

The Canadian Approach to Direct Judicial Communication: Making Concurrent Proceedings Involving the Same Family Operate Effectively¹

The Honourable Donna Martinson, Q.C., LL.M²

Introduction

Judges and lawyers have played leadership roles in the creation of recent access to justice reports in Canada. The reports,³ including the National Access to Justice Committee's final report, *A Roadmap for Change*, and the Canadian Bar Association's *Reaching Equal Justice* reports, indicate that the justice system is too often unable to provide just, timely and cost effective outcomes at a time when legal problems are pervasive in people's everyday lives; access problems intensify for vulnerable people who may face multiple disadvantages. These problems can be exacerbated when proceedings relating to the same family take place in different jurisdictions at the same time, as they do in cross-border child abduction cases.

Direct judicial communication between judges in the different jurisdictions is one effective way of addressing such access to justice concerns; it can help by ensuring

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² Donna Martinson is a retired Justice of the British Columbia Supreme Court. She was the B.C. Supreme Court's representative on Canada's national Network of Contact Judges for cross border child abduction cases. Before becoming a judge she practiced criminal law, both a Crown and defence counsel, and family law, and taught both. She is now an Honorary Visitor at the University of British Columbia, Faculty of Law, and an Adjunct Professor at Simon Fraser University's School of Criminology. She chairs the Canadian Bar Association United Nations Convention on the Rights of the Child Sub-Committee, a part of the Children and the Law Committee.

³ *Access to Civil and Family Justice, A Roadmap for Change*, Final Report of the National Action Committee on Civil and Family Justice, October 2013; *Reaching Equal Justice*, the Canadian Bar Association, August 2013; *Reaching Equal Justice: An Invitation to Envision and Act*, Canadian Bar Association, December 2013; *Foundation for Change*, Report of the Public Commission on Legal Aid in British Columbia, March 2011.

that all proceedings are conducted in a just, timely, coordinated and cost effective way. Many Canadian judges have in fact been communicating directly with Judges in other jurisdictions in such cases for several years. The communications have been between Canadian judges and those in other countries as well as those in other provinces/territories.

This paper considers how and why the practice of direct judicial communication has developed in Canada. It explains the Canadian Network of Judges as well as the International Network of Judges. It discusses Canadian judicial communication guidelines as well as the practical step-by-step approach to direct judicial communication developed and approved by the Canadian Network. It refers to the developing jurisprudence. It considers ways in which judicial communication can facilitate children's legal rights to be heard in cross-border child abduction cases.

It concludes by proposing the use of such judicial communication between judges within a province or territory when there are multiple proceedings, such as criminal, family and child protection proceedings, dealing with the same family at the same time. Such communication within a jurisdiction is one of the solutions proposed by a Federal/Provincial/Territorial Working Group, in November 2013, in *Making Links in Family Violence Cases: Collaboration among the Family, Child Protection and Criminal Justice Systems*.⁴

These topics will be discussed under these headings:

- A What is Direct Judicial Communication?;
- B. Direct Judicial Communication in Cross-Border Cases;
- C. How to Communicate with a Judge in Another Jurisdiction;
- D. Direct Judicial Communication and Children's Legal Rights to be Heard; and
- E. Direct Judicial Communication Between Courts Within One Jurisdiction.

⁴ Executive summary: <http://canada.justice.gc.ca/eng/rp-pr/cj-jp/fv-vf/mlfvc-elcvf/index.html>.

A. What is Direct Judicial Communication?

Direct Judicial Communication arises in cases where there are concurrent proceedings in different jurisdictions with the same parties. It involves communication between judges, with the knowledge of the parties, often in a joint hearing - with the parties and their counsel present - for the purpose of coordinating and harmonizing the proceedings so that a resolution of all the outstanding issues can be reached in a just, timely and cost effective way. The communications do not relate to the merits of each case, and there are safeguards in place to ensure that the processes are fair and do not interfere with the judicial independence of either Court.

B. Direct Judicial Communication in Cross-Border Cases

In Canada direct judicial communication has been primarily used in cross-border litigation. Rule 86 of the Nova Scotia Supreme Court *Civil Procedure Rules* governs judicial communication in cross-border cases in that province and is found at Appendix A. It is a comprehensive rule that provides for both joint conferences and joint hearings. An educational note to the Rule says it “will be particularly useful in multi-jurisdictional class proceedings under R.68, cross-border insolvency cases, and applications under the *Hague Convention* for the return of abducted children.”⁵

The British Columbia Supreme Court has had in place since 2004 guidelines for such communication: *Guidelines Applicable to Court to Court Communication in Cross-Border Cases*.⁶ They provide that a Court may communicate with another Court in connection with matters relating to proceedings before it for the purposes of coordinating and harmonizing proceedings before it with those in the other jurisdictions: Guideline 2. They were developed in the context of bankruptcy and insolvency litigation and used regularly in those cases. They, however, apply to all cross-border cases.

In relation to cross-border child abduction cases, the Canadian Judicial Council, which approved the establishment of the Canadian Network of Contact Judges, gave the Network the mandate to consider the concept of judicial networking and collaboration in cases of child abduction and custody. That Network, chaired by Justice Robyn Diamond of the Manitoba Court of Queen’s Bench, developed and approved ***Recommended Practices for Court-to-Court Judicial Communications***, referred to as Judicial Communications Guidelines, for direct communication between courts. A copy of these Guidelines is attached at Appendix B. It also developed and approved a step-by-step guide to judicial communication, called ***How to Communicate with a Judge in Another Jurisdiction – Canadian Network of Contact Judges Recommendations***. They are found at Appendix C,

⁵ Found in the Nova Scotia Barrister’s Society Annotated Civil Rules.

