Sarah McCoubrey, B.F.A., LL.B., M.Ed.
Strategist, Calibrate
sarah@calibratesolutions.ca

Ten Ways to Better Justice

CIAJ Annual Conference - Civil Justice and Economics

October 7, 2016

Innovation and access to justice are frequently linked together in the calls for justice sector reform, easily giving the impression that there is a new model, or an innovative approach that will solve the challenges people face accessing the justice system. Linking innovation with the expectation of new project models or technological solutions narrows the understanding of innovation and excludes many of the current proponents of an effective justice system. Emphasis on innovation can often lead people to wait for a pilot project or a new initiative that promises to be the *right* solution. While some new ideas warrant adoption and scaling across the country, many others reflect the local demographic, linguistic, geographic and resources needs of the communities that developed them.

Innovating on access to justice is not a matter of identifying the right project model and replicating it elsewhere nor waiting for an evaluation that demonstrates the success of one approach, nor watching while one group tries something new. Innovation is a way of thinking when approaching these challenges that creates opportunities to work differently and find approaches that make a meaningful difference to people.

When looking for examples of innovation in access to justice, many expect technological solutions. However, as Malcolm Gladwell has described innovation, at the centre of the

knowledge economy, is "fundamentally social."[1] The promise of innovation lies in a shift in how we work. In looking for promising models across Canada and internationally, it is not the project mechanics that are innovative, as much as the change in thinking that has allowed these project proponents to find creative ways to tackle the seemingly insurmountable challenge of accessing the justice system.

Shifting the culture and adopting new ways of thinking, not an easy feat for individuals or organizations, let alone a system as loosely affiliated as the justice system. The importance of precedence and tradition focus on incremental evolution, stability and predictability in the law and in its administration. The professional relationship between institutions and individuals with different employers, funding streams, organizational goals is one of general alignment, with no imposed or consistent authority on justice system outcomes. Add the critical importance of the independence of the bench and bar to this already loose affiliation of system players and the prospect of defining system-wide culture change appears impossible. The expectations of the public, as voters, as citizens, as clients and as litigants is a relevant, but difficult to articulate, parameter on assessing justice sector reform. The challenge of making justice accessible combines all of these complex factors.

While the challenge is difficult, the consequences of failing to innovate are dire. If society's expectations of dispute resolution surpass the justice system's capacity to innovate, people will rely on external, often unregulated mechanisms of managing conflicts. When the justice system is unable to respond to the expectations of citizens, people will choose alternatives that do not offer the privacy, rights protection and benefits of the rule of law. Meeting the changing needs of justice system users will require a significant culture shift at all levels. Preserving habits, work

---

[1] Gladwell, M., Designs for Working, (2000, Dec 11) The New Yorker Archive, retrieved from: http://www.newyorker.com/magazine/2000/12/11/designs-for-working

preferences, and comfort with how it has been done in the past are not legitimate reasons to resist innovation. Instead, the crisis in access to justice is an opportunity to refocus justice system reform on the needs of users, open to all of the possibilities to make the system work better for people.

A shift in mindset is no easy thing. It requires sharing control, as well as responsibility, and being prepared to be uncomfortable, to learn new ways of working and to avoid defensiveness and territorial approaches. Accepting the fact that some aspects of the administration of justice are out-of-date does not mean that the strengths of the justice system must also be thrown out. Instead, examples of innovative thinking open the possibilities for finding new approaches. Ten ideas for shifting to a culture of innovation are outlined below. It is not the project model or the results or the replication potential that makes each innovative, but the mindset shifts that each has integrated into service delivery. Innovation that can be fostered within and between justice sector institutions by bringing these mindsets to the challenge offer and harnessing the commitment to access to justice that is evident throughout the system. These ways of thinking map a path out of old habits and open the conversation to new approaches.

