important, we need to change our mindset.

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[2] *Ibid*, at para 74.

The family court legal system has to transform itself to being primarily a dispute resolution structure that helps people resolve their disputes constructively, at an early stage, using an interdisciplinary approach.

Separation and divorce is too hard on people, and it no doubt has an effect on functioning of our society. But the riskiest aspect, of course, is the potential damage to the children.

We simply have to come up with something better. And we can, with proper leadership and the cooperation of the Bench, the Bar and the extended family law community.

We will eventually get there, but it just seems to be taking so long.