⁶ See the Court’s website at www.courts.gov.bc.ca.

and are also referred to, below. The step-by-step guide explains both the Canadian Network of Contact Judges and the International Network of Judges.⁷

1. Network and Liaison Judges

For federally appointed judges, each province and territory has a Network Judge, a judge designated to be responsible for overseeing cross-border child abduction cases. The Network Judge is part of the Canadian Network of Contact Judges. The Canadian Network is chaired by Manitoba Court of Queen's Bench Justice Robyn Diamond.

For provincially appointed judges, there is a similar Network, and many provinces and territories have appointed Network Judges. The Ontario Court of Justice has appointed Network Judges in a number of regions.

Canada also has two international liaison judges who are part of the International Network of Contact Judges. They are responsible for liaising between Canada and other countries. Justice Diamond is responsible for the common law provinces and territories, and Justice Jacques Chamberland, a judge of the Quebec Court of Appeal, is responsible for Quebec.

For further useful information about these Networks, see Justice Diamond's November 2013 article, *Canadian Judicial Initiatives Respecting the Handling of Inter-Jurisdictional Cases of Child Protection and the International Hague Network of Judges*.⁸ Similar work is being done by Provincial Courts.

The Canadian approach to direct judicial communication in child abduction cases follows international guidelines developed over time by Special Commissions convened by the Hague Conference on Private International Law. For example, in January of 2009 a Joint Conference of the European Commission and The Hague Conference on Private International Law was held in Brussels on the topic of direct judicial communication on family law matters and the development of judicial networks. As a result of that joint conference, the Hague Conference published an edition of its *Judge's Newsletter* that has as its focus "Direct Judicial Communications on Family Law Matters".⁹

In a case between the state of Oregon and the province of British Columbia, **Hoole v. Hoole**, 2008 BCSC 1248, an Oregon judge contacted the British Columbia Supreme Court with a request to communicate with the judge dealing with the case. A Master of the British Columbia Supreme Court had granted a without notice

⁷ Appendix C, p. 1.

⁸ Published in the International Family Law Journal, November, 2013.

⁹ Volume XV/Autumn 2009, The Judges' Newsletter, Hague Convention on Private International Law, Special Focus, Direct Judicial Communications on Family Matters and the Development of Judicial Networks.

interim sole custody order to the father, Mr. Hoole, after Ms. Hoole took their 4 year old son for a vacation to her parent's home in Oregon, with his permission, and then did not return with the child. The parents and child had been living together in British Columbia since the child's birth. Ms. Hoole obtained an emergency order in Oregon. (The request was referred to me as the B.C. Network Judge and I dealt with the case).

The British Columbia court applied the approach taken by the Canadian Network of contact judges and its own Guidelines, and engaged in a joint hearing with the Oregon Court. The Court made these observations about the benefits of doing so, including obtaining relevant information, providing for effective case management, and encouraging amicable resolutions:

[21] ...There is a recognition that judicial communication should not be for the purpose of considering the merits of the case. Instead, it can provide judges with the relevant information needed to make necessary decisions, such as making informed decisions on jurisdiction, including the location of the place of habitual residence. It can also assist judges in obtaining information about the custody laws of the other jurisdiction, which is needed to determine whether a removal or retention was wrongful.

[22] Communication can also make case management more efficient, thereby facilitating expedited procedures to return the child to his or her habitual residence, where appropriate. It can assist in obtaining, when ordered, the prompt and safe return of the child, by the use of various mechanisms such as undertakings to be done by the parents and the making of identical orders in each jurisdiction to ensure enforcement (mirror orders).

[23] Such communication has been found to be useful in encouraging a parent to agree to voluntarily return a child and in encouraging a more amicable resolution of the parents' dispute. In this case, as a result of this Court's communication with Judge Hochman, the parties agreed upon jurisdiction and a voluntary return. They also ultimately agreed upon an interim custody arrangement and no further court hearing was necessary.

The Court found that by communicating directly judges are fulfilling their mandate to cooperate to facilitate the prompt and safe return of children:

[24] Direct judicial communication may initially seem counter-intuitive to some. The need for communicating must, however, be assessed in the context of the significant and often irreparable harm that is caused to children who are abducted. A prompt return can lessen that harm. By communicating directly between judges, courts are fulfilling their mandate under The **Hague Convention**, or its equivalent, to cooperate to facilitate the prompt and safe return of children. Cooperation between courts in this manner sends the important message to potential child abductors that courts will not tolerate

child abduction and, when appropriate, will act immediately to restore children to the country from which they were abducted.

The Court concluded that direct judicial communication does not interfere with the judicial independence of either court:

[25] Direct judicial communication does not interfere with the judicial independence of either court. The communication does not involve a judge of one country making decisions which are within the jurisdiction of the other judge. Rather, it leads to the making of fair, impartial, timely, and well-informed decisions by the judge who should be making the decision, applying the laws of that judge's jurisdiction. The communication in this case allowed Judge Hochman to make an informed decision as required based on the laws of Oregon.

On the question of the use of judicial communication to effect prompt and safe returns by using mechanisms such as undertaking, referred to at para. 22 of *Hoole*, the United Kingdom Supreme Court, in *Re E (children)*,¹⁰ discussed the question of what protective measures that can be put in place when a child is returned. After noting that the appropriate protective measures and their efficacy will vary from case to case and country to country, the Court commented on the importance of liaison judges, the judges who are part of the International judicial network:¹¹

...This is where arrangement for international co-operation between liaison judges are so helpful...

There have been other cases of direct judicial communication in child custody cases both before and after the decision in *Hoole*.¹² For example, the British Columbia Provincial Court communicated directly with the District Court of Colorado in *N.B. v. L.E.*,¹³ a child custody case in which the convenient forum was at issue. Judge B.K. Davis of the British Columbia court and Judge Laff of the Colorado District court engaged in an open court discussion on the issue. Judge Davis ultimately concluded that British Columbia was the convenient forum. In doing so, he spoke about the advantages of the process in avoiding a multiplicity of hearings and court orders in child custody cases:¹⁴

¹⁰ [2011] UKSC 27.