1 – The Justice System Doesn't Own the Law
The meaning and relevance of laws is in constant interpretation by individuals and communities. The regulation of relationships through legal means is changing as people find more accessible avenues to manage their conflict. People are constantly living with, and working with legal concepts, with little dialogue with the formal justice system. Being open to rethinking how people manage conflict, requires the justice system to be in genuine dialogue with people about the interpretation and enforcement of the law. Many of our indigenous communities have a community-wide approach to law making, interpretation and enforcement that provides forums for everyone to contribute on important issues, to describe the application of legal concepts to different situations and to generate ideas. We can see this in regulatory law, where the Tsleil-Waututh recently followed their own governance process to

articulate a regulatory response to resource development[2] that is based on a complex understanding of legal and social relationships and included problem-solving precedents.[3] The Sto:lo Nation has a process for dispute resolution that is centered on the concept of Qwí:qwelstóm[4] and a process that prioritizes the reestablishment of a harmonious balance for everyone involved in the dispute. These ancient processes are an innovation that has built community consensus and an opportunity for changing contexts and circumstances right into the process by recognizing the collective ownership of legal structures and decisions.

2 - Share Control of Conflict

An implication of acknowledging a shared ownership of the law, is a need to share control of individual conflicts. The reliance on legal language and terminology makes it difficult for people to understand the conflicts they find themselves in. At a day-to-day level, people are dealing with minor and easily managed conflict, as well as major conflict that requires assistance. As soon as their relationships are framed in terms that most people are unsure of, they are less confident taking action, or presume that they are unable to act without formal legal solutions. The task of speaking about conflict in plain language not only increases people's understanding of the formal processes, but would also empowers them to deal with the day-to-day issues that the legal system never sees. This innovation goes beyond producing legal materials that are understandable, to actually using language that people already understand to describe their relationships. A society-wide transition to understanding and accepting conflict as a normal aspect of social life, with many of the tools for managing it within people's capacity, would minimize the severity of escalating conflict and cultivate confidence in the justice system as a helpful institution for complex conflicts. The development of legal capability as a life skill is

---

[2] Tsleil-Waututh Nation, Assessment of the Trans Mountain Pipeline and Tanker Expansion Proposal, (2016, April 14), retrieved from: http://twnsacredtrust.ca/assessment-of-the-trans-mountain-pipeline-and-tanker-expansion-proposal/
[3] Estella Charleson, E., Making Space for Indigenous Law, (2016, January 12), retrieved from: http://www.jfklaw.ca/making-space-for-indigenous-law/
[4] Sto:lo Nation, retrieved from: http://www.stolonation.bc.ca/justice

starting to build people's comfort with and ability to take action on everyday issues.[5] The shift from system-focused language to public-focused language will share control of disputes through an understanding of conflict and of the possibilities for resolution.

3 - Make it Easy

Putting services where people are, when they need it, has driven changes in other sectors, particularly in the financial sector. Fintech (technology in the financial sector) has embraced the importance of making it easier for people to manage their money from wherever they are. From basic banking to complex investing, the tools to manage money are available in-person, online, by phone. Banks are open in the evening and on weekends. Chats, help desks and phone lines work from wherever the client is. These services have not replaced in-person help, nor is any one of these options the only option. Instead a large sector, managing personal data and resources, with a strict regulatory regime, has managed to make it easier for people to get information, make decisions and take action. The legal sector is starting to see this an emphasis on linking related tasks and making it easier for people to take action. LegalSwipe[6] combines information on rights with the police, with the video recording function on smartphones, and automatic uploads to the app's server, preserving the evidence of police interactions. It has recording functionality built into the same place where people also learn about their rights, recognizing the stressful dynamics of police interactions and the practical issue of losing control of one's phone if detained. Putting the steps together in the same place and combining the information with the ways to take action is making it easier for people to understand and follow through on their legal issues.

4 - Make it simple

---

[5] CLEO, A Framework for Ontario: Introducing a working legal capability matrix, (2016, September), retrieved from: http://www.plelearningexchange.ca/wp-content/uploads/2016/09/working-legal-capability-matrix.September-2016.final_.pdf; Justice Education Society, Everyday Legal problems, retrieved from: http://www.justiceeducation.ca/; Law for Life, retrieved from: http://www.lawforlife.org.uk/research-and-theory/plenet-on-legal-capability/

