Why Access to Justice for Children Matters

CLE BC Access to Justice for Children: Child Rights in Action Conference

May 11, 2017

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

Introduction

[1] I would like to start by thanking CLEBC and the conference organizers — specifically the Honourable Donna Martinson, Q.C., Suzanne Williams and Teresa Sheward — for inviting me here to speak to you today. I am in the privileged position to speak on a day that marks the launch of the CBA Online Child Rights Toolkit. Through my position as chair of Access to Justice BC, I can attest to the profound importance of initiatives such as this in effecting real change on the ground. Perhaps somewhat fortuitously, we get to talk about these pressing issues as we also celebrate the 35th anniversary of the *Charter* and the 150th anniversary of our country. There's no time like the present to bring these issues to the forefront.

[2] I would like to take the next ten minutes of your time to explain why I think access to justice for children matters. I will break this down into three essential points:

a. first, why it matters at an institutional level for our justice system;

b. second, why it matters in advancing the goal of reconciliation, which is at the heart of s. 35 of the *Constitution Act, 1982* and critical to protecting the rights of Canada's indigenous people, and

c. third, why we should care about access to justice for children simply as a matter of moral imperative.

1. Institutional: Advancing the Rule of Law

[3] First then, why access to justice for children matters at an institutional level for our justice system. Specifically, it is fundamental to furthering the rule of law.

[4] For any right to be more than just a promise, an individual must have a means with which to enforce the right. For children, accessing enforcement measures is particularly problematic because of their dependency, lack of maturity and actual or perceived voicelessness. Access to justice for children is about building a system that recognizes these difficulties, but nonetheless gives children participatory rights. It is not about paternalism. It is about empowerment.

[5] The rule of law is what constrains actions that violate or threaten children's rights. But the rule of law is fragile. To the extent that the law or those who administer the law fail to protect rights (or are perceived to so fail), right-holders lose respect for the justice system, which in turn weakens the rule of law. In other words, it can be a virtuous or vicious cycle depending on how the justice system administers the laws it is entrusted to interpret and apply.

[6] This is particularly relevant where children's rights are at stake because it speaks to our system's ability to protect our most vulnerable citizens who lack a voice in the democratic process. To the extent that it does not protect them, there are profound consequences in terms of the public's perception of the administration of justice. It goes without saying that one of the most important measures of any justice system is its ability to protect the most vulnerable.

[7] I recognize that it is easy to make these broad statements of principle about the rule of law and access to justice, and far harder to articulate what that means on the ground. It is one thing to recognize, for example, that courts and service providers must determine the best interests of the child separate and apart from what an adult might view as the best interests of that child, but quite another to achieve this in practice. In practice, we must apply a profound sense of empathy, open-mindedness and resourcefulness to truly come to appreciate the interests of the child. It also takes providing a child with a certain level of health, safety and security before they will even be able to exercise their participatory rights.

[8] As a judge, I recognize my duty to seek to fully understand the social context or lived reality of a child involved in a case before me; and to apply procedural and

substantive legal principles in a way that takes notice of that context and respects a child's rights to the fullest extent possible.[1] Often, it is difficult to get reliable information on which to arrive at this type of contextual understanding. But of course that difficulty does not detract from my duty to apply the law in this way.

[9] The truth is that we all have to make decisions in dynamic environments that have time constraints. We must perform our duties and obligations with respect to children who are from varying backgrounds and at different levels of physical, emotional and intellectual development. I am fortunate enough to be able to reserve judgment where I need time to reflect. I know that is a luxury few others have. Some of you are forced to make the best decisions you can in very difficult situations that often involve imperfect information. But it is crucial that you continue to do so with the child's best interests as the priority.

[10] And this is why I am heartened to see a conference like this one that involves front line workers, lawyers, alternative dispute resolution professionals, and many others. Through a cross-pollination of approaches from these different fields we stand a better chance at giving meaning to children's rights.

