

4-1-2013

Meaningful Change for Family Justice: Beyond Wise Words: Final Report of the Family Justice Working Group

Action Committee on Access to Justice in Civil and Family Matters

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Action Committee on Access to
Justice in Civil and Family Matters

Comité d'action sur l'accès à la
justice en matière civile et familiale

Meaningful Change for Family Justice: Beyond Wise Words

Final Report of the Family Justice Working Group

of the

Action Committee on Access to Justice
in Civil and Family Matters

April 2013

**“Resolved that the Action Committee approve the Working Group report for
distribution and consultation on March 12, 2013”**

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EXECUTIVE SUMMARY & RECOMMENDATIONS

A. Executive Summary

The Action Committee on Access to Civil and Family Justice

Canadians do not have adequate access to family justice. For many years now reports have been telling us that cost, delay, complexity and other barriers are making it impossible for many Canadians to exercise their legal rights. More recently, a growing body of research has begun to quantify the extent of unmet legal need in our communities and to describe the disquieting individual and social consequences of failing to respond adequately to family legal problems.

We have in Canada a highly evolved and comprehensive body of substantive family laws designed to help provide direction to families about the rules that apply when issues arise on separation. Unfortunately, the procedures by which this substantive law is invoked are increasingly complex, unaffordable and inaccessible. Without access to the mechanisms to implement them, the substantive rules have limited value.

The Family Justice Working Group (the “FJWG”) is one of four Working Groups of the Action Committee on Access to Civil and Family Justice. The Action Committee's chair, the Hon. Thomas A. Cromwell, has recently described the committee's purpose and role with respect to the issue of access to civil justice as follows:

The Action Committee...sees itself as a broadly representative group of leaders in the field of civil and family justice which can develop consensus about priorities, encourage organizations and groups to take the lead with respect to them and provide ongoing consultation, coordination and advice.¹

The Committee has four Working Groups: Court Processes Simplification, Access to Legal Services, Prevention Triage and Referral, and Family Justice. The Working Groups have premised their work on a broad notion of access to justice, articulated by Justice Cromwell as follows:

In general terms, members of our society would have appropriate access to civil and family justice if they had the knowledge, resources and

¹ Thomas A. Cromwell "Access to justice: towards a collaborative and strategic approach" *University of New Brunswick Law Journal* (January, 2012), online: www.highbeam.com/doc/1G1-302776655.html



services to deal effectively with civil and family legal matters. I emphasize that I do not have a "court – centric" view of what this knowledge in these resources and services include. They include a range of out-of-court services, including access to knowledge about the law and the legal process and both formal and informal dispute resolution services, including those available through the courts. I do not view access to justice...as simply access to litigation or even simply as access to lawyers, judges and courts, although these are, of course, aspects of when access to justice requires.²

The FJWG has adopted a definition of the “family justice system” which is consistent with this broad notion of access to justice. The family justice system is comprised of all laws, programs and services that meaningfully contribute to the resolution of family law issues. This includes public institutions such as the courts, government ministries, and legal aid service providers, as well as non-government agencies, lawyers, mediators and other private professionals who help families during the separation process.

Past Reports

The FJWG is very mindful of the many family justice reform reports that precede this one. These reports are remarkably consistent in their diagnosis of the problems and their prescriptions for change. A key theme of all reports is the place of adversarial (rights-based) and non-adversarial (interest-based) dispute resolution processes in the family justice system and the still untapped potential for non-adversarial values and consensual dispute resolution processes to enhance access to the family justice system.

Steps have been taken to respond to these reports across Canada and the Commonwealth and, in many respects the practice of family law looks very different today than it did 25 years ago. Changes to court rules and forms have made courts more accessible and judges have become increasingly involved in case management and settlement facilitation. Legal information programs, subsidized mediation and post-separation parenting programs are widespread. The legal profession has adopted non-adversarial approaches to family law disputes and processes like mediation and collaborative law are now widely used across Canada.

Despite these changes, reports and inquiries continue to call for further reform, saying that the changes to date, while welcome, are simply not enough. The reports

² *Ibid.*



continue to advocate for a more dramatic shift to non-adversarial approaches, calling for “drastic change”, a “fundamental overhaul” and a “paradigm shift”.

This report explores the relationship between the adversarial and non-adversarial paradigms and the need for the family justice system to integrate and utilize non-adversarial, problem-solving values even more fundamentally than it already has.

The Implementation Gap

The Working Group has attempted to grapple with the gap between the strongly worded recommendations of past family reports and the failure of justice systems to fully implement them. We see that to a significant extent, the ideas needed to make the family law system work better have already been articulated and we ask, what is getting in the way of the changes that are widely seen as necessary? The first conclusion we draw is that good ideas alone are not enough to change the system. As the title of this report suggests, we need to go “beyond wise words” to concrete action and full implementation of recommendations that have been on the books for some time now.

We identify two primary barriers to change. One is the limited resources available for the family justice system. Despite the pervasiveness of family justice problems, the general public, media and politicians are far more engaged with criminal law matters. This heightened interest fuels criminal law reform efforts and often translates into funding support for criminal justice as a priority over family law.

The implementation gap is also a function of the culture of the justice system and its incomplete embrace of non-adversarial or consensual dispute resolution processes. While progress has been made on this front, the potential of non-adversarial programs and consensual processes in family law has not yet been fully realized. Accordingly, we see further culture change as one of the more important options for enhanced access to family justice.

Guiding Principles

Our vision of a family justice system and the recommendations for change are based on these guiding principles:

- **Minimize conflict** - Programs, services and procedures are designed to minimize conflict and its negative impact on children.
- **Collaboration** - Programs, services and procedures encourage collaboration and CDR is at the centre of the family justice system, provided that judicial determination is readily available when needed.



- **Client Centred** - The family justice system is designed for, and around the needs of the families that use it.
- **Empowered families** - Families are, to the extent possible, empowered to assume responsibility for their own outcomes.
- **Integrated multidisciplinary services** - Services to families going through separation and divorce are coordinated, integrated and multidisciplinary.
- **Early resolution** - Information and services are available early so people can resolve their problems as quickly as possible.
- **Voice, fairness and safety** - People with family justice problems have the opportunity to be heard and the services and processes offered to them are respectful, fair and safe.
- **Accessible** - The family justice system is affordable, understandable and timely.
- **Proportional** - Processes and services are proportional to the interests of any child affected, the importance of the issue, and the complexity of the case.

Informed by these principles, this report makes nine recommendations related specifically to the goal of entrenching consensual dispute resolution values and processes more firmly at the centre of the family justice system. We make a further twenty two recommendations relating to diverse aspects of the system, including:

- services and administration;
- courts organization;
- substantive law;
- court procedures;
- post-resolution support; and
- research to support evidence-based decision making.

Family law has a very broad reach. There is perhaps no single area of law that touches as many people. The quality or adequacy of a family's encounter with the justice system can shape their lives and influence their wellbeing for the long term. Accordingly, we attempt throughout this report to look at the problems experienced by families, as well as the laws, services and procedures that our justice institutions offer them, primarily from their perspective. From this vantage point we see the



imperative need for timely and affordable outcomes and the considerable financial and emotional cost to spouses, parents and children when this need is not met. From a broader social perspective we see the risks associated with insufficient access to family justice. Access to justice is a corollary of the rule of law and as is essential to the social and economic well-being of civil society.

