

# PROMOTING ACCESS TO FAMILY JUSTICE BY EDUCATING THE SELF-REPRESENTING LITIGANT

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*[Deborah Doherty, PH D, delivered these comments at an Access to Justice panel at the University of New Brunswick, on October 28<sup>th</sup>, 2011. The panel followed the thirty-third Viscount Bennett Lecture by The Honourable Justice Cromwell.]*

## INTRODUCTION

Thank you for inviting me to sit on a discussion panel about Access to Civil and Family Justice at the Viscount Bennett Lecture. I am particularly pleased because it is not often that public legal education is included in discussions about improving Access to Justice. I appreciate the opportunity to share my reflections on this topic, along with my esteemed colleagues. I am also honoured to comment briefly on Justice Cromwell's keynote address, which promoted a more collaborative and strategic approach to accessing the civil and family justice systems. He suggested that the strain on the justice system might be alleviated if individuals were able to obtain the "knowledge, resources and services required to deal effectively with their legal matters" as early as possible.

I intend to focus on the "knowledge" component of this equation and the role of public legal education and information – what we refer to as "PLEI" - in creating access to the family justice system generally, and more specifically, in educating the growing number of individuals who are representing themselves in family matters. PLEI agencies believe strongly that access to information about the law is fundamental to a fair and accessible justice system, and many PLEI providers are non-profit organizations that exist for the sole purpose of promoting such access. Across Canada, PLEI groups are often acclaimed for disseminating high calibre, plain language law-related services and resources.<sup>1</sup> I would suggest checking the Justice Canada website<sup>2</sup> to find the contact information for many of these PLEI groups.

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<sup>1</sup> Many provinces have several PLEI groups, some of them specializing in delivering services on a particular legal topic, while others also have organizations that may have another primary mandate such as provision of legal aid, but who also create and deliver PLEI.

<sup>2</sup> Department of Justice Canada, Public Legal Education and Information (PLEI), online: Department of Justice Canada <<http://www.justice.gc.ca/eng/pi/pb-dgp/prog/plei-pvij.html>>.

## What is Access to Family Justice and is there a Nightmare?

Access to family justice clearly encompasses a broad range of legal resources, services and non-legal options for resolving family law disputes. For many, access to family justice is epitomized by access to a judge in family court. One does not have to look far to find reports, studies and articles that describe a nationwide “nightmare in family court”.<sup>3</sup> Indeed, many scholars and legal professionals attribute this nightmare to the unprecedented growth in self-represented litigants (SRL) which is bringing family court proceedings to the brink of collapse. The negative impact reverberates throughout the justice process.<sup>4</sup> For example, the lawyers representing clients find it more difficult to negotiate with SRLs so more cases end up in the courtroom instead of being settled. Individuals who do engage legal representation are finding the legal process more expensive and frustrating than they anticipated. Not surprisingly, the individuals attempting to access the family justice system without legal representation are typically having a negative experience fraught with stress.<sup>5</sup> Regardless of the underlying reasons for self-representation,<sup>6</sup> the complexity of court forms and procedures and the lack of guidance through the process typically results in incomplete forms, inappropriate affidavits, missed deadlines, omissions related to swearing and serving documents, and utter confusion around presenting a case in court.<sup>7</sup> Many SRLs end up making costly and time consuming mistakes, or simply give up.

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<sup>3</sup> Articles include: Steven Benmor, “Self-represented family law litigants pose challenges”, *The Lawyers Weekly* (23 September 2011) 9; Bev Cline, “A nightmare in family court”, *National* (June 2008) 27; Michael Trebilcock, Report of the Legal Aid Review 2008, (Attorney General of Ontario, 2008), online: Attorney General of Ontario < <http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/> >.

<sup>4</sup> Court Services, *Self-Represented Litigants in Nova Scotia: Needs Assessment Study* (Halifax (NS): Department of Justice, 2004) at 11-12, online: <<http://www.gov.ns.ca/just/publications/docs/SRL%20Report%20March%202004.pdf>> [Self-Represented Litigants in Nova Scotia]; Report of the Access to Family Justice Task Force, (23 January 2009) at 9, online: Government of New Brunswick <<http://www.gnb.ca/0062/FamilyJustice/FinalReport-e.pdf>> [Report of the Access to Family Justice Task Force]; Legal Services Society, “PLE Review: Reflections and Recommendations on Public Legal Education Delivery in BC” (May 2007) at xi, online: <<http://www.lss.bc.ca/>> [Legal Services Society]; Ann Sherman, “A Study of Self Represented Litigants in the Supreme Court of Prince Edward Island” (2008) at 29, online: Community Legal Information Association < <http://www.cliapei.ca/sitefiles/File/Project%20Files/SRL%20Report.pdf> > [Sherman].