2. Reconciliation

[11] I turn now to why access to justice for children matters with respect to affirming and recognizing a key part of Canada's Constitution. A fundamental part of our constitutional order since 1982 has been the express recognition and affirmation of the Aboriginal and treaty rights of the Aboriginal peoples of Canada in section 35. At the core of this section is the goal of reconciliation. As many of you may know, reconciliation is a thread that runs through many of the Supreme Court of Canada's decisions on Aboriginal rights.

[12] For the moment, I would like to step back and think about reconciliation outside of a strict legal framework. Taking the concept at its plain meaning, we can think of reconciliation in two ways: 1. the act of causing two groups of people to become friendly

[1] The Honourable Donna Martinson, Q.C., "Justice not Just Access: Effective Outcomes for Children; Children's Legal Rights - the Fundamentals" (Paper delivered at the CLEBC Access to Justice for Children Conference 2015, 14-15 May 2015) at 5, 11, 12.

again, or 2. the process of finding a way to make two different ideas exist or be true at the same time.[2] I do not refer to the plain meaning to trivialize the concept. Instead, I think it's important to emphasize that as courts, we need to think of reconciliation as advancing both redress for the devastating harms visited on Canada's indigenous people, and also creating space for indigenous self-determination. We need to be open to, and create space for, several different ideas to exist at the same time.

[13] Canada's indigenous youth population is a crucial part of moving the goal of reconciliation forward. We, as courts, lawyers, and other professionals, have to work hard to earn the respect of Aboriginal youth, lest section 35 become an empty promise. This is, of course, difficult because supporting children who are still living with the inter-generational effects of assimilationist and discriminatory policies – such as the residential school system and enfranchisement – involves tackling unique problems. It also demands that support workers have an awareness of the misguided paternalism that so often informed these policies.

[14] As I said in the first section, we have to strive for empowerment not paternalism. We cannot start reconciling by alienating. We cannot start reconciling by ignoring. And we certainly cannot start reconciling by patronizing.

[15] To be frank, our existing legal tools are often insufficient. In the criminal justice context, we have *Gladue*[3] and the youth criminal justice provisions, which require that courts consider the circumstances of Aboriginal youth offenders who appear before us in a sentencing hearing.[4] But it is not enough to wait until that child comes into contact with the criminal justice system, and in fact is at the end of the criminal justice process, before acting.[5]

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[2] *The Oxford English Dictionary*, *sub verbo* "reconciliation."

[3] *R. v. Gladue*, [1999] 1 S.C.R. 688.

[4] This is codified in ss. 38(2)(d) and 50(1) of the *Youth Criminal Justice Act*, S.C. 2002, c. 1.

[5] I note that some courts have accepted that *Gladue* applies outside of the sentencing context to, for example, bail, Review Board and extradition proceedings: *R. v. Hope*, 2016 ONCA 648 at paras. 8-12.

[16] The failure of our justice system on this front is demonstrated by the crisis of Aboriginal over-incarceration, which is particularly apparent in the youth context. Under the *Youth Criminal Justice Act*, Canada's overall youth incarceration rate had fallen by 35 percent as of 2009.[6] That figure was just 23 percent for Aboriginal youth. And that overrepresentation continues today with Aboriginal youth representing 35 percent of admissions to correctional services in 2015/2016 — a 6 percent increase from the previous year.[7]

[17] To address the many factors that may cause an Aboriginal youth to come into contact with the criminal justice system we need to do better than focus on sentencing principles and judicial discretion. We need to pay attention to the lived reality of Aboriginal youth at the earlier stages of the criminal justice process, or better yet, before the youth comes into contact with the criminal justice system at all.

[18] More broadly, it is incumbent on all of us in society to provide indigenous children with the support and respect necessary to access the justice and administrative systems to get the benefit of their rights to education, health, an adequate standard of living, and to be protected from all forms of physical or mental harm. We have an obligation to these children to facilitate this type of access, particularly in recognition of the societal ailments Canada's indigenous population has endured.[8]

[19] More to the point, we desperately need to work to build a system that protects Aboriginal youth rights so that they themselves have the ability and willingness to speak out about what must change in our society. They are the ones who must play a key role

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[6] Nate Jackson, "Aboriginal Youth Overrepresentation in Canadian Correctional Services: Judicial and Non-Judicial Actors and Influence" (2015) 52:4 Alta. L. Rev. 927 at 928, citing Statistics Canada, "Youth custody and community services in Canada, 2008/2009" by Donna Calverley, Adam Cotter & Ed Halla in 30:1 *Juristat*, Catalogue No 85-002-X (Ottawa: Statistics Canada, 2010) at 31, online: <www.statcangc.ca/pub/85-002-x/2010001/article/11147-eng.pdf>.

