My Retrospective On The Unified Family Court
From Inception to Present

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Tamara Bodnaruk –Wide wrote me a note asking me to talk at this conference on my retrospective on the Unified Family Court from inception to present. This was a pleasant surprise for me. I'm no spring chicken and tomorrow I turn 80 but that age gives me the privilege of saying what I want about the Unified Family Court as in the past and now. You will see that there are in my view some needs for improvement in the process of the court and also a need for the Ontario Government to determine the Unified Family Court's relationship within the Superior Court.

I'm going to spend some time on what the various components of the UFC are and how Justices Van Duzer, Gravely and myself thought and implemented its original direction and how that changed in 2000 or thereabouts when the UFC became part of the Superior Court of Ontario. Since that time, which was just after the second last expansion of the court there have been no further expansions.

I do draw to your attention that after the first court was established in Hamilton in 1977 it took until 1995 for the first expansion to occur and then about 2000 for the second. So governmental delay in movement is a part of the delay in the court's expansion. Why, I am not sure. Without listing all of the sites there are twenty sites in the UFC system which serves about forty per cent of the Ontario population.

What is the definition of a Unified Family Court? Going back to 1977 there were three court systems which had jurisdiction in family law matters. The Supreme Court of Ontario and the County and District Courts had jurisdiction in divorce, alimony, spousal maintenance, property distribution, annulment, child support and custody and access matters. The Ontario Court Family Division which existed in every county in the province also had concurrent jurisdiction in non-divorce spousal support, child support and custody and access matters. As well the Ontario Court had exclusive jurisdiction in the most important area of law dealing with child protection cases as well as adoption matters. In the Ontario Court there was a specialized Branch called the Family Division which was mainly presided over by specialist Judges. In the other courts no specialist sections then existed. That is most important.

You can imagine the frustration that spouses experienced when one starts a case in one court and the other goes spitefully to another court. That takes a while to sort that problem out by way of motions.

But the first important step in the creation of the Unified Family Court is the legislation which merged all legislation regarding family law into one court.

Overlapping all of this is the Canadian Constitution which provides that only federally appointed judges may grant divorces and corollary divorce issues as well as all property matters between spouses. It has always been clear that for a judge to have total jurisdiction in a UFC he or she

must be appointed by the Federal government. This sounded rather simple but from a political point of view it was not.

It is important that judges in a family court must be specialized in family law. Not only must they know the law but they should have considerable trial and pretrial experience in the sense that they know how to intervene to recommend, amongst other things mediation, know when and how to shorten cases, fully understand case management, and to handle interim motions .

Much of this experience is found in judges of the Ontario Court Family Branch. That is an important resource to tap into for specialized Unified Family Court Judges. But they are provincially appointed and the Federal Government is to be sought to appoint them to the UFC. From time to time it has taken agreements and cooperation to appoint a significant number of Ontario Judges to the UFC court. I hope that that continues.

When the Federal Law Reform Commission considered the need for Unified Family Courts in its 1974 working paper, it strongly advocated the absolute need for support services to be attached to the Unified Family Court. All of the governments involved in the creation and expansion of the court have been on side with this recommendation.

So what are the services that are being provided?

There is provided considerable legal aid for those without appropriate income, by way of duty counsel, legal aid certificates, provision of legal aid mediation services for cases that have been set for trial, and provision of Family Law Information Centres for those without counsel, including free 20 minutes legal advice from counsel. On site court service is very necessary for parents who are subject to a child protection proceeding in which their ability to parent is in question. These cases often come up on a few hours or few days notice and legal aid is essential to most parents in getting their cases organized. In the Supreme Court in New Brunswick v. G in 1999 Chief Justice Lamer concluded that a parent who is liable to lose his or her child to the state and who cannot advance his or her case without counsel and who cannot afford counsel, is entitled under S.7 of the Charter to legal aid assistance.

Provision of mediation services at every branch of the UFC (now subsequently including other courts hearing family matters). This unique service is provided by the Attorney General. It is not necessary for parties to have a case before the court to use this service. All parties have to do is walk into the court site and request it, and pay the rather modest fees geared to their income, (if they are earning one). At certain times such as on a motions day an on-site mediator will be available to help parties resolve urgent matters.

This is a major contribution to our courts.

The legislation in Family Law supports the provision of mediation in all family law matters before the courts. See s.31 of the *Children's Law Reform Act*; s.3 of the *Family Law Act* and s.5.1 of the *Child and Family Services Act*.

The Ontario Children's Lawyer can be called in by the court to provide legal support for children in a custody and access case. The OCL has the discretion to provide counsel for the child or to prepare an assessment report for submission to the Judge of the Court.

The Attorney General has provided in each county of Ontario a supervised access facility to implement an order of a court, which may also include a supervised exchange program. The success of this is that some sites are quite overbooked.

