

Session 6.2

Social Context Workshop

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1 I sit in a trial court in Calgary, Alberta. My role is to try to outline what social context education is, why it is distinctive and why it is important and how it is that we have, through the National Judicial Institute, come to do it in a certain way in Canada. I will start by saying that we are proud of our equality jurisprudence and the kinds of education initiatives we have around it. It is interesting to understand a little bit of the development. I have been to Australia before, talking about equality and social context, and talking about gender equality. When I came the first time it was quite contentious to have a discussion about sex and equality in Australia. At that time everyone was quite nervous. What was I going to say? I told them what I think is probably one of my best lines, which was that I had hoped to come here as a prophet in a foreign land and arrived to find I am just another Sheilah. With that in mind, I embark on my task.

2 Social context education is a created word. It is the label that has been put on a whole bunch of equality initiatives that have as their goal a deeper understanding of the varied life circumstances of the public that we serve in the judicial enterprise. The National Judicial Institute has come up with certain objectives for social context programming and I am going to read them to you because they do give you the scope of what is intended:

*To understand the nature of diversity, the impacts of disadvantage and the particular social, cultural and linguistic issues that shape the persons who appear before us, to explore judges' known assumptions, biases and views of the world with a view to reflecting on how these may interact with the judicial process, to examine relevant research and community experience in order to enhance the process of judicial reasoning, and to provide jurisprudential and analytical tools to allow judges to examine the underlying basis of legal rules and concepts, to ensure that they correspond with the social realities and conform to the constitutional guarantees of equality.*

3 Why is social context education needed? And why is it needed now? The cases that we see as judges do not respond to purely legal analysis or the basket of skills that we acquired in law school. The cases we see as judges involve problems people cannot solve themselves, so there is some point of principle or conflict or even catastrophe that brings individuals before our courts, seeking impartial justice before an independent tribunal, to have our discretion, bound by law, and to have legal standards applied. It is trite to say that individual cases involve individuals, who are each separate, distinct, who have their own human dignity and certainly have their own combination and constellation of life circumstances.

4 Cases are but a snapshot – and I am going to build on that metaphor – of something that has occurred. In photographic terms, the skills that we have as lawyers and the legal skills imparted to us as judges impose frames of reference that tend to narrow what it is we see. We put a box around events. We ask, what happens within the four

corners of a contract? Our issues are usually narrowly defined. We do not decide more than what is necessary. We are guided by precedents and we have narratives, and storytelling heard in a courtroom is constrained by rules of evidence, by what we say is both relevant and material.

- 5 Our time is limited and so even excepting that it is a snapshot, or some point frozen in time, we also tend to drill down, to distill things to the issue that needs to be resolved, a focal point, as it were. 'Social context' is in a sense shorthand for the limits of this legal method. It is at one level a wide-angle lens, encouraging a larger understanding of social situations, why people got into particular places at particular times, and why they are before us now. It opens up for us what it is we need to see and to understand, to help complete the image, so that we can deliver a fuller justice. It is about getting the facts. It is about the full picture. It is about background and foreground. It is about challenging ourselves to look for and appreciate depth but more importantly to understand the commands of perspective.
- 6 We talk about impartial justice. We do not want to be partial in any sense of the term, whether that is engaging in some apprehension or appearance of bias or partial in the sense that we understand only part of what is desired and what is sought through social context education, a heightened judicial awareness of varied life experiences, and how people occupy different social, political and economic spaces, so we may have a more seriously socially grounded and inclusive justice.
- 7 I was in China five years ago. A delegation of Canadian judges went to China. At that time I was a legal academic so I was looking in from the outside. There were 300 women judges in Beijing. They had a curious problem, a pressing problem, and they told us this story. If we looked at the headline, the headline could read 'wife kills sleeping husband'. There was no doubt. The wife was caught. She was blood-stained. She was running away from the crime-scene. The issue before the courts was whether or not the death penalty should be meted out to her.
- 8 As they started to describe more of the background, what emerged was that this was an event that took place in rural China. A fifteen-year-old girl had been kidnapped by an older man from a neighbouring village. He brought her back to his village. Young girls were at a premium and he married her and she became his wife. As he was impotent he decided that his brother should have sexual intercourse with this young girl, so that the family could continue. She was being sexually assaulted, in our terms, by the brother. She tried to run away but she did not have any money and she did not have anywhere to go. When she met up with other villagers she spoke a different dialect. They knew she was a stranger. They knew where she came from and where, in their view, she ought to be returned and so they brought her back to her husband, at which point she killed her husband and tried to escape again.
- 9 Those are the same story, but they are very different narratives. They are very different perspectives. They are both in some respects equally true. What social context education tries to do is to draw out those facts, to gain a widened sense of relevance. Every story faces the difficulty of where it begins, and what questions need to be asked and answered so that a just solution can occur. I tell that story only to give some context, I guess. It is sometimes easy when you go to a different place to see a story like that and to understand the levels of analysis that would be required to understand the social situation of an abducted young person who has nowhere to go,

what might be going through her mind, as opposed to what the headline version might be. But we need to take those kinds of examples and then turn them to the places where we live, to try to tease out the same kind of limits to the snapshot that we might see, or the headlines, or the narrow version we might have.