<sup>5</sup> Self-Represented Litigants in Nova Scotia, *supra* note 4 at 33.

<sup>6</sup> Although studies show that a significant number of individuals simply “choose” to represent themselves, the majority of individuals handle their own family law matters because of the unaffordable costs of legal representation and limited legal aid services.

<sup>7</sup> When Public Legal Education and Information Service of New Brunswick was creating a family law website to help self-representing litigants, we consulted with court staff about the problems that SRLs were having in handling their own matters. We were told that it is very common for the files handled by SRLs to experience multiple delays that related to routine procedural matters such as missing information on forms, improper service of documents on the other party, forgetting to swear affidavits and so on.

The importance of public legal education in helping SRLs in New Brunswick was noted in the Access to Family Justice Task Force Report.<sup>8</sup> This Report underscored the need to promote more timely Access to Justice in resolving family law disputes; expand use of alternatives to the family court to resolve family law issues; and, increase access to legal information and legal assistance in family law matters. The Report notes:

Our Rules of Court and the forms contained in those rules are very technical and completely impede a self-represented litigant from gaining Access to Justice. Due to their lack of knowledge, the self-represented litigants generally require additional time in court even to process fairly simple matters. It is not uncommon for a party who has retained counsel to incur additional costs due to delays and improper proceedings occasioned by a self-represented opponent.<sup>9</sup>

Although accessible information is not a panacea, individuals with family legal issues must be able to learn about the range of options and services available for dealing with their legal problems. Only then can they make informed decisions on a course of action that is appropriate and proportionate to their situation. Studies have demonstrated that individuals who obtain accurate and easy-to-understand information about their legal rights and obligations, along with referrals to legal services and out-of-court options such as mediation, are more likely to feel empowered and to act sooner.<sup>10</sup> Self-help resources provide SRLs with a greater knowledge and ability to complete court forms, follow the rules of court and understand the process for presenting their case in court.

Once cases are before the court, authorities agree that, “Canadian judges are to extend a ‘helping hand’ to guide the unrepresented accused through trial”.<sup>11</sup> In other words, judges have a duty of assistance, within reason, to spend time guiding SRLs through the court process, providing information about the law and evidentiary requirements and directing them to resources.<sup>12</sup> This means that judges must walk a fine line between offering “on-the-spot education”, and appearing to be biased in

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<sup>8</sup> Report of the Access to Family Justice Task Force, *supra* note 4. The report examined the issues and challenges faced by the Family Division of the Court of Queen’s Bench of New Brunswick and offered 50 recommendations covering three areas for improvement: education and information, legislation and rules of court in relation to family division matters, and operations.

<sup>9</sup> *Ibid* at 26.

<sup>10</sup> Melina Buckley, “Moving Forward on Legal Aid: Research on Needs and Innovative Approaches”, (Ottawa: CBA, 2010) at 102, online: Canadian Bar Association <<http://www.cba.org/cba/Advocacy/PDF/CBA%20Legal%20Aid%20Renewal%20Paper.pdf>> [Buckley].

<sup>11</sup> *Christie v Woodstock (Town)*, 2010 NBQB 092 at para 13 (available on CanLII).

<sup>12</sup> *R v Miller* (1995), 171 NBR (2d) 1 at para 6 (QL) (NBQB).

favour of the SRL, or holding the SRL to the same standard as lawyers and risk having their decisions overturned on appeal.<sup>13</sup>

### **PLEI and Empowerment**

Research studies<sup>14</sup> show the overwhelming benefit of educating SRLs. As a result, numerous publications, websites, and various self-help resources relating to civil and family justice have evolved. These resources are not restricted to educating people on what to do at a court hearing, although that may be part of it. Individuals experiencing family conflict typically begin the process of self-representation much earlier, for example, when they first try to find information about separation, read a booklet on marital property division, obtain forms, search the Internet, attend a parenting after separation course, review a self-help guide or call a toll-free family law line. Viewed in this light, Access to Justice can be seen as a process that typically plays out across a continuum of needs, rather than a single destination. By helping people to chart the various pathways, resolutions to family conflicts may emerge at various points and not just in the courtroom.