There are programs of public education of the public through FLIC (Family Law Information Centre) and through MIPs (Mandatory Information Programs). Under Rule 8.1 everybody who starts a traditional family matter or who wants to defend a case ,whether he or she has a lawyer or not, has to attend a MIP session within 45 days of starting the case , in order to proceed . These sessions outline Alternative Dispute Resolution options, effect of separations on children, and resources for dealing with separation.

The next important issue involves the design and accommodation of the UFC premises to accommodate the needs of the bar and the public to attend a court site which is comfortable and also provides safety and security for all persons including the judiciary; a court must also provide offices where counsel and their clients may meet to discuss their case.

The security involves court officers and police constables who are assigned to the court through local police services.

On the last expansion of the court, I was assigned to evaluate sites based upon their ability to protect all persons in the court. In a family court there is a small percentage of people who are prone to acting out. The last sites chosen met at least a minimum safety standard.

A court cannot function efficiently unless it has an effective model of court administration. In a busy day, numerous counsel or their agents, and unrepresented parties line up to file papers, open cases, ask questions about their cases or asking how to proceed. Each case has a file and there are thousands of them, and every filing has to be recorded and readily available to the clerks of the court or the clients.

After each child or spousal support order has been granted whether at trial, on consent or at a motion, they have to be immediately recorded and filed with the Family Responsibility and Support Arrears Enforcement Office in Toronto. That Branch of the Attorney General has the

duty to collect all support payments under those orders, for distribution to the recipients and to start proceedings to collect arrears.

There are clerks deputized by court administrators to read all the draft court orders submitted by counsel or clients to make sure that they conform to the judge's endorsement. They then will sign the order and have it distributed. If there are not enough staff to do this, the parties and their counsel are delayed, sometimes considerably, in finalizing their matters.

Every court including a UFC has a trial coordinator whose responsibility, with his or her staff, is to meet with counsel or the clients by telephone or personally, to organize the various lists of the court, including case management lists, trial or motions lists. His or her office ensures that each judge has the files respecting the cases before him or her, the day before the listing date. It is essential that Judges study their cases before they start court. The Trial Coordinator also assigns court clerks to assist each judge and other key workers who will meet with parties outside of the courtroom. They are very helpful in encouraging parties to see a mediator on site.

The Family Law Bar has as its prime duty, to ensure that their clients are properly represented. Each counsel new or experienced has to prepare his or her case, know the law and the rules and procedures of the court. As you may know, in cases of child support or spousal support each client is required to serve and file income tax documents, returns and certificates for three previous years, and in cases of pensions to obtain their valuations. Completed net property valuation forms are essential where there are cases of the determinations of net family property equalizations. Where there are claims by one party that he or she has a claim of a constructive or resulting trust in another property owned by a partner or a third party, the fullest of disclosure is mandatory.

I have touched on these duties because it is essential that lawyers have well trained staff and associates who can help clients provide the mandatory financial material required by the various statutes and rules including reports in accordance with the case management rules. Family Law is far more complicated than most people, including politicians and some members of the Bench, think. When lawyers are required to charge fees that some perceive as high, part of these fees have to pay for support of well trained staff.

The Family Law Bar in Hamilton has been instrumental in making the Hamilton UFC Court a success. In particular I want to point out that establishment and continuation of the Liaison Committees and Community Resource Committees established for UFC sites under Sections 21.13 and 21.14 of the *Courts of Justice Act*. These committees are devoted to working out problems in the functioning of each court site and organizing and streamlining the provision of

support services. The Hamilton Bar was successfully insistent that these committees be established in statutory form.

As many of you know, many local Bar Associations have subcommittees devoted to family law and the Ontario Bar Association has a Family Law Subcommittee.

The last major player in the UFC complex is the Family Law Rules Committee. In any court system there must be rules in a regulatory form providing what is required of the parties and their counsel in terms of process, provision for disclosure of documents and the process for case management. The whole idea of the rules process is to make sure that every party makes full disclosure of his or her case and that the other side is not surprised. Settlement will often occur when parties know the details of the other party's case.

When the UFC first opened, an informal rules committee was set up and it worked on an interim basis until a statutory committee was set under section 67 of the *Courts of Justice Act*. This present committee is mandated to set up rules for all courts dealing with family law. Its members are the Chief Justices and Associate Chief Justices of the Court of Appeal, the Superior Court and the Ontario Court of Justice; the Senior Judge of the Family Court, a judge of the Court of Appeal, four Superior Court judges which includes two judges of the UFC and two judges of the Ontario Court, the Attorney General or his or her designate, a law officer of the Crown, two administrative people, four lawyers from the Law Society of Upper Canada., four lawyers appointed by the Chief Justice of the Superior Court, and two lawyers appointed by the Chief Justice of Ontario Court of Justice.

