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A Methodology for Beginning Fundamental Justice Reform

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Discussion on the reform of civil justice in Canada reached a new crescendo last year with the publication of the various reports of the national [Action Committee on Access to Justice in Civil and Family Matters](#) and the initiatives that have popped up here and there across the country, and continue to pop up, as a result. An enormous amount of learned discussion on justice processes, barriers to justice, the meaning of access to justice, potential solutions and reform processes is available on websites of organizations like the [Canadian Forum on Civil Justice](#), [Slaw](#) and the [Canadian Bar Association](#).

As the various initiatives move forward, the issue of reform processes has in particular taken on a new importance. The reasons for this are fairly straightforward: the rules and principles of the English common law justice system are 900 years old and somewhat hidebound as a result; the system engages a significant number of influential stakeholder groups that must be convinced to support efforts toward substantive reform; the system is managed by a dense bureaucratic administrative structure laden with regulations, politics and vested interests that must be reorganized and reenergized; and, the system itself is incredibly expensive, as are the cost of mistakes and false starts. The process most likely to be successful must be one that is capable of reconciling these intransigent, obdurate circumstances and achieving broadly supported change. At present, the most promising reform process available is the social lab approach, which has been eloquently written about by people such as [Nancy Cameron](#) and [Nicole Aylwin](#).

I won't reiterate what Nancy and Nicole have said; they're both very articulate writers who have described the concept better than I could, and you really should read their articles. (Nicole's article, incidentally, has lots of helpful links to related resources.) Suffice it to say that the social lab approach attempts to mobilize the different stakeholders involved in a particular social issue to collaboratively implement prototypes of new processes which are continuously refined in an iterative cycle of evaluation and adaptation. This is all very well and good, and the social lab approach is likely one of the very few means of achieving the large-scale reform of intractable social problems in a manner that is neither coercive nor unpleasantly prescriptive. It's also the approach being used in Alberta's Reforming Family Justice Initiative, which [Diana Lowe](#) has succinctly described.

Some Concerns

I am, however, worried that the social lab approach might circumscribe our ability to be genuinely creative in developing new approaches to systems that are complex, multidisciplinary

and massive, like the justice system, and involve multiple stakeholders with varying commitments to reform. The implementation > evaluation > feedback > adjustment > re-implementation loop required by the prototyping methodology strikes me as being limited to taking the bits and pieces of existing systems and rearranging them, albeit in innovative, novel ways. There may be some aspect of the social lab process that I have failed to grasp, but it seems to me that the approach may be incapable of contemplating a fundamental redesign of established complex systems; rather than being a renovation that takes the house back to the studs and starts over, the prototyping approach seems to be limited to reconfiguring the furniture and testing new arrangements.

I raise this point as it is not at all clear to me that the way we manage disputes within the present family justice system has any necessary or intrinsic merit. While I suspect there will always be a need for authoritarian and perhaps adversarial court processes to address truly difficult individuals and problems of immediate urgency, I am concerned that a proper reconceptualization of the system may require more than triage processes and the co-location of social services, both of which are really not much more than reconfigurations of existing services, and may demand:

- a fundamental reconsideration and reappraisal of our basic assumptions; and,
- a critical examination of alternatives such as inquisitorial processes, abridged trial procedures, non-adversarial judging techniques, the embedding of mental health professionals in decision-making processes, mediation-ligation hybrid processes and so forth.

A social lab approach may be the most effective way to pilot new ideas and new procedures once this reconceptualization has taken place, but I suggest that it may not be suitable to reforms addressing the fundamental underpinnings of family justice processes, assuming of course that these processes need to be addressed at all.

A Potential Methodology

In light of my concerns with the social lab approach, and given that the usual alternatives to that approach are, for the reasons pointed out by Nicole, unworkable for the purposes of justice reform, the next step must be to discover the process that will work if we are to develop a completely new way of doing family law. I do not pretend to have the answer, but I do have a suggestion.

I think that first there needs to be some really big-picture brainstorming. I would hand-pick a dozen of the best and the brightest thinkers on family justice, focussing on people with practical experience in the trenches who are genuinely creative, out-of-the-box thinkers with a deep understanding of justice issues and family law. I'd send them off to a secluded place outside of Banff with a box of notepads, whiteboards, markers, the best research currently available on family breakdown and its sequelae, and a case or two of good wine, with instructions to come up with a comprehensive outline of a new family justice system, complete with workflows, processes and rules, applying no preconceptions that any aspect of the current system needs to be or should be retained, and I would tell them to keep at it until they reach a consensus about a completely new model of family justice.

When they're done, I'd bring them back, and get them to write up their model in two statements, a technical draft for legal professionals, government and others involved in the system and another in plain language for the public and the media. I would take a year with the group criss-crossing the province talking to the bench, bar, community groups, court staff, social workers, counsellors, advocates, social service agencies and so on to collect feedback, correct problems and foster buy-in. The group would then issue a final statement on the new system that reflects the insights gained from touring the province. This, by the way, is more or less the approach taken by Professors Rollie Thompson and Carol Rogerson between the release of their [first draft](#) of the Spousal Support Advisory Guidelines in 2005 and the release of the [final draft](#) in 2008, and it worked wonderfully well.

I would then put the final statement into the care of a larger, more comprehensive group of stakeholders for implementation in one justice centre, using the social lab approach to prototyping and the iterative evaluation and adaptation of new processes. When the new model seems to be more or less functional, I'd roll it out to other justice centres and their local stakeholders for the same process of evaluation and adaptation, tailoring the implementation of the model to the particular needs of each community.

The point of all of this is to achieve a redesign of the family justice system from the group up, by putting aside our current assumptions about family breakdown, and how the disputes arising from family breakdown should be managed, and starting afresh in a principled manner supported by research. Family justice is, you see, fundamentally different than any other branch of civil justice. We should not and must not handle the legal issues arising from family breakdown as we do those arising from shareholders' grievances, motor vehicle accidents and wrongful dismissals.

Just an idea.

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