[7] Jamil Malakieh, "Youth correctional statistics in Canada, 2015/2016" (2017) 37:1 Juristat <http://www.statcan.gc.ca/pub/85-002-x/2017001/article/14702-eng.htm> accessed 19 April 2017.

[8] Jackson at 930.

in the reform process. It is only then that we stand a chance at achieving reconciliation and ensuring the equal protection of the law for Aboriginal youth.[9]

3. Moral Imperative

[20] Finally, I'll discuss why access to justice for children matters simply as an issue of moral imperative. We as a society must seek to simultaneously protect and empower children because they are ends in themselves. They are individuals who are justly entitled to the full protection of the *Charter*. They are entitled to education, health care, and an adequate standard of living. They are entitled to be heard and to be treated with dignity.

[21] There are very few convictions that we can comfortably say are shared by the overwhelming majority of society. It's safe to say that the protection of children's well-being is one of that very limited group.

[22] Applying this moral imperative to the access to justice question, we can think of access to the justice system in both a procedural and substantive sense. Procedural justice implicates a child's right to participate and be heard.[10] It is key to respecting a child's dignity. Substantive justice is concerned with getting to the just result that enforces a child's rights. As I said in the first section, without enforcement a right loses meaning. Enforcement of the right then is attendant to our collective moral imperative.

[23] In its report calling for a National Children's Commissioner for Canada, UNICEF Canada said:

> The true measure of a nation's standing is how well it attends to its children – their health and safety, their material security, their education and socialization, and their sense of being loved, valued, and included in the families and societies into which they are born.[11]

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[9] This is part of Canada's obligation as a signatory to the *Convention on the Rights of the Child*, 20 November 1989, Can. T.S. 1992 No. 3, Art. 2 (entered into force 12 January 1992) [*Convention*].

[10] *Convention*, Art. 12.

[11] UNICEF Canada*, It's time for a National Children's Commissioner for Canada* (Toronto: Canadian UNICEF Committee, 2010) at 1, citing UNICEF Innocenti Report Card 7, *Child poverty in perspective: An overview of child well-being in rich countries, 2007*.

[24] Marie-Claude Landry, Ad. E., the Chief Commissioner of the Canadian Human Rights Commission, wrote to similar effect in her message in the Commission's 2016 annual report to Parliament when she said :

> Ensuring that children are given equal opportunities to thrive, regardless of their individual challenges, is the best way of ensuring human rights for all. How they are treated today, will determine, in large measure, how they will treat others tomorrow.[12]

[25] It is telling that the Commission chose to present its annual report this year with an examination of human rights in Canada through the eyes of children. In the Commissioner's words: "let's bring it back to the children". Children who were taken from their parents; children who want to express their gender identity; children of migrants who have been detained; and children who face daily challenges and bullying due to their disabilities.[13] I understand that you will be hearing from young individuals over the next two days who will be able to speak to their lived realities in confronting these very issues.

[26] I sincerely hope that we, as a part of Canadian society, and particularly in our roles as professionals who are involved in protecting children's rights, will be able to seize on the momentum from conferences like these and further the cause of access to justice for children.

Conclusion

[27] To conclude, I would just like to again thank CLE BC and the organizers for having me here today. I would also like to thank all of you for performing an important role in making access to justice for children a reality. There are few more compelling issues facing our society today.

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[12] Canadian Human Rights Commission, *People First: The Canadian Human Rights Commission's 2016 Annual Report to Parliament*, Cat. No. HR1-4E-PDF (Ottawa: Ministry of Public Works and Government Services, 2017) at 3.

[13] *Ibid* at 15-44.