This committee is too large and does not necessarily have a complement of specialists in family law.

The Chief Justice of the Court of Appeal is the chair of the Rules Committee with power to delegate. I was the delegated chair for several years when I was the senior judge of the Family Court.

I've spent what for you must be a boring time outlining to you the numerous people delivering to the public what is known as family law. It is not a simple structure.

Now let's go back to a couple who are breaking up. They may have a house probably mortgaged as well as a cars with moneys owing on them. They have children who they both love and care for, who are in school or day care. For most of them money is in short supply. We know that often they are both not communicating well because the separation is probably frightening for both of them. Where will the children live or go to school? Will they be returned to the person who had the primary care of them, after a visit? The person who left the home, maybe he or she is upset about where will he or she be going to, how does he or she get

furniture or some minimal accommodation needs? How are the limited family finances to be distributed?

In some homes today one or both of the parties have mental health problems. But we know that a lot of people get through life with medical assistance for them. Some spouses or parents often have minor or some involvement with drugs. These issues have a potential for violence. Separation often happens after a quarrel.

Some of these difficulties are aggravated by friends or relatives who have gone through the separation process and have views as to what should be done. Remember that at least forty per cent of marriages fall apart and there are also periodicals that often advise people how to cope with separation.

For many couples, they are able to quickly sort out the separation issues on their own. Counsel may be necessary to draw up an agreement and that is it. No court is necessary. Some couples are able to seek out counsel whose are dedicated to resolving family law problems outside of litigation. They can be easily identified by looking at the local bar pages on the internet. They are called Collaborative Lawyers.

But what are the rest to do? Resort to the Court is their only choice other than to do nothing. And they come to court because they are in a very frustrated state. They need help and they need it quickly.

Up until the time when the UFC merged with the Superior Court it was perceived as a forum which provided quick and relatively inexpensive access to the Judges of the Court. For reasons which I will address shortly that has somewhat changed.

Before the UFC was merged with the Superior Court (I might add this had my support) it was our policy to make each UFC court site work in a loose partnership between the Bench, Bar and Court Services. We knew that you could not change a process, a rule or a form without affecting all those serving the court. Most affected by the changes are the Bar as each change or each form adds to the cost of the solicitor which has to be passed on to the client.

Once the merger happened several things changed:

The Family Court Rules were reorganized to apply to all courts hearing family law cases.

The judicial administration of the court was transferred from the Senior Judge of the Family Court to the Regional Senior Judge in each Provincial Region, subject to the overall supervision of the Chief Justice. The Senior Judge of the UFC became merely the Chief's advisor, but remained the Chair of the Rules Committee.

However while I was chair of the Rules Committee, several rule changes were made which I believe has upset how the UFC has functioned.

I strongly opposed the amendment that an interim motion cannot be commenced until a case conference or settlement conference had been heard. Rule 4.2 indicates that this does not apply to urgent issues. However generally speaking it has been held that urgent matters do not include motions for interim custody, access and spousal and child support.

I also opposed the rule that when a case contained a property matter it was deemed so important that it would only enter into the case management stream until one party wanted it to. Thus all other issues became caught up in that delay.

Prior to those rule changes, none of the family law issues, property included, were subject to those interim motion access denial restrictions. One party could bring a motion on four days notice for temporary relief. These motions came before a specialist judge quickly and allowed him or her to make an interim or interim interim order, before the case could be fully argued. It provided some short term stability for the children and some basic support. More often than naught, counsel for the parties might work out a settlement for a full time or interim or interim interim order. They might agree to produce documents and allow the court to bypass a case conference and set a settlement conference. Sometimes at the motion a settlement conference may be deemed to have been held and a time for trial would be set.

The use of an early motion process is quick, effective and inexpensive. It should also be noted that on motions days most family law solicitors are in court dealing with several cases and this process allows them to settle all or part of their cases. The new rule allows for the mandatory hearing of a case conference before a motion, is costly and delaying. I'm told that some of the courts are trying to avoid this but these activities are in conflict with the rules which the Judges are bound to comply with.

The rule indicating that cases with property issues are not subject to any quick case management is frustrating to the parties as it allows cases to sit in abeyance until the parties or their counsel want it to move.

After I resigned in 2001 as chair of the Rules Committee, Rule 8.1 was enacted that requires all parties starting or defending a case in the UFC or other courts to attend a Mandatory Information Program in order to be entitled to proceed. Why should parties who have counsel have to attend them? It delays cases where both parties have counsel have to delay starting their cases up to 45 days. These meetings may assist self-represented parties, but to impose them on others is demeaning to counsel who have the responsibility to advise their clients.

In my view it would be helpful to change those rules. They are not helpful to the quick and speedy and inexpensive access to the court.