B. Summary of Recommendations³

Recommendation 1

That stakeholders across the family justice system, led by the law schools, collaborate on a study of family law curricula and make recommendations for changes that would better prepare students by providing them with the unique knowledge and diverse skills needed to assist children and families through the contemporary family justice system.

Recommendation 2:

That changes to the family law curriculum be accompanied by a greater emphasis on CDR skills and knowledge across the entire law school curriculum.

Recommendation 3:

That Canadian law schools hire and develop more full-time professors with an interest in family law.

Recommendation 4:

That Law Societies recognize the unique knowledge and skills needed to practice family law by accepting training in these areas as meeting ongoing obligations for continuing professional development; and, that continuing legal education organizations should develop courses to support the full range of skills needed by family law lawyers.

Recommendation 5:

That Law Society regulation of family lawyers explicitly address and support the non-traditional knowledge, skills, abilities, traits and attitudes required by lawyers to optimally manage family law files.

Recommendation 6:

That the family law Bar in each jurisdiction review and consider adopting guidelines similar to those promulgated by the BC Branch of the Canadian Bar Association for lawyers practicing family law.

Recommendation 7:

That ministries of justice, Bar associations, law schools, mediators, collaborative practitioners, PLEI providers and – to the extent appropriate - the judiciary, contribute

³ These recommendations are not ranked in order of priority. Their order is determined by the organization of the paper.



to and advocate for enhanced public education and understanding about the nature of collaborative values and the availability of CDR procedures in the family justice system.

Recommendation 8:

That the family justice system offer an array of dispute resolution options to help families resolve their disputes, including information, mediation, collaborative law, parenting coordination, and adjudication.

Recommendation 9:

That before filing a contested application in a family matter (but after filing initial pleadings), parties be required to participate in a single non-judicial CDR session. Rules should designate the types of processes that are included and ensure they are delivered by qualified professionals. Exemptions should be available where the parties have already participated in CDR, for cases involving family violence, or where it is otherwise urgent for one or both parties to appear before the court. Free or subsidized CDR services should be available to those who cannot afford them.

Recommendation 10:

That the provision of early, front-end services in the family justice system be expanded. This means:

- *making front-end services highly visible, easy to access and user-friendly, as has been done through initiatives such as the Family Law Information Centers in Alberta and Ontario, Justice Access Centres in British Columbia, and les Centres de justice de proximité in Quebec;*
- *coordinating and integrating the delivery of all services for separating family whether provided by lawyers, governments or non-government organizations; and*
- *allocating new resources and/or rebalancing and reallocating existing justice system resources in support of expanded front-end services.*

Recommendation 11:

The FJWG supports recommendations made by other NAC Working Groups with respect to making early information available to citizens, and supports the following as particularly useful for families:

- *information that is accessible, in plain language, neutral and accurate;*
- *information that responds to the needs of self-represented litigants; and*
- *information that is available in a variety of forms including in-person (through law information centres and phone lines), online, and printed guides.*

Recommendation 12:

Except in cases of urgency and consent orders, that information sessions be mandatory for self represented litigants and all parents with dependent children. The session should take place as early as possible and before parties can appear in court. At a minimum, the following information should be provided:

- *how to parent after separation and the effects of conflict on children;*
- *basic legal information;*



- *information about mediation and other procedural options; and*
- *information about available non-legal family services.*

Recommendation 13:

That triage services, including assessment, information and referral, be made available to people with family law problems.

Recommendation 14:

That legal aid be defined, for the purpose of both funding and service delivery, as consisting of a broad range of services and service providers, including:

- *full legal representation, partial representation, duty counsel, advice counsel, summary advice, brief services and limited scope retainers;*
- *legal information and self help services, including guided self help;*
- *mediation, parenting coordination, counselling; and*
- *programs or services linking or coordinating legal help with non-legal services.*

Recommendation 15:

That funding for family law legal aid be increased.

Recommendation 16:

That professional Codes of Conduct and court rules in all jurisdictions be reviewed to authorize and support the use of limited scope retainers.

Recommendation 17:

That jurisdictions expand reliance upon properly trained and supervised paralegals, law students, articling students, and non-lawyer experts to provide a range of services to families with legal problems.

Recommendation 18:

Recognizing the scale of unmet family law need, the individual and social cost of failing to meet that need and the existence of programs and services that have demonstrated their value to separating families, that funding be significantly enhanced for all family justice programs and services.

Recommendation 19:

Recognizing that each jurisdiction would have its own version of the unified court model, to meet the needs of families and children in each jurisdiction, that the two levels of government cooperate in the completion of unified family courts for all of Canada.



Recommendation 20:

That a unified family court retain the benefits of provincial family courts, including their distinctive and simplified procedures, and that it have its own simplified rules, forms and dispute resolution processes that are attuned to the distinctive needs and limited means of family law participants.

Recommendation 21:

That family courts adopt simplified procedures for smaller or more limited family law disputes.

Recommendation 22:

That the use of simplified, interactive court forms accompanied by easy to follow instructions be expanded.

Recommendation 23:

That specialized judges be appointed to hear family cases and that these judges have or be willing to acquire:

- *substantive and procedural expertise in family law;*
- *the ability to bring strong dispute resolution skills to bear on family cases;*
- *training in and sensitivity to the psychological and social dimensions of family law cases (in particular, family violence and the impact of separation and divorce on children); and*
- *awareness of the range of family justice services available to the families appearing before them.*

Recommendation 24:

That one judge preside over all pre-trial motions, conferences and hearings in family cases.

Recommendation 25:

That court rules committees, justice policy analysts and court administrators review legislation, rules, procedures and administrative mechanisms for ways to encourage a broader problem-solving approach to dispute resolution, especially in early stages, while minimizing the predisposition to manage all family issues as if they will be resolved at trial.

Recommendation 26:

That the following measures be considered:

- *each case be assessed and placed on different procedural track that is proportional and appropriate to the needs of the case;*
- *enhance judicial discretion to impose proportional processes on the parties;*
- *all court appearances be meaningful;*
- *parties be required (where possible) to agree on a common expert witness;*
- *both courts and parties be encouraged, where appropriate, to engage in a short, focused hearing under oath and without affidavits or written briefs to allow the*



court to hear oral evidence and, thus, reduce the cost and time of preparing legal materials;

- *jurisdictions explore using non-judicial case managers to help the parties move their cases forward and, where appropriate, narrow and resolve many issues in a proceeding;*
- *case managers should have and use the powers, in appropriate circumstances, to limit the number of issues to be tried and the number of witnesses to be examined;*
- *judges should use costs awards more freely and more assertively to contain process and encourage reasonable behavior.*

Recommendation 27:

That jurisdictions explore the use of less adversarial hearing models, including inquisitorial or modified inquisitorial models and, if appropriate, to pilot and evaluate such alternative models in Canada.

Recommendation 28:

That all justice system stakeholders support the exploration of the potential for the Internet and information technology to make family justice more affordable and accessible.