More recently, self-help family law centres and information kiosks have begun to emerge across Canada, often attached to the family court, such as those in British Columbia (e.g. the Vancouver Justice Access Centre), Nova Scotia, Alberta, Ontario and more recently, the pilot family law court in Saint John, New Brunswick. Generally, PLEI resources are available to help individuals with family law problems in the following ways:

- Information on rights and obligations associated with various family law matters such as divorce and separation, child and spousal support, custody, marital property, etc;
- Referral to programs/services and alternatives for resolving family law problems outside of the courtroom;
- Self-help skills where appropriate and sometimes access to fillable, annotated forms;
- Assistance with understanding the general structure and operation of the courts, rules and procedures for filing forms and presenting a case in court; and
- Encouragement to seek legal advice/assistance on some or all of their specific legal issues and options.

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<sup>13</sup> In an appeal won by a person who had self-represented at trial, the decision noted, “The situation may have been avoided had the trial judge provided Mr. Christie at the outset of the trial with a brief overview of the trial process including an explanation of the difference between evidence and argument.” *Christie v Woodstock (Town)*, 2010 NBQB 092 at para 19 (available on CanLII).

<sup>14</sup> Self-Represented Litigants in Nova Scotia, *supra* note 4; Legal Services Society, *supra* note 4.

Law information clearly plays an important role in helping individuals make decisions about how to handle their family law matters. As Melina Buckley suggests, “[education] and information about legal rights can empower people to take the necessary steps to address their problem in the early stages, before it escalates.”<sup>15</sup> This is an important observation, since many studies have demonstrated that SRLs have a range of specific needs and for the most part, these needs are unmet. The longer these needs go unmet, the more likely it is that the SRL will face additional judicable problems, such as eviction, loss of employment, social welfare appeals, and so on. This is often referred to as a “clustering” or “cascading” of legal issues that may start with a catalyst such as marriage breakdown. It has been well-documented by Dr. Ab Currie and others.<sup>16</sup> Given the co-concurrence of legal problems, it is important to note that public legal education organizations often offer an array of educational resources and self-help guides that may help individuals deal with a variety of legal topics ranging from consumer law and employment issues, small claims, evictions, and so on.

Unfortunately, numerous unreliable sources of law information abound. Many individuals search the Internet and discover an array of generic and often inaccurate or inappropriate kits and resources, or blogs about others’ experiences with the justice system. Some people obtain advice about legal rights and options from friends and neighbours – not all of it accurate. Even respected social service providers and community agencies where the public might turn when seeking family law information and resources, may have stockpiled family law resources which have become outdated. In part, the challenge of providing information about the law is to have a process in place to recall or destroy such outdated materials so that inaccurate resources do not continue to be used and relied on by the public. Moreover, everyone involved in helping individuals with family law issues, ranging from staff at court offices to community stakeholders, should be aware of, or know where to refer the public to obtain accurate, up-to-date, plain-language public legal education and information (PLEI).

To ensure accessibility, PLEI groups typically distribute their information resources proactively throughout their jurisdictions to community agencies, special interest groups, courts, libraries, and others so that accurate, up-to-date, plain-language public legal education and information is readily available to the public. This is extremely important since numerous studies show that individuals in family crisis often turn first to community agencies for support, particularly where these community groups are seen to share specific values, interests, language, cultural sensitivities, and so on. Such agencies are often best positioned to share information

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<sup>15</sup> “Access to Legal Services in Canada: A Discussion Paper”, (April 2011).

<sup>16</sup> Ab Currie, “The Legal Problems of Everyday Life: The Nature, Extent and Consequences of Justiciable Problems Experienced by Canadians”, (2009) at 49, online: Department of Justice <[http://www.justice.gc.ca/eng/pi/rs/rep-rap/2007/rr07\\_la1-rr07\\_aj1](http://www.justice.gc.ca/eng/pi/rs/rep-rap/2007/rr07_la1-rr07_aj1)>; Buckley, *supra* note 10 at 2.

in a non-threatening environment, offer assistance, make referrals and sometimes act as advocates. Thus, in considering the pathways that different individuals might decide to take in accessing the family justice system, we must recognize the value of, and the importance of improving, service provider knowledge of family legal services and educational resources. With appropriate coordination we should be able to maximize our effectiveness in directing individuals to the services most appropriate to their situation. Even those individuals who can afford a lawyer, as well as those who qualify for family legal aid or who seek mediation, would benefit by becoming informed about their legal rights and obligations.