- 10 Social context is in part deals with the limits to legal analysis but it is also distinctive, a little bit different and perhaps even challenging to some, because it calls into question the craft of judging and the judicial role. For those who think that judging is purely abstract, the finding of the one correct answer to a particular problem in law, it is difficult to explain why social context education might be necessary. But if that philosophy of law even survived legal realism in the 1920's it is no longer current today, in most areas of the world.
- 11 We know that judges are the composite people that their life experiences have made them. When we are alone, thinking and writing, we more than anyone else know that we can use law and precedent and analysis, we can be rigorous with facts, we can find evidence according to the best principle, but it is 11:30 at night and you have got to reach a conclusion, and between your analysis and your conclusion is you. It is all of you, and it is everything that you know, it is everything that you understand, it is everything that you learn. We render judgments. We give opinions. They are not personal opinions but they are not impersonal either. They are grounded. So, if we understand that judges take to their task, a difficult task, a task asking for wisdom, everything that they are then it makes sense that we try to make sure that judges understand the human experience from the broadest context possible, and not allow personal insight or personal experience to govern.
- 12 We also, in addition to understanding changed judicial roles, have a much deeper understanding of what discrimination looks like and what equality requires. Whether, as I say, you have constitutionally entrenched rights in your jurisdiction or not all societies profess to have some notion of equality, as an element of their legal system. What it means is often contested and so we have this quest. We have an imperfect and ever-changing understanding. Plato's *The Republic* had a concept of equality that only allowed certain people as citizens. What we have seen in human history, through the various tragedies and absolute denial of universal human rights, that there is an impetus toward the increasing recognition of human dignity, belonging, and the acceptance into community.
- 13 If we see inequalities in society we have to ask how the law deals with them. In Canada, in 1982, we were very fortunate in that we had a new charter of rights and freedoms introduced. There was a huge impetus to ask questions around rights and around the role of the judiciary in guarding those rights. It is very well-accepted that the court systems and the judges are the guardians of rights but in Canada we were asking questions about the judiciary might be in a position to bring forward all of the political energy and aspiration from our founding fathers, to have expansive remedial equality rights, to have well grounded legal rights, to have language rights established, to recognise the rights of aboriginal people. How will that translate into changed social reality? Questions were being asked about who judges were, and what values were to be respected. We had a natural place to have that conversation in Canada but many other places, obviously, have the same ability to have the conversation because you have the same pressing examples of discrimination and the same political will to move towards greater equality.

- 14 But we have had, I think, in Canada not just this question of who is the judiciary and what kind of education do they need. History is replete with examples of a wonderfully worded, expansive phraseology of rights and a retrograde interpretation that does not deliver real-life change to disadvantaged individuals and so the question becomes, how, then, do we have a judiciary that is more attuned when they are defining equality rights and when they are applying them? What we see in the Canadian equality jurisprudence is something that I think quite remarkable. We have a lot of decisions that deal with what our equality rights mean. They are very progressive decisions, spanning 1985 to the present day. They have gone through variations and there have been doctrinal disagreements and there has been working out of interpretations but very recently our Supreme Court reconfirmed that what Canadian law guarantees is substantive equality, that is, law that meets the needs of individuals.
- 15 It is not just an identical-treatment of similarly situated people model. It is, understanding what the impact of even a facially neutral provision might be on people who have different social contexts in their lives. Through the debates and conversations we have had, around equality, at the jurisprudential level some interesting things have happened. We have the principle that you do not need to intend to discriminate before inequality can result. One must look behind principles and practices to understand whether or not there is systemic or historic discrimination. There is a stripping-away, an un-coating of things, to see if there is inequality. These kinds of ideas, with the promise that what we are trying to do is equalise opportunity so that individuals feel that they have the human dignity and an equal right to belong, the right to equal respect and concern and consideration, have done more than shape our equality law because what equality law does in jurisprudence is not just establish rights; it establishes a mode of thinking about legal problems that is far more expansive.
- 16 What have we seen? Surprisingly, that equality rights, like all charter rights, are not insular and discrete. They have effects and implications. They had an immediate effect on Canadian law and Canadian thinking about what law can do. What do I mean by that? I mean that even if we go outside of the constitutional realm, where we consider the content of a charter right, we see those charter rights being balanced off against charter rights. In a sexual assault trial in which questions are asked about medical records or prior sexual history the sexual assault complainant's rights to sex equality and privacy are balanced because there is no hierarchy that would give to an accused person greater rights to full answer and fair defence,. They are balanced. They are seen as comparable interests that need weighing.
- 17 Similarly, the common law is to be interpreted according to charter values, including equality. Statutes are now interpreted with constitutional conformity such that there is an attempt to read law in a way that respects equality rights. The common law is developing that way. If we looked and said, well, what areas of law has equality affected, you would have to say, well, which areas has it not affected?! If we look at equality analysis we see it pertains to all aspects of the legal process: substantive provisions and principles, rules of evidence and procedure, everything from dealing with child witnesses to the recognition of aboriginal practices and customs as evidence. We see at almost every level in every subject area, in criminal law, in

