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Legal Innovation, Access to Justice, and the University of Calgary's Family Law Incubator

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Matter Commented On: The University of Calgary's Family Law Incubator

Family law litigants are increasingly experiencing difficulty with access to justice that compounds the nature of their legal problems. This post reviews the potential of the University of Calgary's Family Law Incubator to meet the growing demand for legal services from Canadian families, and considers some regulatory issues surrounding its operation. Before discussing the specific contours of family law practice that would benefit most from this kind of legal innovation, I must first describe the problem that the Incubator is properly aimed at addressing. That problem is the lack of access to justice for family law litigants, as illustrated by the increasing frequency of self-represented litigants in family law matters at all levels of court in Alberta.

In a recent study conducted by Dr. Julie Macfarlane as part of the National Self-Represented Litigants Project, she found that 60% of all self-represented litigants (SRLs) were family law litigants. Among them, a clear majority in each province appeared in divorce court — in Alberta specifically, 85% of SRLs appeared in the Court of Queen's Bench. The relative complexity of family law proceedings in Queen's Bench as compared to Provincial Court does not appear to have any effect on the percentage of SRLs who appear there. In 2012, at Pro Bono Law Alberta's Meeting with Fraser Milner Casgrain LLP Managing Partners, David Tavender stated that the number of parties appearing in Alberta Family Law Chambers who are self-represented has increased 160% since 2006 (as cited in Macfarlane at 555). This increasing trend towards self-representation is not confined to Alberta. Macfarlane cites the increase as a nationwide trend, and looks to courts in California (North America's highest volume jurisdiction) to illustrate it. There, only 1% of litigants in family courts in 1971 were self-represented, compared to 46% in 1993 and 77% in 2000 (Macfarlane at 555).

The numbers may be higher, as Macfarlane's data only reflects whether or not an individual is represented at the time of a hearing. Her interviews with SRLs and court staff revealed that some SRLs will bring an agent to represent them in a hearing, but otherwise handle their case on their own behalf. In addition, a survey of judges conducted by John-Paul Boyd & Lorne D. Bertrand found that an average of 47.5% of their family law cases in the past year involved at least one SRL for part of the litigation process.

Why is the number of SRLs in family court increasing so rapidly? The most consistently-cited reason for self-representation in family law matters was the inability to afford to retain legal counsel (Macfarlane at 560). Because the maximum annual income limit for a single person seeking Legal Aid in Alberta is a relatively low $19,653, compared to the average 2014 salary in Alberta of $60,476, the vast majority of SRLs who cannot afford counsel are not eligible for Legal Aid either. While final costs of a divorce are difficult to calculate, a 2014 survey of 106

family litigants in Western Canada revealed that total fees for contested divorces ranged from $7,633 to $139,690.

SRLs are often required to confront a variety of legal issues by themselves that are complex and deeply personal, including child custody and access agreements concerned with the best interests of their children, or spousal support agreements and property division to ensure litigants' future security. It is clear that litigants in family law proceedings do not have adequate representation.

Addressing the Problem

For the past two years, members of Calgary's family law bar, the Law Society of Alberta, the Canadian Research Institute for Law and the Family, and the University of Calgary Faculty of Law have been working together to develop the University of Calgary's Family Law Incubator. It is expected to open in the second quarter of 2017. The incubator model will provide students interested in practicing family law with an opportunity to begin their careers by way of an innovative approach to articling. Legal incubators offer a combination of intensive education for articling students while supplying much needed legal services to the community. Originally developed and utilized in the United States, the University of Calgary's Family Law Incubator will be the first of its kind in Canada.

Under the direction and guidance of Kyla Sandwith, executive director and principal lawyer employed by the Incubator, the project proposes to provide training in family law and practice management for up to four articling students. With the goal of becoming a self-sufficient legal service provider, the Incubator will charge clients at cost-effective rates more accessible to middle-income Albertans, increasing access to justice for the middle group of family litigants who cannot afford to retain counsel full time but earn too much money to qualify for Legal Aid. The Incubator will likely implement limited-scope retainers, and embrace a paperless office concept in an effort to efficiently streamline the delivery of much needed legal services in the Calgary area.