Recommendation 29:

That Canadian family law statutes encourage consensual dispute resolution processes and agreements as the norm in family law, and that the language of substantive law be revised to reflect that orientation.

Recommendation 30:

That substantive family laws provide more support for early and complete disclosure by providing for positive obligations to govern all stages of a case and serious consequences for failure to comply.

Recommendation 31:

That substantive family laws be simpler and offer more guidance by way of rules and presumptions, where appropriate.

Recommendation 32:

That existing post-resolution programs be expanded and that justice system policy-makers continue to explore additional ways to provide post-resolution support to families.

Recommendation 33

That universities, ministries of justice, judicial and bar organizations, and non-government organizations cooperate in generating more and better empirical research into the operation and administration of the family justice system, particularly with respect to access to family justice.



1. Introduction

A. The Family Justice Working Group

The Family Justice Working Group (“Working Group”) is one of four Working Groups of the Action Committee on Access to Civil and Family Justice (the “Action Committee”).⁴

The Action Committee has its origin in the invitation of Chief Justice Beverley McLachlin to representatives of the judiciary, the bar and governments from across Canada to meet in Edmonton in September 2008 to consider the urgent problem of diminishing access to justice in civil and family matters. The Action Committee's chair, Supreme Court of Canada Justice Thomas A. Cromwell, has recently described the Committee's purpose and role as follows:

*The Action Committee...sees itself as a broadly representative group of leaders in the field of civil and family justice which can develop consensus about priorities, encourage organizations and groups to take the lead with respect to them and provide ongoing consultation, coordination and advice.*⁵

The functions of the Committee include providing a forum for stakeholders and decision-makers to discuss issues relating to the improvement of access to justice and identifying areas of common priority for action.

⁴ The Family Justice Working Group would like to thank Erin Shaw for assistance with the preparation of this report, as well as the Law Foundation of BC, Alberta Justice and the Federation of Law Societies of Canada for their financial support. We are also grateful for the support of Department of Justice (Canada), in particular from DOJ staff Janet McIntyre and Michael Gauvreau.

Members of the FJWG are:

- M. Jerry McHale, QC, University of Victoria, Lam Chair in Law and Public Policy (Chair)
- Justice Marie Gaudreau, Superior Court, Montreal, Quebec
- Justice Barry Tobin, Ontario Court of Justice
- Elissa Lief, Senior General Counsel Family, Children and Youth Section, Justice Canada
- Patricia L. Blocksom, QC, A.O.E., Family Law Practitioner, Calgary, Alberta
- Dr. Deborah Doherty, the Public Legal Education Association of Canada
- Jeanette Fedorak, QC, Executive Director of Strategic Policy, Alberta Justice & Solicitor General
- Professor Rollie Thompson, Schulich School Law, Dalhousie University

⁵ *Supra*, note 1.



To assist the Committee in identifying specific areas of common priority and recommendations for action, four Working Groups were created: Court Processes Simplification, Access to Legal Services, Prevention Triage and Referral, and Family Justice.

All the Working Groups have made some common assumptions with respect to their mandates:

- Adequate access to justice is of foundational importance to Canadian society. As a 1996 report of the Canadian Bar Association observed "... a fair, effective and accessible civil justice system is essential to the peaceful ordering and the economic and social well-being of our society."⁶
- Canadians do not have adequate access to civil and family justice. The 1996 CBA report observed, "Many Canadians feel that they cannot exercise their rights effectively because using the civil justice system takes too long, is too expensive, or is too difficult to understand."⁷ Access to justice is a serious and urgent problem, not least of all in the area of family law.

- By "access to justice" we mean, quoting Justice Cromwell again,

...in general terms, members of our society would have appropriate access to civil and family justice if they had the knowledge, resources and services to deal effectively with civil and family legal matters. I emphasize that I do not have a "court – centric" view of what this knowledge, these resources and services include. They include a range of out-of-court services, including access to knowledge about the law and the legal process and both formal and informal dispute resolution services, including those available through the courts. I do not view access to justice...as simply access to litigation or even simply as access to lawyers, judges and courts, although these are, of course, aspects of when access to justice requires.⁸

By way of elaboration, having "the knowledge, resources and services to deal effectively with civil and family legal matters" includes providing people with the knowledge and skills, to allow them to take responsibility – or as much responsibility as is possible and appropriate – for the resolution of their own disputes. The

⁶ *Systems of Civil Justice Task Force Report* (Canadian Bar Association: 1996), p. 11.

⁷ *Ibid*, p. 11.

⁸ *Supra*, note 1.



frequency of family disputes is so high and the support our justice institutions are able to give has been so relatively limited, that a significant degree of self-help must be one ingredient of the answer to the access to family justice problem.

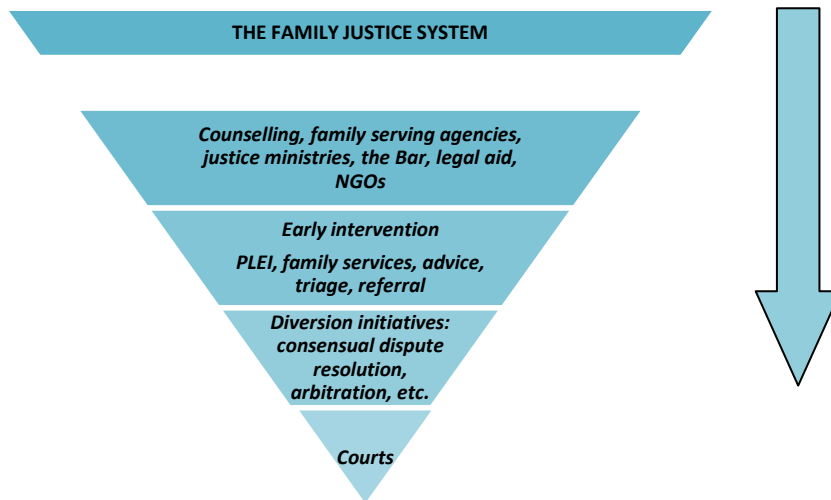
B. What is the Family Justice System?

The FJWG gives the term “family justice system” a correspondingly broad definition. It is taken to comprise any program or service which meaningfully contributes to the resolution of a family law issue, including:

- public institutions such as the courts, government ministries, and legal aid service providers;
- individual professionals, including judges, lawyers, mediators, social workers, counsellors and administrators who work in these public institutions; and
- non-government agencies and private services that help families by providing advice, information, assistance or orientation designed to assist in the resolution of issues arising out of separation or divorce.

The family justice system also includes the laws that govern marriage, cohabitation, separation, divorce, parenting responsibilities, financial obligations flowing from marriage or relationship breakdown, property division, and child protection.

The following graphic illustrates the broad array of services and organizations that constitute the family justice system. At the same time, it previews one of the FJWG’s conclusions – that separating families should be exposed to a number of services and procedural options designed to help resolve their dispute before turning to the courts.



In terms of scope, this report does not discuss child protection despite its important role in the family justice system. We recognize the importance of child protection matters and that these cases dominate family court dockets across the country. We believe that many of our proposals for consensual dispute resolution and other changes can also be applied in the child protection context, with important modifications. But child protection is very different from the rest of family law, as it involves the state intervening in the family to protect children from abuse and neglect under separate statutes with distinctive procedures. Given the limits on our time and resources, we have decided to focus on access to justice issues arising from separation, divorce and parenting.