¹¹ [2011] UKSC 27 at para 36.

¹² See *Canadian Judicial Initiatives Respecting the Handling of Inter-Jurisdictional Cases of Child Abduction: An Update*, footnote 2.

¹³ 2009 BCPC 0395.

¹⁴ At para. 57.

I cannot leave these reasons without expressing my appreciation for the manner in which this was handled by the Honourable Judge Laff from the Denver District Court, Second Judicial district in Denver Colorado. This procedure was unknown to me until I read the decision of [the Judge] in ***Hoole v. Hoole***, [citation given]. The ability to avoid multiplicity of hearings and court orders is such an advantage to child custody proceedings. I can see little disadvantage utilising such a procedure. (emphasis mine)

In ***Campbell v. Campbell***,¹⁵ Justice Kruzick, a Judge of the Ontario Superior Court of Justice, communicated with a judge in Utah, saying:

There is a recognition that judicial communication should not be for the purpose of considering the merits of the case. Instead, it can provide judges with the relevant information needed to make necessary decisions, such as making informed decisions on questions of jurisdiction, including the location of the place of habitual residence. It can also assist judges in obtaining information about the custody laws of the other jurisdiction, which is needed to determine whether a removal or retention was wrongful.

Justice Maher, of the Saskatchewan Court of Queen's Bench communicated with an Arizona Judge. It took place on February 16, 2011, and related to a decision Justice Maher had to make relating to undertakings, after he ordered the return of the child to Arizona. He described what he did this way:¹⁶

[4] On February 16, 2011, I arranged a conference call with Judge McCoy of the Phoenix, Arizona Family Court. Judge McCoy is the presiding judge in Phoenix, Arizona on an application made by the respondent father before the Arizona Court. Judge McCoy had before him the respondent (father) and his counsel, Ken Winsberg. I had before me the petitioner (mother); her counsel, Ms. Funk and Mr. Little; and the respondent (father's) Saskatchewan counsel, Ms. T. Hackl.

[5] I received submissions from counsel on the time lines for return of the mother and child to Arizona. Judge McCoy confirmed to me that he would set this matter to come before him at 11:00 a.m. February 28, 2011 at his Phoenix Court facility.

With respect to the many other cases Canadian cases decided up until November 2013, I cannot improve upon the discussion about them by Justice Diamond in her article ***Canadian Judicial Initiatives Respecting the Handling of Inter-Jurisdictional Cases of Child Protection and the International Hague Network of Judges***, referred to above.¹⁷ She canvasses judicial communications in which

¹⁵ 2010 CarswellOnt 5908.

¹⁶ M.C.S. v. H.V.L. 2011 SKQB 79.

¹⁷ Published in the International Family Law Journal, November, 2013.

she has participated, both within Canada, and with other countries. Her article demonstrates how the Canadian Network of Contact Judges, as well as the International Hague Network of Judges, who act as liaison judges between countries in international cases, work effectively. She emphasizes the ways in which such communication generally, and joint judicial hearings in particular, can expedite proceedings and lead to timely, just results.

She refers to an important case involving judicial communication between Manitoba and Alberta, *Giesbrecht v. Giesbrecht*.¹⁸ In that case Justice Diamond and Justice Andrea Moen, the Network Judge for Alberta, conducted a joint video conference, with counsel for the parties participating. She notes that the communication led to the timely and effective resolution of the issue of jurisdiction which arose between the two provinces. All of the exchanges between the judges were in strict compliance with the judicial communication guidelines. She explains the problems that can arise when judges either make or receive “cold” calls to or from judges in other jurisdictions and the ways in which the judicial networks can help:

[27] While judicial communication can have considerable value, these guidelines were designed to avoid judges making and receiving “cold” calls to judges in other provinces/territories regarding inter-provincial/territorial custody disputes. It has been the Canadian experience that when judges make cold calls, the judges in the other provinces or territories often will not accept the calls. By channeling all requests for judicial communication through their provincial/territorial Network Judge to the Network Judge in the other jurisdiction, the Network Judges can provide assistance in facilitating the communication between the judges including providing information respecting the operation of the Network and the Judicial Communication Guidelines.

She also makes the important point that Canadian judges often have to deal with cases in which a parent asks for custody in one province or territory after bringing a child from another province or territory. The legal principles that apply require that such custody disputes should, absent significant safety concerns, be dealt with in the jurisdiction where the child is most significantly connected:

[28] This type of case is not unique. Judges in Canada are frequently faced with applications by a parent who is seeking custody of children whom he or she has recently removed from another province or territory. A court in considering a custody matter, where it is clear that the children’s habitual residence is in another province or territory, must have a complete and full picture of the children’s circumstances or of any proceedings pending in the other jurisdiction. Most family law statutes in Canada contain jurisdictional

¹⁸ 2013 MBQB 115.

provisions and judges should bear in mind the appropriate jurisdiction principles set forth in the operative legislation. It is extremely important that custody disputes respecting children should be determined in the jurisdiction where the children are most closely connected, except where there are significant safety concerns.

[29] The Judicial Communication Guidelines, (B.1), provides systemic safeguards and procedures to ensure that judges have the full picture. In addition to the due process and transparency provisions (A.1-6), these Guidelines suggest specific questions to be asked with respect to the nature of the communication:

B. Nature of the request to communicate

1. Is there a question of foreign (interprovincial or international) law or procedure to discuss with a judge in the foreign jurisdiction?
 - a) Is there a case pending before the foreign court?
 - b) If so, is there a need to speak with the judge who actually handled portions of the case, or will any judge in the foreign jurisdiction suffice?
 - c) If no case is pending, consider the difficulty in finding a judge with whom to communicate in the foreign jurisdiction. In this instance, if there is a Network judge consider contacting that judge.