It is hoped that the Incubator will introduce market pressure to lower some lawyers' rates, and that the freshly-minted family law lawyers emerging from the Incubator will have the effect of keeping those rates lower in the long term. The Family Law Incubator is a good example of a "disruptive innovation," as Clayton M. Christenson puts it in his book, *The Innovator's Solution* — an innovation with the potential to create a new market and value network for family law service delivery, disrupting previously established market-leading firms who are not as quick to innovate themselves. The Incubator may prove to be a barometer accurately reflecting both families' changing demand for efficient and convenient legal services and the most appropriate method for delivery of those services. Because the Incubator will consist of four articling students and only one practicing lawyer, it may also have the added effect of encouraging negotiation and alternative dispute resolution, as students' time in the Court of Queen's Bench and Court of Appeal will be limited.

Rethinking Billing Structures

Perhaps the most effective way for the Incubator to reduce client costs is for it to think critically about the current billing structure that dominates family law firms across North America. While a discussion of all the issues created for family litigants by this fee structure is beyond the scope of this post, some need to be mentioned. A significant problem for family law litigants is that billing by the hour takes all of the risk away from the lawyer and places it squarely upon the

client. As legal service providers, we must ask ourselves if this kind of business practice is an appropriate method for assisting family law litigants. The only risk for the lawyer with this type of fee arrangement is the risk of client mistrust and dissatisfaction. Some common themes revealed by Macfarlane's research (at 565-569) among clients who initially hired lawyers but were not able to retain them include a lack of progress being made, a lack of explanation with respect to fees, and the overarching theme that legal services paid for by the client did not represent value for money. The reality is that SRLs who are at first willing and able to pay for counsel often run out of funds or exhaust their willingness to continue to pay for legal services. Macfarlane's study, and others, consistently found that the primary reason for self-representation is financial.

I cannot possibly articulate the extent of the vulnerability that some family law litigants experience. While application of the billable hour model may be less repugnant in some other areas of law, family law is an area of law that could benefit greatly from a move away from it. The Incubator can champion this change. Indeed, the way in which lawyers are currently offering their services is not compatible with the budgets of the majority of family law litigants.

It is true that flat fees have limited application in family law because of the uncertainty, or perceived uncertainty, involved in family matters. One reason lawyers have difficulty telling a client what her fees are or will be is uncertainty as to how much work will really be involved in the matter. However, many of the problems created by use of the billable hour can be solved if the Incubator makes smart use of a limited-scope retainer.

Both the *Alberta Rules of Court* and the Code of Conduct clearly contemplate limited-scope retainers (see, for example, rule 2.27(1) of the *Alberta Rules of Court*). This type of retainer involves a lawyer providing advice on specific issues or handling specific tasks, such as drafting an argument or arguing a motion. There is no expectation that the lawyer will provide full or continuous representation. Clients are beginning to ask themselves if a lawyer's time spent on a file is equivalent to value received, and research suggests a high demand for unbundled family law legal services.

Unbundled legal services benefit clients because they are able to seek specific assistance with items such as drafting a letter to the opposing party, answering a question of law, preparing for a hearing, or receiving representation in court for a specific hearing. If properly delivered, these services can lead to concrete benefits aimed directly at the current crisis of access to the family justice system. Such targeted legal assistance can improve the outcome of a SRL's case, and assist the courts by better preparing SRLs to advance their case. Additionally, in family law cases, unbundling almost inevitably results in more contact between spouses in a divorce, providing opportunities to set a pattern for both that emphasizes working through issues together, rather than relying on lawyers to do it for them. This can be beneficial to the extent that there is no history of domestic violence in the relationship.

Offering unbundled legal services raises a number of other questions spanning the breadth of lawyers' duties. I will briefly address some of these. A lawyer's reluctance to offer limited-scope legal services may stem from uncertainty regarding how limited scope legal services are to be regulated, and whether the courts will respect the limited scope of the retainer, or expect the lawyer to provide services beyond the agreed scope of the retainer. One must also consider the extent of the lawyer's ability to provide competent and ethical advice when working on only a discrete aspect of a case, especially when she may not be aware of all the implications with respect to more complex issues such as property division or spousal support calculations. With

respect to risk management, it may be difficult for the lawyer to ensure she is receiving enough information to give competent advice. The more limited the retainer, the more important it is for the family lawyer to work within her area of knowledge.