C. Background Work

The FJWG began its work by assembling many of the various reports, recommendations, research studies and papers that have been published over the last 10 to 15 years on the topic of enhancing access to family justice, both in Canada and in other common law jurisdictions (“the reports”). There is now a remarkably large amount of such material available. Many Canadian jurisdictions have formally examined the issue of family justice access – in fact, some of them have done so several times. Additionally, a great deal of work has been done by governments in other common law jurisdictions, as well as by academics and researchers from around the world.

The FJWG concluded that a synthesis or comprehensive summary of this material would be useful. Accordingly, a research paper was commissioned and Ms. Erin Shaw, a lawyer and consultant, researched and drafted a paper for the FJWG entitled “Family Justice Reform: A Review of Reports and Initiatives” (April 15, 2012).⁹ This paper assisted the FJWG greatly by providing an overview of the considerable work that has been done in common law jurisdictions around the world with respect to family law reform.

In addition to Erin Shaw's paper, this report also rests on a research paper written by Dr. Melina Buckley for the Access to Legal Services Working Group entitled “Access to Legal Services in Canada: A Discussion Paper” (April 2011).¹⁰ The FJWG report will

⁹ Erin Shaw, *Family Justice Reform: A Review of Reports and Initiatives*, (Family Justice Working Group of the Action Committee on Access to Justice in Civil and Family Matters, April 2012).

¹⁰ Melina Buckley, *Access to Legal Services in Canada: A Discussion Paper* (Working Group on Access to Legal Services of the Action Committee on Access to Justice in Civil and Family Matters: April 2011), p. 3.



also rely upon and will occasionally refer to reports written by each of the three other National Action Committee Working Groups.

The FJWG also had the benefit of input from a wide range of justice system stakeholders. An earlier draft of this report, dated December 19, 2012, was circulated for feedback. In response, the FJWG received more than 40 submissions from ministries, superior courts, provincial courts, the family law bar, mediators, academics, legal aid plans, and family-serving agencies. A further comment about this feedback is set out at appendix “A” to this report.

With family separation occurring on a large scale, and in the context of dramatic social change, it is not surprising that justice systems across the Western world have been struggling to meet the challenge of responding to the complex and growing needs of families. The many reports from around the common law world¹¹ reflect a remarkable consistency in the conclusions reached about what does and does not work in family justice systems.

The problems identified in the reports that precede this one were distilled in the background paper prepared for the FJWG as follows:

- there is a built-in tendency for adversarial process to polarize spouses and exacerbate conflict;
- parental conflict can be very harmful to children;
- conflict tends to protract process, which already tends to be complex, costly, lengthy and unpredictable;

¹¹ For example, Law Commission of Ontario, *Towards a More Efficient and Responsive Family Justice System: Interim Report* (February, 2012), online: www.lco-cdo.org/en/family-law-reform-interim-report; Dr. Barbara Landau, Tom Dart, Heather Swartz, Joyce Young, *Submission to Attorney General Chris Bentley: Creating a Family Law Process that Works: Final Report and Recommendations from the Home Court Advantage Summit* (2009), online: www.docstoc.com/docs/39516572/Submission-to-Attorney-General-Chris-Bentley-CREATING-A-FAMILY; *Report of the Access to Family Justice Task Force*, Government of New Brunswick (January 23, 2009), online: www.legal-info-legale.nb.ca/en/index.php?mact=News.cntnt01.detail.0&cntnt01articleid=34&cntnt01returnid=252; Alfred A. Mamo, Peter G. Jaffe & Debbie G. Chiodo, *Recapturing and Renewing the Vision of the Family Court* (2007), online: www.books2.scholarsportal.info/viewdoc.html?id=357212; *A New Justice System for Families and Children: Report of the BC Family Law Reform Working Group* (2005), online: www.bcjusticereview.org/working_groups/family_justice/media_release_06_09_05.asp; *Out Of The Maze: Pathways to the Future For Families Experiencing Separation*, Report of the Family Law Pathways Advisory Group (Commonwealth of Australia, July, 2001) www.ag.gov.au/Publications/Pages/FamilylawssystemOutoftheMazeAugust2001.aspx



- justice systems need to do a better job of providing integrated services and multidisciplinary responses to the many “non-legal” dimensions to issues that arise when families are restructuring; and
- the complexity of family breakdown and the relative inaccessibility of the courts results in many family law problems remaining unaddressed and unresolved.¹²

We see the mounting pressure of unmet family legal need on our courts where increasingly large numbers of self represented litigants¹³ struggle to use a system designed for highly trained professionals. At the same time, research makes increasingly clear the cost and suffering, in the form of additional legal, social, health, and financial problems that result from the failure to resolve family law issues at the first instance. We wonder at the ultimate impact this will have on public confidence in the justice system and on civil society.

The prescriptions for change in the reports are also remarkably consistent. Virtually all the reports compare adversarial to non-adversarial dispute resolution processes. Typically, mediation and collaborative practice are identified as the main forms of non-adversarial family law dispute resolution. They, in turn, are informed by theory that contrasts a “rights-based approach” with an “interest-based approach”. The latter takes a number of forms and has a variety of names including: problem-solving, non-adversarial justice, interest-based negotiation, principled negotiation, mediation, conciliation, consensual dispute resolution, cooperative dispute resolution, participatory justice, therapeutic justice and collaborative practice. We would include many judicial settlement initiatives in this category as well. For simplicity, the term we use in this paper to signify the paradigm underlying all of these non-adversarial approaches to family law disputes is “**consensual dispute resolution**” or “**CDR**”.

¹² *Supra*, note 8.

¹³ While “self represented litigant” is the term most commonly used to describe all persons who try to use the courts without legal representation, it is important to note that a distinction should properly be made between the minority who could be represented but elect to represent themselves (“self represented litigants”) and those who, usually for reasons of affordability, have no choice but to represent themselves (“unrepresented litigants”). We employ the former term as the one most widely used to describe both groups but suggest that the distinction is important.



2. Challenge and Change in Family Law

A. The Evolution of the Family Justice System

Disputes arising out of family separation present an immense challenge to Canadian justice systems. They are many in number and they typically involve complex interpersonal relationships, highly charged emotions, vulnerable family members, and outcomes that are particularly consequential to the lives of all involved. The scale and complexity of family disputes have been complicated considerably by the barriers that inhibit access to the justice system.

The family justice system has worked hard to respond to these challenges and it has introduced many changes over the last twenty years. Court rules have been modified to accommodate more flexible and informal processes. Judicial roles have expanded to include case management and settlement facilitation. In most jurisdictions governments provide legal information, legal advice, self-help services, parenting programs, subsidized mediation, and referral services for family litigants. In many courts, particularly unified family courts¹⁴, the delivery of such services is seen as indispensable to the mission of the family justice system. Finally, the legal profession has explored and widely adopted non-adversarial ways of thinking about and responding to family law disputes. Consensual family dispute resolution processes like mediation and collaborative law are widely utilized across Canada.