Justice Diamond also refers in her article to the March 2013 World Congress, held in Sydney, Australia and attended by people from all over the world. She and I spoke about the Canadian approach to judicial communication. We were pleased that one of the conference resolutions, which apply to all countries, supported both the establishment of national and regional networks and the establishment of judicial communication guidelines. The resolution says that Canada's guidelines provide a helpful model:

[39] At the most recent World Congress held in March 2013, the Canadian Network of Contact Judges and the Network's Judicial Communication Guidelines received international recognition. The following resolutions were passed:

- where appropriate, jurisdictions should be encouraged to establish a national network of regional and decentralized judges (the Argentinean and Canadian National Networks being effective models);

- judges should be encouraged to use judicial communication in cases of international child protection;
- judges in each jurisdiction should establish judicial communication guidelines. Such guidelines should be, as far as legally possible, internationally consistent. The Canadian guidelines for judge-to-judge judicial communication provide a helpful model for such judicial communication guidelines.

Since her November 2013 article was published, Justice Diamond decided the case of **Cohen v. Cohen**.¹⁹ The Manitoba Central Authority was asking for the return of children in Manitoba to Florida. Justice Diamond communicated by way of a joint conference with the Florida judge dealing with the case.

In early 2014 a judge of the Ontario Superior Court of Justice, Justice Price, dealt with a case from Poland. He reviewed information on the concept of judicial communication, the Canadian Network of Contact Judges, its Recommended Practices for Court-to-Court Judicial Communications, and its step by step guideline document, *How to Communicate with a Judge in Another Jurisdiction – Canadian Network of Contact Judges Recommendations*. He concluded that:²⁰

The present case would benefit from court to court communication. I will therefore be referring this matter to the International Network of Contact Judges. The issues to be discussed will include the two competing divorce petitions and a request to the courts in Poland

One Ontario Superior Court judge, Justice Perkins, decided not to engage in judicial communication in a case involving Peru. He concluded that while he wished he could share the optimism he saw in **Hoole** on the issue of communicating in a satisfactory way when there are different languages and different legal concepts, his judicial experience told him “that language and terminology issues can pose significant problems and the translation and interpretation resources to deal with them are often lacking.”²¹ He added that, “Nevertheless I would certainly consider such direct communication in an appropriate case, even if the other jurisdiction involved used a different language from our official languages and had a different legal system...”²²

His ultimate decision not to return the child to Peru was upheld by the Ontario Court of Appeal. That Court made a brief comment about judicial communication in its judgment. The Court appears to support the concept of communication between

¹⁹ 2013 MBQB 292.

²⁰ **Nowacki v. Nowacki**, 2014 ONSC 2052 at para. 110.

²¹ **Landman v. Daviau**, 2012 ONSC 547 at paras. 121 and 122.

²² At para 122.

judges in different jurisdictions while suggesting that there is no absolute requirement that it must be done in every case.²³

I also find no error in principle in the trial judge's approach to assessing evidence: there is no absolute requirement of interstate dialogue under the Convention...

The Canadian approach to direct judicial communication in child custody cases has received international support. The Chief Justice of the Australian Family Court, Diana Bryant, said of the British Columbia judgment in **Hoole**.²⁴

... [the] Judgment in *Hoole v. Hoole* [2008] BCSC 1248 is considered particularly noteworthy for its forceful and cogent articulation of the advantages of direct judicial communication. As [the Court] stated, "By communicating directly between judges, courts are fulfilling their mandate under the Hague Convention, or its equivalent, to co-operate to facilitate the prompt and safe return of children. [Judicial communication] leads to the making of fair, impartial, timely, and well-informed decisions by the judge who should be making the decision, applying the laws of that judge's jurisdiction."

One Canadian appellate court raised the question of using direct judicial communication in a commercial case. The Alberta Court of Appeal, in a cross-border case involving the enforcement of an Arizona judgment, referred to **Hoole** and the BC Guidelines:²⁵

...We also raise for consideration whether the issue here would qualify as one that might be resolved through direct judicial communication between the affected courts along the lines of the judicial cooperation now being demonstrated between courts in cases involving child custody, and bankruptcy and insolvency: see **Hoole v. Hoole**, 2008 BCSC 1248. See also **Guidelines Applicable to Court to Court Communications in Cross-Border Cases (Guidelines)**, developed by the American Law Institute. These *Guidelines* were adopted by the British Columbia Supreme Court in 2004 and are posted on its website at www.courts.gov.bc.ca.

C. How To Communicate with a Judge in another Jurisdiction

In April 2011, the Canadian Network of Contact Judges issued a document entitled "How to Communicate with a Judge in Another Jurisdiction" explaining the system of

²³ **Husid v. Daviau**, 2012 ONCA 655 at para. 32.

²⁴ The Honourable Diana Bryant, Chief Justice of Australia, *Direct Judicial Communications in 2010, What Can we Expect? The Judge's Newsletter*, Volume XV/Autumn 2009, footnote 3, p. 172 at 173.

²⁵ **Magellan v. Miller**, 2009 ABCA 124 at 129.