[6] LegalSwipe, retrieved from:www.legalswipe.com

Start where people are and build approaches around people's experience. *User-driven, not system-driven* should be a mantra that constantly questions the reasons for maintaining the status quo. The organization of services by substantive topic is a good example of a system-driven habit. People do not think in substantive legal categories. The distinction between an event with criminal consequences and the related family, housing, employment and social issues does not make sense to someone trying to navigate the intersecting areas in their lives. Responding to this reality requires the integration of good information and referrals to meet people's needs, regardless of practice areas, catchments or eligibility. Steps to Justice[7] is a new approach just being launched Community Legal Education Ontario (CLEO) that has brought together clinic and non-profit legal information with courts and government information and forms as well as private bar lawyers' resources and advice. CLEO involved users in each draft of the materials, listening to how people understand their legal issues and adjusting to make it work for them. CLEO built a base of over 40 partners, many of whom do not usually work together, to compile the range of information and resources linked through the site. Once launched, the site can be embedded on all of the partners' sites, as well as those of community organizations, law firms and institutions who want to present their users with an easy, intuitive, guided approach to understanding their legal issues.

5 - Make it Complex

Effective access to the justice system must not only be easy to find and navigate, it must also recognize the complexity of people's problems, beyond the scope of legal remedies. Integrating a recognition of the messiness of conflict and the critical importance of health, well-being, economics and safety to people's understanding of a conflict means that we need to embed our legal options in a complex range of responses. The ability of someone to act on legal advice often depends on the priority the put on the other interrelated factors. People who expected the legal remedy to address all of their issues are often disappointed by the lack of attention to

---

[7] Steps to Justice, retrieved from: http://yourlegalrights.on.ca/steps-to-justice

their well-being, their ongoing relationships or their sense of resolution. BC's Civil Resolution Tribunal[8], currently available for strata disputes, "encourages a collaborative, problem-solving approach to dispute resolution, rather than the traditional courtroom model [and] aims to provide timely access to justice"[9]. It recognizes that legal problems are human problems and asks people questions about their level of frustration, anger and other emotions. It identifies local resources for handling the non-legal aspects of the dispute, reminding people that they might want to factor their safety, emotions, and long-term goals into the decision of which legal option to take.

6 - Listen

Any understanding of user needs based on system usage, or data framed in justice terminology will only ever give a partial view of the issues. Broadening the picture of public needs, perceptions and expectations requires listening to people. The perspective of the public, as voters and as potential users of the system is not the same as that of clients or litigants within the courts. The number of people who chose to abandon their legal claims rather than access the formal system, and their reasons for choosing not to rely on the system, will never be captured in system usage data. Models for listening to the public are being implemented across the country. In May a group of lawyers and court staff on circuit court in Kugluktuk, NU held a fair and feast to talk about civil legal needs. In communities with no or few resident lawyers and an overwhelming perception of the justice system as the criminal justice system, this approach invited people into a community setting, to share a meal and talk about civil issues in their community.[10] In Ontario, the Action Group on Access to Justice (TAG), developed the Architects of Justice program,[11] now being adopted in Saskatchewan, that invites anyone to

---

[8] Civil Resolution Tribunal, retrieved from: https://www.civilresolutionbc.ca/
[9] Civil Resolution Tribunal, About the CRT, retrieved from: https://www.civilresolutionbc.ca/disputes/
[10] Law Society of Nunavut, Access to Justice Program, retrieved from: http://lawsociety.nu.ca/access-to-justice-program/
[11] The Action Group on Access to Justice, Architects of Justice, retrieved from: https://theactiongroup.ca/clusters/architects-of-justice/

share their ideas about access to justice. Participants are approached in community or festival settings. In addition to interesting ideas and a snapshot into public expectations of the justice system, people regularly commented that they were honoured to have been asked about such an important issue. Listening to people is not only generating new ideas, but engaging more people in justice system reforms.

7 - Embrace and admit failure

In a legal framework where mistakes are identified through appeal processes, judges and governments do not comment what many perceive as mistakes. While appropriate in the context of a case, this mentality has a negative impact on innovation. Experimenting with new approaches requires taking risks, and occasionally failing. Creating room within access to justice efforts to admit, discuss and adapt to failures will support a culture of innovation. Some proponents of failure recognize that failures are an indication that people are trying ambitious approaches, and not sticking to safe, or easy options. To encourage an environment for experimentation, structured reporting of failures are used to share lessons and expand the number of people reflecting on and adapting to each attempt[12]. This is a dramatic contrast from environments where only successes are celebrated or rewarded and would change the culture to empower people to discuss risky ideas.