In spite of all these changes, reports and commentaries on the effectiveness of the family justice system continue to call, often forcefully, for even more change. The recent report of the Law Reform Commission of Ontario, for example, is one of a number suggesting that while past reforms have been helpful, they have not been sufficient, and that change of a fundamental nature is still needed:

We have concluded from our research, including consultations with users and workers in the system that Ontario's family law system requires a drastic change if it is to be truly effective and responsive. Whatever the

¹⁴ The term 'unified family court' is used in Canada and other countries to refer to a single specialized court that has legal jurisdiction over all family law matters and which provides access and referrals to a range of services for families experiencing separation and divorce. The precise name of the court will vary, depending upon the province or territory. A later section of this report discusses unified family courts in more detail.



merits of particular reforms (and in themselves they may well be meritorious), they have been layered onto an existing system.¹⁵

The theme of insufficiency of reforms to date is emphasized in that same report by reference to a recent comment made by Ontario Court of Appeal Chief Justice Winkler:

I do not believe [the changes required to the family law system] can be achieved by tinkering at the edges of the existing family law system or by grafting new procedures and services onto the existing system. The reforms I am advocating can best be achieved by undergoing a fundamental overhaul of the current system. Only in this way can we properly ensure that all elements of the family justice system work together in harmony to achieve a coherent and balanced system that is affordable, timely, easy to understand and easy [to] manoeuvre through.¹⁶

The language of “drastic change” and “fundamental overhaul” corresponds with calls made in earlier reports for a “paradigm shift”¹⁷ and for a family justice system that is “fundamentally different from what we have known in the past.”¹⁸

B. The Implementation Gap

The FJWG takes as a given the pressing need for enhanced access to family justice and the corresponding need for bold innovation and change in the family justice system. This takes us directly to the number of important questions:

- What is it that motivates these assertions?
- What are the nature and degree of the changes needed to make the family justice system more workable?
- What is it that is getting in the way of the needed changes?

Essentially, this entire report is about trying to answer these questions. In this respect the FJWG has come to see the large number of previous reports at its disposal

¹⁵ Law Commission of Ontario, *supra*, note 10, [450]. *Towards a More Efficient and Responsive Family Law System: Interim Report (Part V: Transforming the System)* (2012), [450].

¹⁶ *Ibid.*

¹⁷ Mamo, et al, *supra*, note 10, p. 6.

¹⁸ BC Justice Reform Working Group, *supra*, note 10, p. 6.



as presenting something of a puzzle. On the one hand, these reports help us to answer such questions in that they define the problem very clearly, articulate a compelling argument for change, and provide much insightful advice and many useful recommendations for change.

On the other hand, the reports present a problem precisely because many of them are so well done. In the face of these many reports we have asked ourselves two questions. First, what can we add to the advice and recommendations that have already been so well articulated over the last 10 or 20 years? Second, what are we to make of the fact that in spite of these many insightful recommendations, contemporary reports continue to express emphatic concern about access to family justice and call for "drastic change"?

The first conclusion we can draw is that it is going to take more than wise advice to change the system. To a significant extent, the ideas needed to make the family law system work better have already been articulated. What we confront is an "implementation gap". The FJWG has observed that there is a gap between the vision of the previous reports and the reality of today's family justice systems. Many of the very promising recommendations contained in previous reports have either not been implemented or have been only partially implemented. The reasons for this under-implementation are multiple. One reason is simply that limited resources are available for the family justice system. This resource problem is compounded by the current environment of fiscal restraint, in which family justice funding falls even further behind criminal and civil justice funding.

The implementation gap is also, to a certain extent, a function of the culture of the justice system and its, as yet, incomplete embrace of CDR. The family law reports are forceful and virtually unanimous in recommending that priority be given to non-adversarial family dispute resolution processes and that the courtroom be treated as a valued, but secondary resource. A great deal of progress has been made by governments, lawyers and judges in moving toward this reality. At the same time however, it is clear that the potential of non-adversarial programs and processes in family law has not yet been fully exploited.

When, after the introduction of no-fault divorce more than 40 years ago, family law cases began to arise in large numbers, they continued to be conceived of and managed as another species of civil dispute, subject to the same analysis and the same adversarial procedures as tort or commercial claims. The assumptions that originally shaped family law dispute resolution have their origins in adversarial values that have informed our justice institutions for hundreds of years. Arguably,



the most significant development in family law over the last 20 years has been the introduction of CDR values and the extent to which CDR procedures have displaced litigation.¹⁹ This report explores the relationship of these two paradigms and the need for the family justice system to integrate CDR values even more fundamentally than it already has.

A family justice report published in British Columbia in 2005 observed that,

*We apparently acknowledge the shortcomings of the current system and the merits of consensual processes for families in conflict, but still people are steered to the courthouse. Mediation is certainly more widely available than it was a few years ago but still it is characterized as an "alternative" process.*²⁰

Among other things, this report will explore potential changes to substantive law, procedural law and institutional culture designed to put CDR approaches more deliberately at the core of the family justice system. Put another way, this report talks about the still untapped potential for CDR to enhance access to family justice by becoming more than an "alternative" method of dispute resolution.

C. A Client-Centred Perspective

Throughout this report we have attempted to adopt the client-centered perspective recommended in many of the previous family law reports. That is, we try to look at the problems and the conflicts experienced by families, as well as the laws, services and procedures that our justice institutions offer them, primarily from the family's perspective, not from the perspective of the professionals who work in the system. This position corresponds with the vision articulated by the Prevention, Triage and Referral Processes Working Group, which observed:

Historically the discourse about access to justice has been system-centered. That is, it has revolved around the notion that justice for individuals is best achieved if they are provided with access to lawyers, judges, courts and tribunals. In this paradigm the role of law and access to justice is best reinforced by good laws, comprehensive legal aid plans and high-quality enforcement.

¹⁹ Across Canada, legislation encourages - or mandates - family mediation, court rules facilitate consensual resolution, and mediation and other CDR processes are offered by government employees, judges, lawyers and other private sector professionals. Law schools and legal education organizations have been educating lawyers in this area for two decades.

²⁰ BC Justice Reform Working Group Report, *supra*, note 10, p. 11.



This report does not contradict the need for any of these important elements of a well functioning justice system. However, it's primary starting point and consistent focus is on the needs and concerns of individuals: it looks at legal problems from the point of view of the people experiencing them...This vision of access to justice requires definition of problems, setting up objectives and the creation of recommendations that are focused on the legal capabilities of individuals and structures that support their capacity to understand, anticipate and resolve issues.²¹

D. The Structure of the Report

The FJWG's response to the "implementation gap" will be discussed within the following framework.

- Part 3 explores the forces shaping the current family law context;
- Part 4 looks at certain features of family law disputes that make them fundamentally different from most other kinds of disputes in the justice system;
- Part 5 discusses the unmet need for family legal services and the problems confronted by self-represented litigants;
- Part 6 identifies the principles that guide and inform our recommendations;
- Parts 7, 8 and 9 sets out our main recommendations which are in three categories, relating to:
 - justice system culture;
 - services and administration; and
 - law and procedure.
- Parts 9 and 10 make final recommendations related to post-resolution support and evidence-based decision making.