family law, that equality has, sort of, had its own enterprise and maybe even its own empire, because it has entered into all these areas.

18 One of the things that we do in Canada in our social context education is we say to people who think equality is limited, clearly defined, what area of law would you say does not have a social context dimension? What aspect of law would not respond to some kind of social context analysis?

19 It is actually quite wonderful, especially if we set this up as a competition in small groups, because people love to try to find the arcane point of law that does not have a social context dimension. The closest I have ever heard anyone come to it was at an IOJT conference where somebody said stamp law. I would say, well, compare the leaders of state and how many are the queen on the stamps. We can push it that far but the point here is that in Canada it is hard to say what is cause and what is effect in social context education and broad equality rights.

20 Yes, of course, because we have constitutional rights it places a black-letter justification, indeed a compelling, perhaps unassailable, obligation on Canadian judges to understand equality as a core part of their own judicial competence. Nevertheless, what it does show is the reach of the equality analysis and that jurisprudence in cases informs practise in other areas, and contributes to the continuum of things that we do as judges.

21 With that understanding, how then do we integrate those ideas with social context education programming, knowing that it is about equality, knowing that it is about different philosophies of judging and the judicial role, knowing that it is about expanding upon notions of judicial skill, knowing that it is about changing attitudes and encouraging open-mindedness, knowing that it is a challenge to core values?

22 It is an aspect of programming in the National Judicial Institute and it is a required aspect. In every program social context is supposed to be integrated such that one has skills, knowledge, social context and, increasingly, ethics, which all four components intertwine in a solid educational program. We have the commitment of the Chief Justice of Canada, and the respect for social context of all of the Council of Chief Justices. It is an accepted aspect. It does not mean that it is always accepted. It does not mean that everybody likes it, and it does not mean that it was easy or that we got there overnight. There were different models tried. There were small beginnings. Most of the early work in Canada was done at the provincial court level by the Western Judicial Center because – and it makes perfect sense – you have judges seeking to understand the circumstances of the diverse populations that they deal with every day on the front lines of the justice system.

23 Now, in Canada we have basically three stages, or progressions, that I think you should be exposed to. The first is that we had free-standing programs at the National Judicial Institute between 1996 and 2001. We had either national programs or court-based programs. In these conferences, usually about two-and-a-half to three days, there would be a philosophical understanding of equality, of social context, of the exceptionally changed and diverse demographics of our country – and, I am sure, of some of yours – and a realisation that this was something that needed to be understood. Then, there would be workshops on particular issues. Whether it was disability, gender bias, race bias in law, gay and lesbian rights, there would be specific

focus. There would always be discussions and there would always be the opportunity for communication between judges. What I found interesting about those early conferences was that many judges said, 'we don't need this; we are all products of a liberated world; my wife works; my nephew is gay; my father was sick ...' Whatever you were talking about they would personalise in that way. Then, what would happen is that you would go in and have a discussion with your colleagues in these small rooms and they would say 'oh, okay, I see why we need this'. There was such a diverse understanding of equality and of what social justice required. The problems got talked out and sometimes the people got talked out and the problems did not get solved.

- 24 Then we worked into a training of the trainers. That was from about 2001 to 2003. Those judicial leaders across the country who were interested in doing the programmatic aspects of court-based initiatives were identified. It was thought that if one wants to integrate social context one needs people at the court level that understand that kind of programming because it is distinctive, it is difficult. There were programs to teach people who would do the programmatic aspects.
- 25 Now, we are at a situation where we are supposed to be integrating social context into all programs, all materials, all initiatives, as well as having specialised conferences on, for example, disability law. There is a conference on race law. There was a recent conference called, "Does Gender Still Matter?"
- 26 This gives you, I hope, a brief overview of the Canadian concept. I see, in terms of time perhaps we will just go to Justice Kelleher, who can discuss some of the barriers and then we will open it up for discussion as to what is going on in your jurisdiction and the barriers that you see.