One last comment. I've mentioned case management in the Family Courts. This process, if a case is in the court system, has been the key to early settlement for some cases.

In the 1970's and 1980 I was part of the American Association of Marriage and Family Counselors. For some of that time, I was its secretary. On a date I cannot recall, I heard a lecture on the necessity of Court Case management by Earnest Friesen who was a professor at the California Western School of Law. He was a generator of things to develop.

He spoke of the difficulty that litigation counsel experience in managing their practices. Cases only get organize when crises develop. He spoke of the necessity of developing management systems where a case management Judge requires all lawyers on a case meet with him or her to discuss settlement and or productions. When these meetings occur settlements happen at a significant rate. A simple idea.

The professor came to Ontario twice. Firstly to speak to the Judiciary and secondly at the National Judicial Institute where Professor Carl Baar, Justice Patrick Gravely and myself dealt with case management.

It was through these meetings that case management systems were more fully developed including first meetings and settlement conferences. These approaches have spread to some but not all judicial systems in most aspects of law.

The Rules provide for case conferences, settlement conferences, and trial management conferences.

Case conferences deal with production issues and resolution of interim matters; settlement conferences deal with resolution by settlement of a case; trial management deals with the organization of the trial and some efforts to settle. Not every case has to have all three. A judge may in certain cases combine all three meetings into one. Of interest to you is that under Family Law Rule 17 sub 9, a regional senior judge may permit a non- judge to conduct these conferences. It allows a Regional Senior Judge, with the parties consent, to assign a case conference or settlement conference to a retired master or judge or lawyers active or retired with 10 years past experience.

This section has been rarely used. But generally speaking judges do not have, in most complex cases, a great deal of time to hear a settlement conference. It occasionally makes sense to allow non-judges to do these cases. They can spend as much time is necessary in a mediation process to possibly settle the case.

One critical factor in a successful case management process is that there should be the same judge who deals with all on the case management sessions. It is essential that the parties who have made commitments to a judge in the process, for them to account for their failures to keep them. In some jurisdictions that doesn't happen.

Remember if all case management sessions are held, motions heard with case management required briefs, and subsequent trial reports submitted, the cost of getting to the trial door is somewhere between $30,000 to $50,000. The result is that most of us cannot afford this expense.

The above are a few minor but important criticisms of how the present UFC is run. They can be addressed very quickly by rules changes.

However there is another very important issue that has to be addressed. It has always been my view, that of the Federal Law Reform Commission and the views of Roy McMurtry and Frank Callaghan, both past Chiefs of the Superior Court, that the Unified Family Court should be administered outside of the traditional court management system. Their view, as well as mine is that the court should be managed by an Associate Chief Justice for family law whose dedication is solely devoted to the Unified Family Court. He or she should not permit Family Court judges spending but a very minimal time outside of the court. He or she should only permit judges from outside of the UFC to come in to the court for extended periods only because they want to, not because they have to. They should come into court for periods that will allow them to case manage cases up to the dates set for trial.

The Associate Chief Justice must chair the Family Rules Committee and its membership should be minimized and revamped to cover those persons with a knowledge of family law and its budget needs.

Once the Unified Family Court became swallowed up into the traditional judicial system, it became subject to the direction and management of the Regional Senior Justices in each Region whose mandate is very broad and family law is only one their responsibilities.

I do not fault anyone as to some of these somewhat critical views of the court, but the government has to change the way the court is administered.

An Associate Chief Justice for the Unified Family Court should be a sitting Judge who, from time to time travels to the court sites, meets with the judges, members of the Bar and courts administrators and press for changes where needed. One only knows the system if one actively travels within it.

The Associate Chief Justice will then be in a unique position to organize the education for the court.

But until all of these changes can be made in the past as I have often suggested, counsel should advise their clients to attempt to settle their cases outside of the court system. A case often takes too long to conclude and is too costly. But even if all the changes are made in the court system, many other ways of resolving a case are still available. One of them is mediation.

Mediation can for most people, be a way of escaping the litigation process. In the final analysis it is the duty of counsel in particular to impress upon their clients that they should approach their disputes from the point of view of settling their case based upon using their heads rather than their hearts. For the past five years I have settled most of the matters that come to me. But it takes more time to do that than brief time that is available to a case conference judge. Many settlement matters take five or six hours for me. I might add that I only hear matters where all parties have counsel. But it is a process where we try look at each party in a positive light and attempt to quash attempts at negative accusations which are the features of litigation. Mediation is much cheaper than going to trial. As you may note mediation is available to parties who wish to totally avoid the litigation process or who are in litigation and wish leave it and settle. Just ask the judge to assign it out.

The UFC will be hopefully be expanded and I hope that some of the problems in the system can be worked out and that mediation will play a major role an expanded Unified Family Court.