²¹*Consultation Paper on Prevention, Triage and Referral Processes: Description of Key Issues and Recommendations for Action* (Action Committee on Access to Justice in Civil & Family Matters, Prevention, Triage and Referral Working Group, August 24, 2012), p.3.



3. The Family Law Context

The substantive law relating to grounds for divorce, entitlement to and division of family property, parenting obligations, spousal support, and child support has evolved more or less continually over the last forty years. The number of families turning to the law began to grow exponentially when no fault divorce became a possibility. Before 1968 divorce was not a common event and in Quebec and Newfoundland an Act of the Canadian Parliament was necessary for a divorce. The world we live in today is utterly different. Marriage is no longer assumed to be forever. About 38% of all Canadian marriages end in divorce, resulting in approximately 70,000 divorce orders annually.

It is probable that more people are touched by family law disputes than by any other single area of the law, especially when considering the broad range of relatives, friends, employers and colleagues whose lives are affected by a single family separation. Family law cases comprise about 35% of all civil cases. They take up a disproportionate amount of court time, with many more events per case, three times more adjournments, and twice as many hearings. At the same time, only 1% of divorce cases go to trial, suggesting that the greatest volume of work of family courts involves non-trial appearances and negotiated resolutions.²²

A. Transformation of the Family

The growth in the number of separations since the late 1960s is only part of the story. The family itself has undergone a profound transformation. In addition to the many changes to family structures as a consequence of separation (blended families, single-parent families), same-sex couples may now legally marry and reproductive technologies are forcing a revision of our thinking about historically immutable concepts like parentage.²³ There has also been a great increase in the number of common law relationships, especially in Quebec. Gender roles have evolved dramatically and the post-war model of the male wage earner and the somewhat

²² Statistics Canada, Divorce Cases in Civil Court 2010/11 (Ottawa, March 2012), online: www.statcan.gc.ca/pub/85-002-x/2012001/article/11634-eng.htm#a1

²³ The recent Statistics Canada Report reporting: married couples make up the majority of couples at 67%, but the percentage of common-law couples is growing, from 13.8% in 2006 to 16.7% in 2011; the number of same sex couples (both married and common law) was up 42.4% since 2006; the number of lone parent families is also growing, going from 15.7% to 16.3% between 2006 and 2011; for the first time the number of common-law couples surpassed the number of lone parent families; one out of every ten children was living in a stepfamily. ²³ Statistics Canada, Portrait of Families and Living Arrangements in Canada (Ottawa 2011), *2010/11 Juristat Report* (Ottawa 2012), online: www12.statcan.gc.ca/census-recensement/2011/as-sa/98-312-x/98-312-x2011001-eng.cfm



disenfranchised female homemaker has substantially, albeit not totally, gone by the wayside.

At the same time, our understanding of how best to conceive of and manage family conflict has changed considerably. Justice systems have been obliged to respond to important information provided by the social sciences about, for example, the nature and prevalence of family violence and the impact of conflict on children. The use of mediation, collaborative law and other CDR processes has grown substantially over the last 20 years, and there is much greater recognition of the value of early, cooperative resolution of family disputes.

B. The Place of Family Law in the Justice System

In trying to set the general context for the problem of access to justice and family law reform, it is important to comment on the place of family law in the larger justice system. While the field of family justice has many dedicated and energetic champions, it is nonetheless the "poor cousin" in the justice system. This is true inside the system where it is subsumed in the larger "civil justice" category and regarded as an undesirable area of practice by some lawyers and law students.²⁴

It is also true outside the family justice system. Despite its high rates of engagement with the family justice system on an individual basis, the general public pays relatively little attention to family law. The media focus is substantially on criminal law cases and the public tends to view and evaluate the justice system through a criminal law lens. The greater media attention to, and corresponding public engagement with issues of crime translate into heightened political interest and investment in criminal law matters. This has already had a measurably negative effect on family law in an environment that has seen family law legal aid budgets diminish significantly in the face of relentless resource pressures from criminal justice.

At the same time, natural advocates for the family justice system have not emerged as strongly as in criminal law where institutional players, such as Crown, police and corrections appear to have a greater capacity to pursue a reform agenda. On the political question of resource allocation at least, it is apparent that more assertive and sustained advocacy combined with highly visible leadership are needed to better assert the interests of families and children.

²⁴ See for example, the report published by Westcoast LEAF: Zara Suleman, *Not With a 10 Foot Pole: Law Students Perceptions of Family Law Practice* (Westcoast LEAF: January 2009), available online at: www.westcoastleaf.org/index.php?pageID=163&parentid=29



4. The Unique Nature of Family Law

With the advent of no-fault divorce in Canada in 1968, the number of divorces began to increase exponentially. The numbers increased even more with the new *Divorce Act* in 1986. Traditionally, separation and divorce were treated as matters for the courts. Issues arising out of separation and divorce were characterized as legal issues and framed and managed like other types of civil disputes: as adversarial contests between opposing parties. It was clear by the 1980s, if not earlier, that this characterization was not working very well and a refrain arose in legal circles that, "there must be a better way".²⁵

In our view, understanding the unique nature of family justice problems - that is, how they differ from other forms of civil dispute - is essential to determining what that "better way" might look like. As Bala, Birnbaum and Martinson observe:

*Traditional adversarial approaches used by the court for civil litigation have not worked well for family law cases. Understanding the difference between family cases and other types of litigation is essential for an appropriate response to family disputes.*²⁶

What many of the following points go to is the fact that relationship breakdown is not a legal event that has some potential social consequences; it is a social phenomenon that has some legal consequences.

Emotion and value driven

Family cases are often highly emotional and characterized by significant financial, interpersonal, and psychological stress for family members. The non-legal (emotional, interpersonal, and relationship) problems often fuel and complicate the

²⁵ The phrase was used by US Chief Justice Warren Burger in, Warren Burger, *Isn't There a Better Way?* (1982) 68 ABAJ, 274 at 275, and widely applied in a number of legal contexts in the USA and elsewhere.

²⁶ Nicholas Bala, Rachel Birnbaum, Donna Martinson, *One Judge For One Family: Differentiated Case Management For Families And Continuing Conflict*, (2010) 26 Canadian Journal of Family Law (2010), p. 395.



legal problems. This is particularly true in high conflict cases.²⁷ While small in number, these cases take up a disproportionate amount of justice system resources and have devastating effects on the children.

Relationships are ongoing

It is the restructuring of familial relationships rather than their termination that is the central objective of the family law process.²⁸

Unlike parties to other types of civil cases, parties in family cases must frequently sustain a long term working relationship after the legal issues are resolved. Family relationships seldom actually end; they are simply reorganized. Spouses must continue to parent while jointly navigating problems and re-negotiating obligations as personal and financial circumstances change. This implies both a need for dispute resolution processes that sustain relationships and a need for post-resolution support mechanisms.

Future oriented

In non-family civil cases, the judicial task typically involves the retrospective assessment of fixed, historical facts followed by the application of legal principles to those facts in order to arrive at a final judgement. In family cases, the facts upon which adjudication is to be based are commonly in flux, and the dispute resolution process often involves a prospective assessment of these unknown and uncertain future facts based on existing obligations and dependencies. Outcomes are provisional and subject to revision as needs, capacities and obligations change with circumstances.