Striving to provide public legal education and information more effectively is not intended to encourage more people to handle their own legal problems, but to recognize that the floodgates are already open and that if we can improve the competencies of SRLs, there will be widespread benefits to the entire family justice system. For example, research<sup>17</sup> shows that SRLs who have access to information and assistance such as family law information centres, self-help guides, family law lines, and limited representation to assist with certain aspects of their case such as review of their documents by a lawyer, tend to be more knowledgeable about required procedures, make fewer errors or omissions, and have more confidence in their ability to navigate the justice system. By encouraging those who should be able to settle matters outside the courtroom to do so, we also generate efficiencies for court staff (who may spend less time returning incomplete documents/forms and rescheduling hearings) and reduce the need for judges to intervene in the courtroom.

### **The Role of PLEI in Future Plans to Improve Access to Justice**

The need to enhance the justice system by operational, legislative and procedural change is well-documented. So too is the ongoing importance of educating the public about their rights and obligations, and how to act on those rights. Clearly, the most appropriate means of addressing the so-called nightmare in family court eventually will include a comprehensive overhaul of the rules and court procedures and better resourced legal services. As PLEI practitioners we sometimes become frustrated that we must explain archaic and unnecessarily complex and confusing rules and procedures to individuals who are then often unable or unwilling to participate in the system. However, we also appreciate the significant role that public legal education will continue to play in facilitating multiple pathways for explaining new and simplified procedures, and helping individuals learn how to access the justice system.

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<sup>17</sup> Self-Represented Litigants in Nova Scotia, *supra* note 4 at 32-33; Sherman, *supra* note 4; Public Legal Education and Information Service of New Brunswick, "Family Law Information Hub: Project Evaluation Final Report" (March 2011) at 30, online: PLEIS NB <[http://www.legal-info-legal.nb.ca/en/uploads/file/pdfs/FLI\\_Evaluation\\_Report\\_2011\\_EN.pdf](http://www.legal-info-legal.nb.ca/en/uploads/file/pdfs/FLI_Evaluation_Report_2011_EN.pdf)>.

In his Viscount Lecture remarks, Justice Cromwell spoke of the National Action Committee on Access to Civil and Family Justice, which was established in 2008 to find meaningful ways to address the urgent problem of Access to Justice.<sup>18</sup> To move forward on their broad mandate, four working groups have been created to focus on particular issues identified in priority areas. Each working group includes representatives from a broad range of stakeholders offering diverse perspectives. These working groups have been structured so as to eliminate the “silo approach” that typically characterizes the scrutiny of systemic problems. Instead, committee members are encouraged to work in a coordinated, collaborative way to identify and implement doable projects and reform that relates to the system as a whole.

Needless to say, PLEI practitioners from across Canada are particularly pleased that representatives from our national association (Public Legal Education Association of Canada) were invited to sit on the National Action Committee and on each of the working groups. This recognizes the value of PLEI, not as an “add on” once reform has been undertaken, but as an integral part of the plans for improving Access to Justice. Under Justice Cromwell’s leadership, I am confident that we will find ways to enhance access to the knowledge, resources and services that would enable people to handle their civil and family legal matters more effectively and with considerably less stress.

## CONCLUSION

In light of the complexity of people’s legal problems, which can vary greatly, we must be positioned to respond to their needs with a range of appropriate and proportionate remedies. For some, using self-help options can and should be sufficient to resolve their issue. Of course, knowledge does not always ensure the ability of an individual to act on that knowledge and we must also find ways to address unique barriers such as low literacy skills, languages spoken and read, trust in the justice system, and so on. Nevertheless, it is more likely that individuals who do not need to be in the courts will be empowered to seek resolutions outside the courtroom if they are well-informed and have early support and assistance to do so.

It is now recognized that easily understood step-by-step information that tells SRLs specifically what they have to do and how they should go about doing it is integral to the process of enhancing access to the family justice system.<sup>19</sup> In order to promote remedies and solutions that are appropriate to different levels of family conflict, it is important that we work across sectors to enhance coordination and referral among all the stakeholders in the justice system. Ultimately, one would hope

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<sup>18</sup> See the Canadian Judicial Council’s website: < <http://www.cjc-ccm.gc.ca> >.

<sup>19</sup> Self-Represented Litigants in Nova Scotia, *supra* note 4 at 32-33; Legal Services Society, *supra* note 4.

that this would make the courts more accessible in a timely matter for those parties who are experiencing complex family legal issues.

To summarize, opportunities to educate and inform individuals with family law conflicts about the law and legal services/resources should be fostered early, often, and at multiple entry points - not just at the courthouse where there is a tendency to view individuals who show up unprepared and unrepresented as “the cogs in the wheel” so to speak. It is a disservice to everyone associated with the justice system when individuals with rather straightforward, uncomplicated family matters, such as an uncontested divorce or child support variation, end up in the courtroom using an adversarial approach because they cannot figure out how to navigate the justice system.