Canadian Network Judges and Liaison Judges who oversee cross-border child abduction cases. This document is found at Appendix C. It sets out and recommends a step-by-step procedure to be followed, involving the Network and Liaison Judges, to facilitate a judicial communication between: a Canadian judge and a judge in the United States, (using Arizona as an example); a judge in another country that is a *Hague Convention* signatory, (using Australia as an example); and a judge in one Canadian Province or Territory and a judge in another Canadian Province or Territory (using Manitoba and British Columbia as exampl

D. Direct Judicial Communication and Children’s Legal Rights to be Heard

Children in cross border child abduction cases have broad participatory rights which can be facilitated by judicial communication in appropriate cases. I, along with my co-author Melissa Gregg, have summarized those participatory rights this way:²⁶

...most of the discussion relating to the rights of children to be heard in these [cross-border child abduction] cases have focused on Article 13 of the Hague Convention, which gives a judge the discretion to refuse to order a return if the court finds that “the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views”. Yet, children, including those involved in Hague proceedings, have much broader participatory rights. The United Nations Convention on the Rights of the Child, in Article 12, gives all children “who are capable of forming their own views the right to express those views in all matters affecting the child” and in particular in judicial proceedings. In addition, the child has the right to have the views given “due weight in accordance with the age and maturity of the child.”

The ultimate decision in a return application, as well as decisions on the issues that must be decided in reaching the ultimate decision, unquestionably affect the child. These include decisions such as: where the child habitually resides; whether the child is, after a year, settled in the child’s new environment; and whether there is a grave risk that a return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation. These are distinct issues from the one of whether the child objects to the return. The views of the child on such issues may or may not support a return order.

It is also noteworthy that there are many cases of child abduction to which *The Hague Convention* does not apply. It does not apply if a child is over the age of 16. It does not apply when a child is taken to a non-signatory country, and it does not apply when a child has been taken to another province or territory within Canada.

Children’s participatory rights extend to all stages of the judicial process, including dispute resolution discussions and mediations relating to the court proceedings. Judicial communication, particularly communications relating to case management, can help ensure that a child can participate in an effective and efficient way, with appropriate legal advice. It can also assist in preventing the child from having to repeatedly express his or her views to various judges, at different times, in different jurisdictions.

²⁶ The Hon. Donna Martinson and Melissa Gregg, ***Cross-Border Child Abduction Cases – Social Context Issues***, prepared for *Cross Border Child Custody Disputes – Judicial Networking and Direct Judicial Communication*, Judicial Officers Pre-Institute, Association of Family and Conciliation Courts, May 28, 2014, Toronto, Ontario. See also the Hon. Donna Martinson, ***Children’s Legal Rights to be Heard in Cross Border Child Abduction Cases***, prepared for the same conference.

E. Direct Judicial Communication between Courts Within One Jurisdiction

In *Hoole*, I concluded, on behalf of the British Columbia Supreme Court, that the principles relating to direct judicial communication apply between different courts within a province when the courts have concurrent jurisdiction:

[26]... [The principles] also apply to situations like that found in British Columbia, where different courts within a province have concurrent jurisdiction; the Provincial Court of British Columbia and the Supreme Court of British Columbia each have jurisdiction in custody cases.

I have suggested elsewhere that there should be regular use of direct judicial communication in cases where there are allegations of domestic violence leading to concurrent criminal, family, and sometimes child protection proceedings within one jurisdiction. Doing so, in my respectful view, results in more effective, timely proceedings, with better results for families, and particularly for children. A “dangerous disconnect” can be created when these proceedings operate in silos, with little communication between them. See: ***Judicial Coordination of Concurrent Proceedings in Domestic Violence Cases.***²⁷ See also: ***One Assault Allegation, Two Courts: Can we do a Better Job of Coordinating the Family and Criminal Proceedings?***²⁸

An example of direct communication between the Supreme Court of British Columbia and the Provincial Court of British Columbia took place in Kelowna in 2009. The Supreme Court was faced with an interim motion for custody by the mother, an order for no contact, and an order allowing her to leave the province. The father was accused of sexually interfering with a young child and faced a criminal trial in the Provincial Court. The issue was delay in the criminal proceeding. The family was in chaos; this child and another were experiencing significant difficulties. Counsel advised the Court that because of the backlog in dealing with criminal cases in the Provincial Court, the trial could not be heard for many months, notwithstanding the important issues at stake.

The fact that the criminal proceedings were ongoing created significant problems in the family law proceeding. It was important that both proceedings concluded in a timely way. The Supreme Court judge, with the agreement of counsel, contacted the local Administrative Judge of the Provincial Court to see if an early trial date could be obtained. The Administrative Judge immediately scheduled a Judicial Case Conference in her Court to do just that. A timely trial date was obtained.

²⁷ http://fredacentre.com/wp-content/uploads/2012/11/MartinsonPaper_5e.pdf

²⁸ Prepared for the National Judicial Institute Conference, *Managing the Domestic Violence Family Case*, Quebec City, November 16 – 19, 2010.

Significant work is being done to assist parents, lawyers, judges and others to ensure that decisions made among systems lead to harmonized results that provide justice for children. The Canadian Network of Contact Judges, at its February 2013 annual meeting, discussed the feasibility of using its judicial network framework to facilitate direct judicial communication within a jurisdiction. As noted in the introduction, a Federal/Provincial/Territorial Working Group recently completed a long term project that examined the intersection of different justice system responses to family violence. The comprehensive and very helpful report, *Making Links in Family Violence Cases: Collaboration among the Family, Child Protection and Criminal Justice Systems*, which was released in February 2014, identifies the many challenges that arise when proceedings operate independently. The report covers a number of topics: risk assessment, the existence of multiple - potentially conflicting – orders from different justice sectors, the identification and coordination of related proceedings, evidentiary and privacy issues, as well as issues related to out-of- court dispute resolution and services for families where there has been family violence.²⁹

I was pleased to be asked to make a submission to the Working Group and that the report refers to my 2010 paper on judicial communication, mentioned above. The report supports judicial communication, stating that promising practices include:³⁰

Judicial communications where there are concurrent proceedings relating to the same family. This communication between judges relates strictly to process and not the merits of each case with a view to streamlining and co-ordinating the process to enhance access to justice for families.