Children's interests at stake

²⁷ High conflict cases have been defined to be those with the following indicators:

- either of the parties has a criminal conviction for (or has committed or has alleged to have committed) a sexual offence or an act of domestic violence;
- child welfare agencies have become involved in the dispute;
- several or frequent changes in lawyers have occurred;
- issues related to the court proceeding have gone to court several times or frequently;
- the case has been before the courts a long time without an adequate resolution;
- there is a large amount of collected affidavit material related to the divorce proceeding; and
- there is repeated conflict about when a parent should have access to the child.

²⁸ Nicholas Bala, *Reforming Family Dispute Resolution in Ontario: Systemic Changes and Cultural Shifts*, in *Middle Income Access to Justice*, University of Toronto Press (2012) p. 271 at 275.



The majority of family cases involve children, who are vulnerable, usually unrepresented non-parties who seldom participate directly in the process. Yet their interests are central to the conflict and protecting and promoting their best interests is the paramount objective. Both the process by which family issues are resolved and the substantive resolution of those issues can have significant consequences for the long term well being of children.

Vulnerability of parties

The parties in a family case can also be particularly vulnerable. This vulnerability involves at least three dimensions:

- violence and physical safety - involving spouses as well as children - are often part of the relationship dynamic;
- family law disputes are not infrequently characterized by significant power imbalances between the parties; and
- increasingly, parties must negotiate complex law and complicated procedures without representation.

Disparate social and cultural norms

Modern social and political views of "family" are rapidly changing. At the same time, Canada's population is becoming increasingly diverse. This diversity can bring differences in deeply held values related to the structure of the family, gender roles, parenting, and the acceptability and consequences of divorce. As English judge Nigel Fricker has observed,

The substantive law and practice of law must recognise and address the dilemmas arising from differing cultural expectations in our society.²⁹

It cannot be assumed that the assumptions embedded in family law about what is fair or right on marriage breakdown are universally shared.

Unsophisticated, one time, and unrepresented litigants

In criminal cases, the Crown is always represented and many civil cases involve sophisticated, repeat litigants such as insurers and banks. Typically, parties in family cases are one-time users of the justice system, who lack a sophisticated

²⁹ Hon. Nigel Fricker, QC, *Family Law is Different*, (1995) Family Court Review, 33, 403 at 406



understanding of the law and legal processes.³⁰ These parties also have less of a stake in the justice system. As Professor Bala notes:

*The lack of institutional litigants in domestic cases means there is less commitment by the parties – especially those who are unrepresented – to the integrity of the justice system.*³¹

State Interest and Intervention

A marriage can only be terminated by the order of a superior court judge, and the court itself has a legal responsibility for the welfare of children of separating spouses. Mandatory pleadings and streaming through the court process, regardless of how amicable the separation, contributes to the public and professional perception of family restructuring as primarily a legal matter governed by the courts. This perception is at odds with policies promoting out-of-court dispute resolution.

5. Unmet Need for Legal Services and Self-Represented Litigants

The problem of unmet need for legal services in both civil and family law has been documented in a number of reports from Commonwealth jurisdictions around the world.³² These reports describe the prevalence of legal problems and how people do or do not deal with them. What these studies tell us is that many people do not use the formal legal system to address their legal problems and many of those who try to use it encounter insurmountable barriers. These barriers include:

³⁰ Child protection cases are different in this regard as they do involve repeat institutional litigants. Government ministries or child protection agencies are always involved and the parents in these cases are usually represented by lawyers funded by legal aid, which offers a further element of repeat use.

³¹ *Supra*, note 24, p. 276

³² For example, the following papers were reviewed for the Access to Legal Services background paper: Dr. Ab Currie, *Legal Problems of Everyday Life*, published in Rebecca Sanderfur, ed., *Access to Justice, The Sociology of Crime, Law and Deviance* (Bingley, UK: Emerald Group Publishing, 2009); Dr. Ab Currie, *National Civil Legal Needs Studies 2004 and 2006* (Ottawa: Justice Canada, 2006); Dr. Ab Currie, "A National Survey of the Civil Justice Problems of Low and Moderate Income Canadians: Incidence and Patterns" (2006) 13:3 *International Journal of the Legal Profession; Documenting the Justice Gap in America: The Current Unmet Civil Legal Needs of Low-Income American* (Washington, DC: Legal Services Corporation, 2005); Carol McEown, *Civil Legal Needs Research* (Vancouver: Law Foundation of British Columbia, 2008); Pascoe Pleasence, Nigel Balmer, Tania Tam, Alexy Buck and Marisol Smith, *Civil Justice in England and Wales: Report of the 2007 English and Welsh Legal Needs Study* (London: Legal Services Commission, 2008); Legal Services Agency, *Report on the 2006 National Survey of Unmet Legal Needs and Access to Services* (Wellington, New Zealand: Legal Services Agency, 2006); Ipsos Reid for the Legal Services Society (LSS), *Legal Problems Faced in Everyday Lives of British Columbians* (Vancouver: LSS, 2008).



- the cost of legal representation;
- the complexity of law and of procedure;
- lack of knowledge about their rights;
- lack of understanding about how rights are asserted;
- lack of capacity (for example, illiteracy); and
- fear of becoming involved in the legal system.

The most visible symptom of unmet family legal need is the rise of self-representation in the courts. Hard data on the number of self-represented litigants is not generally available and what data we do have is not particularly reliable. A recent Ontario study reported:

It is not possible to obtain a totally accurate picture of the extent to which family litigants in Ontario do not have lawyers, since the only data collected is based on reports at the time of filing an application in the courts. However, this data source makes clear that a substantial portion of family litigants do not have lawyers. Based on this data source, between 1998 and 2003, an average of 46 percent of litigants in the Ontario Family Courts were not represented by a lawyer, rising to 62% in 2006-2007 before falling somewhat to 54% in 2009-2010, the last year for which there was data.³³

The prevalence of unmet need for legal services is particularly troubling given the empirical evidence that unresolved legal problems tend to generate additional legal and personal problems. The fact that unresolved legal issues produce additional legal, social and health problems has been explored elsewhere, including in the background paper prepared for the Access to Legal Services Working Group.³⁴ For the purposes of this paper we will emphasize only the following findings:

- family relationship problems are among the most difficult, complicated and time-consuming to resolve;

³³ Rachel Birnbaum & Nicholas Bala, *Views of Ontario Lawyers on Family Litigants without Representation* (2012), p. 2.

³⁴ *Supra*, note 9, p. 5.



- unresolved family issues tend to trigger further legal problems, resulting in complex clusters of interrelated legal problems;
- there is a causal relationship between unresolved legal problems and increased health, social welfare and economic problems; and
- while unmet legal need is widespread and pervasive, the most vulnerable individuals in society experience more frequent and complex interrelated civil legal problems.