8 - Share progress, not perfection

Waiting for perfection before releasing data or resources often leads to the appearance of no action, or the development of siloed approaches. Talking about progress, including ideas in early stages of development, can build momentum and engage people in the efforts, as well as the results, of justice sector reform. The Action Committee on Access to Civil and Family Matters has recently adapted its Justice Development Goals from its Roadmap for Change into a version of the goals designed to build public understanding of the efforts being made across

---

[12] Fail Forward, retrieved from: https://failforward.org/

the country.[13] It includes easy to understand statements of the goal and the primary activities to advance each goal. Over time, the site will monitor progress on each goal, sharing the different approaches and creating a climate of engagement around each priority. This transparent approach to system change does not promise perfect solutions or suggest that any one institution is responsible for either successes or failures, while still maintaining an urgency on the issues and an avenue for broader participation.

9 - Build on strengths

Finding the local strengths that can be harnessed to bridge the accessibility gap might require looking beyond typical legal resources. When assessing the state of access to justice in Uganda the HiiL Institute identified a highly respected form of dispute resolution taking place within rural communities, often mediated by community leaders with limited access to education, low literacy and no resources for filling out forms or paying fees.[14] Nonetheless, this system of dispute resolution is helping local communities manage daily disputes with a high level of public confidence. The report recommends strengthening this decision-making infrastructure and empowering people to rely on their trusted leaders for early or simple resolution. Finding the access points, trusted intermediaries or functioning dispute resolution within communities and valuing the expertise of these approaches can create avenues for legal engagement by building on strengths.

10 - Share

The attention to data and evidence-based decision making creates an imperative to share the data collected throughout the justice system. Concerns about privacy and data security need to be assessed and addressed, within data sharing protocols. Use of data is being use to report on the Canadian justice system, both nationally and internationally. The World Justice Project,

---

[13] Canada's Justice Development Goals, retrieved from: http://www.justicedevelopmentgoals.ca/
[14] Hiil, Justice Needs in Uganda: Legal Problems in Daily Life, (2016, April 14) retrieved from: http://www.hiil.org/insight/justice-needs-uganda-legal-problems-daily-life

originally a project of an ABA president, has grown into an independent non-profit that issues an annual rule of law index, and last year added open-government principles to its assessment of the justice systems in each country.[15] Domestically, a Report card on the Criminal Justice system was issued by the Macdonald-Laurier Institute, issuing letter grades to each jurisdiction on a range of metrics.[16] These tools use publicly available data to produce an assessment of the quality of democratic services. If more data were available, a more comprehensive picture of system strengths and effectiveness could be compiled. In the meantime, these partial pictures will resonate with public audiences. Sharing data with each other will also increase service delivery, allowing community agencies to concentrate services or private sector solutions to meet local needs. As in other aspects of government, the sharing of data will help to identify new points of innovation.

Changing a Culture

Research into large systems undertaking change identify a number of criteria for meaningful progress.[17] One of those criteria is a sense of urgency. The urgency of the access to justice crisis combined with the commitment to meaningful change evident across the breadth of the justice system creates a climate in which the shift in mindsets can create new ways of tackling old problems. The great opportunity to learn from other models lies in adopting the new ways of thinking and working together, as much as the new uses of technology or new methods of justice system delivery. Innovating on access to justice means changing how the system works, how it evolves and how it fits as a democratic and social institution. It is both bigger and more difficult than any one pilot project, and simpler and more immediate than waiting for perfect examples of innovation.

---

[15] World Justice Project, retrieved from: http://worldjusticeproject.org/rule-of-law-index
[16] Macdonald-Laurier Institute, Report Card on the Criminal Justice System, (2016, Sept 21), retrieved from: http://www.macdonaldlaurier.ca/justice-report-card-2016/
[17] Kania J. and Kramer, M., Collective Impact, Stanford Social Innovation Review, Winter 2011, retrieved from: https://ssir.org/articles/entry/collective_impact