The report makes the point that direct judicial communications are increasingly being used in international cases, referring to models I have mentioned in this paper. It suggests that the “objective would be to provide for greater coordination and thus better outcomes for families.”³¹ It refers to my suggestion that one option would be for the two courts to hold a joint management/resolution conference in order to help manage both processes effectively. It points out that this same approach was suggested by Justice Glenn in *Children’s Aid Society of Huron County v. RG*.³² The report says that:³³

This could provide a more consistent approach to safety and risk assessment as well as coordination of the processes. It may also provide an opportunity for all those involved – judges, parties, and lawyers to discuss solutions that could work within the context of both the criminal and family systems. Such discussions would need to safeguard procedural justice guarantees. For example, in the criminal context the accuse must be present whenever their case is discussed

²⁹ Executive summary: <http://canada.justice.gc.ca/eng/rp-pr/cj-jp/fv-vf/mlfvc-elcvf/index.html>.

³⁰ Executive summary, at pa. 8.

³¹ Report at p. 100.

³² Report at p. 100; (2003) 124 AcwS 3d 712.

³³ At p. 101.

When courts become aware of a simultaneous proceeding in another court, such judicial communications may offer a means to achieving better coordination in some cases.

Conclusion

In family law cases generally, the objective of any court proceeding will be to ensure that the case is dealt with in a just, timely, and cost effective way. Governments, lawyers, judges, mental health professionals and others have for many years been looking at ways to make individual proceedings within a jurisdiction work better. Much less attention has been paid to harmonizing and coordinating cases for families when there is more than one proceeding relating to that family, whether they are taking place in different jurisdictions or within one jurisdiction. Renewed discussions about meaningful access to justice across Canada provide the legal profession with the opportunity to take bold and creative steps to assist these families, using judicial communication as one of the methods of doing so.

Appendix A
Nova Scotia Civil Procedure Rule 86

Rule 86 - Judicial Communication Across Borders

• **86.01 - Scope of Rule 86**

This Rule allows both of the following:

- (a) communications between the Supreme Court of Nova Scotia and a court in another jurisdiction to assist either or both courts with the just determination of a claim or enforcement of a remedy;
- (b) coordination and harmonization of a proceeding with a proceeding before a court in another jurisdiction, if the other court agrees and the two proceedings are, despite formal differences, related by common issues or parties.

• **86.02 - Motion for joint communications or hearings**

- (1) A party may make a motion that a judge request a court in another jurisdiction to engage in communications, hold a joint conference in related proceedings, or hold a joint hearing in related proceedings.
- (2) A judge may convene a conference with the parties, under Rule 26 Conference, to consider requesting or responding to a request for communications, holding a joint conference in related proceedings, or holding a joint hearing with a court in another jurisdiction in related proceedings.

• **86.03 - Organizing communications, or joint conferences or hearings**

- (1) A judge may authorize the prothonotary, or a member of the judge's staff, to do any of the following:
 - (a) respond to a request from an authorized representative of a court in another jurisdiction for communications with the Supreme Court of Nova Scotia;
 - (b) make a request to a representative of a court in another jurisdiction for communications;
 - (c) provide copies of court documents to the other court;
 - (d) organize a conference of a judge of the court with a judge, or other judicial official, of the other court;
 - (e) give notice of a joint conference to parties in either jurisdiction, in the manner required of a party under Rule 31 - Notice, or as directed by the judge;
 - (f) organize, and give notice of, a joint hearing in related proceedings;

- (g) do anything else to assist with communication or coordination by the courts;
- (2) A judge may direct a party, or an officer of the court such as a receiver or a referee, to do any of the following:
 - (a) cooperate with the prothonotary, or a member of the judge's staff, to organize communications between the courts;
 - (b) provide technical services for a joint conference, or a joint hearing;
 - (c) provide copies of court documents to the other court;
 - (d) file documents with the other court;
 - (e) assist a party before the other court, or the court itself, in obtaining evidence;
 - (f) give notice, make disclosure, or provide copies of court documents to a person who is a party before the other court;
 - (g) do anything else to assist with communication or coordination by the courts.
- (3) A judge may communicate directly with a judge, other judicial official, or a representative of the other court to organize communications between the courts.
- (4) A judge who makes a direct communication under Rule 86.03(3) must either include the parties in the communication or report to the parties afterward.

- **86.04 - Joint conference**

- (1) A judge may appoint a time and date for the judge to be available for a conference held jointly with a judge or other judicial official of another court.
- (2) A conference that is organized to assist the just determination of a claim or the enforcement of a remedy in a proceeding before the Supreme Court of Nova Scotia or to coordinate or harmonize related proceedings must include the parties to the Nova Scotia proceeding, except a party who chooses not to participate, who has become disentitled to notice, or who a judge determines must be excluded.
- (3) The joint conference may be held by teleconference.
- (4) The provisions of Rule 26 - Conference about what a judge may do at a conference, and recording the conference, apply to a joint conference.

- **86.05 - Joint hearing**

- (1) A judge may appoint a time, date, and place for the judge and the parties to a Nova Scotia proceeding to be available for a hearing conducted jointly with a judge or other judicial official of another court and the parties to a proceeding in the other jurisdiction.

- (2) A joint hearing may be held by teleconference, with the judge in Nova Scotia sitting in a courtroom and with a court reporter recording and logging the hearing.
- (3) A joint hearing may be held by joint sitting, but if the joint sitting is in the other jurisdiction the hearing must be accessible by the public in Nova Scotia.
- (4) A joint hearing conducted with a judge of the Supreme Court of Nova Scotia sitting in another jurisdiction is taken to be accessible by the public in Nova Scotia, if all of the following apply:
 - (a) the hearing is transmitted to a courtroom in Nova Scotia, as with a teleconference;
 - (b) the courtroom is open to the public;
 - (c) the joint hearing is recorded and logged in the same way as any hearing in a courtroom.