To deal with any remaining gaps in existing procedural guidelines, the Incubator's articling students can mitigate risk by assessing, in the circumstances, whether or not limited-scope services can be offered in a competent matter. The retainer agreement should be specific, outlining the precise contours of the services that will be provided, and perhaps more importantly, the services that will not be provided. These recommendations are reflected somewhat in The Law Society of Alberta's *Code of Professional Conduct* (AB CPC) rule 3.2-2. Being clear with respect to the services available gives clients an adequate understanding of the roles they may serve, and the role the lawyer or student-at-law will serve. A comprehensive retainer agreement may mitigate liability risks by clearly defining the lawyer's role in given circumstances. Lawyers should also alert clients to any foreseeable risks or consequences arising from the limitations of the retainer.

Although the uncertainty that surrounds family law litigation may cause limited-scope retainers to be less practical than in other areas, Doug Munro notes for the Law Society of British Columbia that unbundled legal services are very well suited to specific tasks like those that can be aimed at reaching a mutual agreement. One of the Incubator's goals therefore can be to offer unbundled legal services from as close to the outset of a matter as practicable, with the aim of avoiding the polarizing environment of family litigation. Family law firms at large should strive to get unbundled legal services right by considering the issues I have described, addressing any others, and formulating a plan to offer limited-scope retainers to more clients when possible.

While unbundled legal services provide SRLs with a cost-effective and convenient alternative to legal assistance, SRLs as a group also constitute a potentially lucrative market for the delivery of limited-scope representation by the Incubator, and the private bar. Unbundled legal services are what many self-represented family law litigants are seeking (Macfarlane at 643), and despite considerable efforts, many of them are unable to find counsel who will offer these services. As Doug Munro puts it, "by presenting only a 'full service' or 'no service' dichotomy, many lawyers are failing to access and serve a growing market." In addition, as Nancy Carruthers has noted in *The Advisory*, because lawyers are typically paid for their services when rendered, problems with receivables are often avoided. In many cases, Carruthers continues, limited scope retainers eventually become full retainers for those clients who have the means to expand them. By offering the option of limited scope retainers, the Incubator is well positioned towards reaching its goal of achieving economic self-sufficiency.

I expect that because the Incubator offers work for four articling students fresh out of law school, concerns around losing control and moving to the unbundled model will be minimal. Effective use of limited-scope retainers will increase access to justice for family law litigants, increase client satisfaction, and have the added benefit of strengthening the Incubator's position in the legal marketplace of tomorrow.

Forrest Mosten also offers his prediction that "due to consumer education and demand, by 2032, law firms of all sizes will be proactively offering unbundled services in all areas of law and to clients of all demographics."

On Law Reform

While billing structures can be altered and experimented with to a reasonable degree, the business structure of a law firm is subject to rigid control. The first recommendation of the *CBA Futures Initiative* advocates for increased flexibility in business structures: "Lawyers should be allowed to practise in business structures that permit fee-sharing, multidisciplinary practice, and ownership, management, and investment by persons other than lawyers or other regulated legal professionals" (at 35). This is a laudable objective, but a rather lofty one at the moment. Current regulations place strict limits on the sharing of fees and the precise contours of practice with non-lawyers. Furthermore, the Rules of the Law Society of Alberta only regulate law firms. Section 2(1) states:

> For the purposes of these Rules and section 126 of the *Legal Professions Act*, RSA 2000, c L-8, "law firm" or "firm" means
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> (a) a sole practitioner,
> (b) a professional corporation that is not part of a partnership, or
> (c) a partnership consisting wholly or partly of active members or professional corporations or a combination of both
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> that owns and carries on a law practice in Alberta, and includes an LLP (emphasis added).

On the face of this definition, "Legal Incubator" does not fit, and the Incubator is thus incapable of being regulated by the Law Society. While theoretically, s 2(1) poses no obstacle for the placement of lawyers or students-at-law on the University of Calgary's payroll, one question that arises from the application of this definition to the proposed Incubator involves ownership and operation. The University of Calgary, also not fitting within (a)-(c) above, would not be permitted to own or "carry on" the Incubator as a law practice. Law Society rules would also restrict an advisory board or other University organization directing or "calling the shots" of the Incubator. Other innovative business structures like non-profit organizations not specifically approved by the Executive Director pursuant to s 148 of the Rules of the Law Society of Alberta (see below) also run contrary to this definition.