• **86.06 - Conduct of joint hearing by teleconference**

- (1) A judge may set the terms for the conduct of a joint hearing by teleconference in consultation with the judge or other judicial official in the other jurisdiction.
- (2) The consultation may be by conference.
- (3) The terms may be set by approving an order of the other court stating the terms, or making an order that sets the terms subject to the approval of the other court.
- (4) The terms must cover each of the following subjects:
 - (a) simultaneous transmission of the proceedings to each court;
 - (b) transmission of such quality that a witness is as good as present in the other courtroom, if credibility is in issue;
 - (c) simultaneous introduction of duplicate exhibits or a system for transmitting images of exhibits in one courtroom to the other;
 - (d) simultaneous delivery or filing of court documents, such as a brief or an affidavit;
 - (e) who is to pay for transmission services that are not provided by the court;
 - (f) joint rulings on issues of evidence or procedure, and exclusion from consideration by the judge of the Supreme Court of Nova Scotia of evidence ruled to be inadmissible in Nova Scotia but ruled to be admissible by the judge in the other jurisdiction;
 - (g) whether submissions by a person who is a party in one jurisdiction, and not the other, are to be made during the joint hearing or separate from it;

- (h) communications between the judges, or the judge and a judicial official, to coordinate the joint hearing, to resolve procedural or administrative issues, or to provide coordinated orders;
- (i) any circumstances in which the judges, or the judge and the judicial official, may communicate without notice to, or participation by, the parties.

- **86.07 - Translation and interpretation**

A judge who makes an order under this Rule 86 for communications, a conference, or a hearing that involves uses of a language not understood by the judge, counsel, or a party may make an order on terms similar to those permitted by Rule 48 - Translation, Interpretation, and Assistance.

- **86.08 - Foreign law**

- (1) A judge who participates in a joint hearing may accept the guidance of the other judge, or the judicial official, about the laws of and practices in the other jurisdiction, unless a party successfully objects.
- (2) The provisions of Rule 54 - Supplementary Rules of Evidence about proof of the law of another province or a territory, and proof of the law of a foreign state, apply on a joint hearing.

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- **86.09 - Temporary standing**

- (1) A judge may permit a person who is not a party to a Nova Scotia proceeding but who is a party to a proceeding in another jurisdiction, or an officer of the other court such as a receiver or referee, to be heard by the judge on a specified issue.
- (2) A person does not submit to the jurisdiction of the court only by appearing, with permission, to be heard on a specified issue.

- **86.10 - Lifting stay of proceeding**

A judge may except from a stay of proceedings a related proceeding in another jurisdiction that is the subject of mutual communication, a joint conference, or a joint hearing.

- **86.11 - Variation and withdrawal**

A judge may vary a direction, withdraw a direction, or withdraw an approval after giving reasonable notice to the court in the other jurisdiction.

Appendix B
RECOMMENDED PRACTICES FOR
COURT-TO-COURT JUDICIAL COMMUNICATIONS

Background

The Canadian Judicial Council, which has approved the establishment of the Canadian Network of Contact Judges, has given the Network the mandate to explore the concept of judicial networking and collaboration in cases of child abduction and custody. The following checklist sets out the Network's recommendations for such practices.

INITIATING CONTACT WITH FOREIGN COURTS

A. *Due process and transparency*

1. Every judge engaging in direct judicial communication must respect the law in his or her jurisdiction.
2. Notification of the Parties about communication
 - a) The parties and/or counsel involved should be notified in advance if possible of the nature of the proposed communication provided that such notice does not unduly delay the process.
3. Record of the communication
 - a) Judges involved in a particular communication should keep a record of what was discussed preferably using a recording device or court reporter.
 - b) The record should be available to the parties and the judge in the other jurisdiction if requested.
 - c) Any correspondence, emails or other written communication between judges should be preserved for the record.
4. Participation of the parties
 - a) If both judges involved in the communication agree, the parties or their representative may be permitted to be present during the communication.

- b) If both judges involved in the communication agree to permit one party or representative to be present, then the other party or representative should be permitted to be present.
- c) Unless it would unduly delay the process, parties or their representative would be encouraged to be present for example via conference call facility.
- d) If both judges involved in the communication agree, the parties or their representative may be permitted to speak during the communication.
- e) If the judges involved in the communication agree to permit one party or representative to speak, then the other party or representative should be permitted a chance to answer.
- f) Consideration may be given to allow counsel to submit a question or provide information relating to the proposed communication.

5. Language

- a) Because of the necessity for clarity and precision, where there are language differences, and where interpretation is needed, professional interpreters are preferred.

6. Consensus or Arrangement

- a) Confirmation of any consensus or arrangements reached as between judges should be confirmed in writing and made available to the parties.

B. *Nature of the request to communicate*

1. Is there a question of foreign (interprovincial or international) law or procedure to discuss with a judge in the foreign jurisdiction?
 - a) Is there a case pending before the foreign court?
 - b) If so, is there a need to speak with the judge who actually handled portions of the case, or will any judge in the foreign jurisdiction suffice?
 - c) If no case is pending, consider the difficulty in finding a judge with whom to communicate in the foreign jurisdiction. In this instance, if there is a Network judge consider contacting that judge.
2. **Avoid** discussions with the foreign judge about the merits of the case.