Interpreted, rules 2(1) and (2) require that the ownership of law firms rest in the hands of lawyers. One potential solution to this restriction is for the Executive Director to be incorporated as a sole practitioner, thus fitting into (a) above. A structure like this would allow the Executive Director to act as principal for the Incubator's articling students, receive funding from the University of Calgary, make decisions regarding the Incubator's operation in accordance with s 2(1), and otherwise perform any duties imposed upon the Incubator in accordance with s 4(a). (Law Society rule 4(a) states "[w]here a provision of these Rules imposes a duty on a law firm, the owner of the law firm is responsible for performing the duty" (emphasis added)).

Other issues arise around the operation of the Incubator's trust account. Rule 119.1 states:

> A law firm shall, before commencing the carrying on of its law practice in Alberta, obtain and at all times thereafter maintain, the following approvals:
>
> (a) designation of a responsible lawyer; and

(b) authorization to maintain a trust account

unless specifically exempted from these requirements by the Executive Director (emphasis added).

Section 119.2 adds "only a lawyer practicing with a law firm approved to operate a trust account is permitted to receive trust money." While the Incubator's fee structure is more accessible to Calgarians in need of family law assistance than other current alternatives, the fee structure still involves charging clients, albeit at a lower rate. The issue thus is that even if the Incubator manages to work around the restrictions that surround law firm approval, the Executive Director would be the only person permitted to maintain the Incubator's trust account. Neither the University of Calgary nor anyone else would be permitted to receive trust money.

An exemption to the trust account requirement could theoretically be obtained (rule 119.1 gives power to the Executive Director (Law Society) to specifically exempt a law firm from its requirements), but the benefits of such an exemption must be considered alongside the disadvantages of operating the Incubator without a trust account. Trust accounting constitutes a large portion of the lawyer's role, and bypassing the maintenance of a trust account would seriously undermine the Incubator's goal of educating articling students in the business aspect of law. These issues are largely present only for the Incubator's first year of operation, before any articling students stay on as lawyers in the program's second year.

Another reason why the Incubator's official entity matters involves professional liability insurance. Section 148(1) excludes coverage under the professional liability insurance program for services rendered during any period which a member does not practice with a law firm. On the face of this provision, the Incubator and its practitioners are not eligible for liability insurance because the Incubator is not a law firm. However, subsection (2) provides a list of 12 entities to which the exemption of subsection (1) does not apply, including Calgary Legal Guidance, The Legal Aid Society of Alberta, Student Legal Services Society, and Pro Bono Law Alberta. It could be put to the Law Society Benchers to amend s 148(2) to include the Family Law Incubator, but Benchers meet infrequently and relying on this amendment could further delay the Incubator's launch. There is also some question as to whether the Incubator would even fit appropriately in the list of s 148(2), as it is much farther from the pro bono entities enumerated in that list, and much more akin to a law firm. The best possible solution to the problem of insurance may still be for the University of Calgary to employ the Incubator's Executive Director as a sole practitioner, bringing the Incubator within the definition of "law firm" as per s 2(1) and making eligible for insurance the articling students and lawyers who work there.

In reforming the regulations that continue to have a stifling effect on legal innovation, the goal can be a "top-down" list of requirements, or a "bottom-up" visage of what an ethical practice of law looks like. Rules can be drafted that allow for well-meaning entities like the Incubator to flourish, and effectively address the serious issues at which they are aimed to remedy. The current model means well, but the meaning of practicing law has changed considerably since regulation began in 1907.

Conclusion

While there are a number of innovative options for the Incubator, perhaps most innovative will be the simple application of current technology. Executive Director Sandwith will be in a position to foster an environment that engages the use of modern technology and contemporary

business practices, instead of teaching students out-of-date ideas and habits that more established lawyers might pass down to their articling students, simply because those are the practices they are familiar with. Every family law firm can benefit from this way of thinking.

A family lawyer's intention to innovate her profession should not be delayed, because the choice to innovate will not be a voluntary one forever. To stay profitable, family law firms will soon have to innovate whether they want to or not. As Richard Susskind predicts in his book *The End of Lawyers?* (at page 269), "lawyers who are unwilling to change their working practices and extend their range of services will, in the coming decade, struggle to survive." A bigger problem is the exacerbation of a crisis that leaves justice for family law litigants at the end of a long and convoluted path. The University of Calgary's Family Law Incubator is particularly well positioned to effectively address both issues. Its potential to reform family law in Alberta should not be under-estimated, nor should its potential to be modeled across Canada.

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