3. Can the question be answered or dealt with by the Central Authority in your jurisdiction or the Central Authority in the foreign jurisdiction? If it can, consider having the Central Authority address the issue or obtain the information.
4. Specific examples of questions of foreign law or procedure that may arise include:
 - a) scheduling of the case in the foreign jurisdiction:
 - i) making of interim orders, e.g. support, protection orders;
 - ii) availability of expedited hearings;
 - b) availability of protective orders for the child or other parent;
 - c) can the foreign court accept and enforce undertakings offered by the parties in your jurisdiction;
 - d) is the foreign court willing to entertain a mirror order (same order in both jurisdictions) if the parties are in agreement;
 - e) are criminal charges pending in the foreign jurisdiction against an abducting parent;
 - f) can the abducting parent return to the foreign jurisdiction if an order is made returning the child;
 - g) what services are available to the family or the child upon the return of the child;
 - h) logistics of returning the child.

C. *Setting up the communication and initiating the contact*

1. Where appropriate, invite the parties or their representative to make submissions as to whether there should be court-to-court communications and the nature of the communications;
2. If the initiating judge decides such communication should be made in interprovincial or territorial matters they may do so by:
 - a) contacting the judge directly; or

- b) contacting the Network judge in their jurisdiction who will assist in facilitating communication between the initiating judge and the appropriate judge in the other jurisdiction.
3. If it is an international matter, the initiating judge should consider contacting either their local Network judge or one of the two Canadian International Liaison judges who will assist in facilitating communication between the initiating judge and the appropriate judge in the other country.
 4. The initial communication should be in writing (fax or e-mail) and should identify:
 - a) the initiating judge;
 - b) the nature of the case (with due regard to confidentiality concerns);
 - c) the issue on which communication is sought;
 - d) whether further documents should be exchanged;
 - e) when the communication should occur (with due regard to time differences);
 - f) any specific questions which the initiating judge would like answered;
 - g) any other pertinent matters.
 5. Unless the initiating judge decides otherwise, all written communications should be copied to the parties or their representative.
 6. If the other jurisdiction is not English/French speaking, the initiating judge should make their best efforts to have the initial communication appropriately translated.

Appendix C

How to Communicate with a Judge in Another Jurisdiction – Canadian Network of Contact Judges Recommendations – April 2011

How to communicate with a Judge in Another Jurisdiction

This document explains the system of Canadian Network Judges and Liaison Judges who oversee cross-border child abduction cases. It then recommends a step by step procedure to be followed, involving the Network and Liaison Judges, to facilitate a judicial communication between: a Canadian Judge and a Judge in the United States, (using Arizona as an example); a Judge in another country that is a Hague signatory, (using Australia as an example); and a Judge in one Canadian Province or Territory and a Judge in another Canadian Province or Territory (using Manitoba and British Columbia as examples).

2. Network and Liaison Judges

For federally appointed judges, each province and territory has a Network Judge, a judge designated to be responsible for overseeing cross-border child abduction cases. The Network Judge is part of the Canadian Network of Contact Judges. The Canadian Network is chaired by Manitoba Court of Queen's Bench Justice Robyn Diamond.

For provincially appointed judges, there is a similar Network, and many provinces and territories have appointed Network Judges. The Ontario Court of Justice has appointed Network Judges in a number of regions.

Canada also has two international liaison judges who are part of the International Network of Contact Judges. They are responsible for liaising between Canada and other countries. Justice Diamond is responsible for the common law provinces and territories, and Justice Jacques Chamberland, a judge of the Quebec Court of Appeal, is responsible for Quebec.

2. Method of Communication

Initial requests for communications should be made by email.

The request should provide:

- the name of the presiding Canadian Judge;
- the Canadian Court, and its location;
- the email address of the presiding Canadian Judge;
- the name of the parties;
- the action number;
- the nature of the case;
- any information the presiding Canadian Judge has about the proceedings in the other jurisdiction; and
- the purpose of the request for judicial communication.

3. Outgoing Calls – A Canadian Judge Contacting a Judge in Another Jurisdiction

a. Canadian Judge to an Arizona Judge

- i. The Judge should send the email request to the Court's Network Judge.
- ii. The Network Judge will forward the request to the International Liaison Judge, (Justice Robyn Diamond for common law provinces and territories and Justice Jacques Chamberland for Quebec)
- iii. The International Liaison Judge will contact the American Network Judges, and one of them will communicate with Arizona and locate the Court and Judge.
- iv. If there is no file yet, the American Network Judge will determine who, in Arizona, should respond to the call.
- v. The Arizona Judge will then contact the Canadian Judge.

b. Canadian Judge to an Australian Judge

- i. The Judge should send the email request to the Court's Network Judge.

- ii. The Network Judge will forward the request to the International Liaison Judge, (Justice Robyn Diamond for common law provinces and territories and Justice Jacques Chamberland for Quebec.)
- iii. Justice Diamond will contact the Australian International Liaison Judge, Chief Justice Diana Bryant, who will locate the Court and Judge.
- iv. If there is no file yet, Chief Justice Bryant will determine who, in Australia, should respond to the call.
- v. The Australian Judge will then contact the Canadian Judge.

c. Manitoba Judge to a British Columbia Judge

- a) The Manitoba Judge should email the Court's Network Judge.
- b) If the Court in British Columbia is known, the Manitoba Network Judge will forward the email request to that Court's Network Judge, who will forward it to the British Columbia judge hearing the case.
- c) If the Court in British Columbia is not known, the Manitoba Network Judge will contact his/her equivalent in British Columbia, who will determine which Court is the correct court and who is dealing with the case, and direct the email accordingly.
- d) If there is no file yet, the Network Judge in British Columbia, will determine who should respond to the call.
- e) The British Columbia Judge will then contact the Manitoba Judge.

4. Incoming Calls – A Judge in another Jurisdiction Wanting to Communicate with a Manitoba Judge

All incoming requests, whether from another province or territory, or another country, should come to a judge of a court in a Canadian province or territory through that Court's Network Judge. Once the judge receives such a request, he or she can contact the judge in the other jurisdiction directly.