The individual and social costs associated with failing to resolve family law issues, while not yet empirically quantified,³⁵ are presumably high. For the individual, the cost can be measured not only in dollars but in stress, ill health, employment problems, lost opportunities and so on. The broader social costs for business, the health care system and policing are likely considerable.³⁶

Another potential cost is the damage to public confidence in the justice system and the harm to civil society when legal issues are left unresolved on this scale. Resolving family law disputes has broader social and public benefits. First, individual conflict is ended and its potentially destructive consequences are contained. At the same time, resolution of the individual conflict serves the greater good by demonstrating to society at large not only that such conflicts will be managed (enhancing public confidence in the justice system), but also by indicating how they will be resolved. In this way, public values are affirmed and can have an ordering influence on other families and on other conflicts. It should follow that the state has a major interest in responding effectively to the problem of unmet family legal need.

6. Guiding Principles

Our vision of a family justice system and the recommendations for change are informed by the following guiding principles:

- **Minimize conflict** - Programs, services and procedures are designed to minimize conflict and its negative impact on children.

³⁵ The Canadian Forum on Civil Justice located at Osgoode Law School has formed a research alliance, which has awarded a substantial CURA grant to explore such cost-related questions. See www.cfcj-fcjc.org/?q=cost-of-justice

³⁶ See Mary Stratton and Travis Anderson, *Social, Economic and Health Problems Associated with a Lack of Access to the Courts*, (Canadian Forum on Civil Justice: 2006), www.cfcj-fcjc.org/?q=past-projects



- **Collaboration** - Programs, services and procedures encourage collaboration and CDR is at the centre of the family justice system, provided that judicial determination is readily available when needed.
- **Client Centred** - The family justice system is designed for, and around the needs of the families that use it.
- **Empowered families** - Families are, to the extent possible, empowered to assume responsibility for their own outcomes.
- **Integrated multidisciplinary services** - Services to families going through separation and divorce are coordinated, integrated and multidisciplinary.
- **Early resolution** - Information and services are available early so people can resolve their problems as quickly as possible.
- **Voice, fairness and safety** - People with family justice problems have the opportunity to be heard and the services and processes offered to them are respectful, fair and safe.
- **Accessible** - The family justice system is affordable, understandable and timely.
- **Proportional** - Processes and services are proportional to the interests of any child affected, the importance of the issue, and the complexity of the case.

7. Recommendations Related to Institutional Culture Change

Institutional change can take many forms. This report ultimately makes recommendations for changes involving substantive law, procedural law, programs and administration. We begin, however, by focusing on potential changes to the attitudes and behaviours of those who work in the justice system, and also more broadly, of the public at large.

A. Our Hybrid System: Adversarial and CDR Paradigms

The growth of CDR processes

Not so long ago, Canadian family justice systems were built exclusively around an adversarial litigation model of dispute resolution. By the terms of this model, the problems arising out of family breakdown were framed more or less exclusively as legal issues to be resolved in terms of the competing rights and obligations of the parties. Facts relating to the non-legal dimensions of the separation experience – such as the needs, interests and emotions of the parties - were, for the most part, treated as irrelevant to the dispute. Procedurally, the parties were positioned as



adversaries and problems such as the material needs of spouses and emotional needs children were organized as a contest to be determined within the framework of the highly prescribed roles and procedures of traditional advocacy and civil litigation.

This had been the model applied for centuries to all forms of civil disputes and as the number of family cases continued to grow it was adopted on a massive scale. Within less than 20 years of the advent of no fault divorce however, most jurisdictions were concluding that the tools of litigation were poorly suited to the needs of separating spouses and their children.

The metaphor employed by the FJWG to describe the transition that family justice systems have since undergone in this respect, is the iceberg. The facts, law, rights, duties and positions that law posits at the time of family separation are the portion of the iceberg that sits above the waterline. Below the waterline sit the needs, interests, values, biases, beliefs, perceptions, and emotions of the parties and their children. Not only do these substantial and very powerful forces below the surface have the potential to prolong and severely complicate adversarial process, they also have the capacity to destabilize any resolution that does not take them sufficiently into account. What Stephen Covey said in a different context, – “the way we see the problem is the problem”³⁷ - applies here, and so the problem of family separation was redefined to include more than the legal issues.

Tackling family disputes through this enlarged framework is sometimes described as "problem solving". For example,

*the holistic, problem-solving nature of these processes is an attempt to avoid narrowly adversarial forms of dispute resolution that deal only with the presenting legal issue and that ignore other dimensions of the problem that may have engendered the legal dispute.*³⁸

Family justice systems began to articulate policies and develop programs and processes that took this larger perspective and reframing into account. Mediation, conciliation, interest-based negotiation and, eventually, collaborative law brought different ways of conceiving of family disputes and new ways of managing the issues that arise on family breakdown. For approximately 25 years now there has been a steady move toward informal, consensual dispute resolution processes that respond

³⁷ Online at: www.goodreads.com/author/quotes/1538.Stephen_R_Covey

³⁸ Michael King, Arie Freiberg, Becky Batagol and Ross Hyams, *Non-Adversarial Justice*. (Australia, The Federation Press, 2009), p. 14.



to the entire iceberg, as it were, while encouraging the parties to regard the issues between them as common problems to be cooperatively resolved.

Initially, of course, the profound changes implied by the CDR approach to the theory and practice of family dispute resolution were not widely understood. Gradually however, the logic of CDR theory, frustration with the shortcomings of litigation and a growing body of positive experience with mediation and other CDR processes all combined to secure a place for CDR in the justice system. The benefits of CDR in terms of cost, speed and impact on families were increasingly recognized by parties, lawyers, judges, policy analysts, and court administrators. As one commentator observes, modern family courts responded by embracing:

...[a] philosophy that supports collaborative, interdisciplinary, interest-based dispute resolution processes and limited use of traditional litigation. Over the years this movement—combined with the growing number of challenges families bring with them to the court—has unleashed the creativity of professionals worldwide, resulting in literally dozens of distinct dispute resolution processes for separating and divorcing parents. These include multiple models of mediation; psycho-educational programs; collaborative law; interdisciplinary arbitration panels; parenting coordination; and early neutral custody evaluation to name just a few.³⁹

As noted above, the reports have adopted this theme and have, for some time now, recommended that CDR be utilized in priority over litigation. To varying degrees, provincial family justice systems have responded by making consensual dispute resolution services available in the private sector, the public sector, and the courts.

The status quo in Canadian family justice systems

While there are distinct differences in the culture of family practice and the availability of CDR services from province to province, and even within provinces – the most obvious example being the availability of unified family courts – the general status quo in terms of the family dispute resolution models in Canada might be described as follows:

- We have a hybrid family justice system incorporating both litigation and non-adversarial CDR.

³⁹ Peter Salem, *The Emergence of Triage in Family Court Services: The Beginning of the End for Mandatory Mediation?* (2009) 47 Family Court Review, 371.



- It is accepted that CDR is the preferred approach, that it should generally be made available to families in priority to litigation, and that litigation should be utilized only for the limited number of cases where CDR is inappropriate or impractical.
- That said, CDR and litigation are not in opposition. Both are essential for a balanced and effective family justice system. As King et al. observe:

*adversarialism and non-adversarialism are not mutually exclusive. Key non-adversarial developments sit alongside more traditional aspects of the adversarial system. Rather than being mutually exclusive opposites, we prefer to conceive of adversarialism and non-adversarial as a continuum, a sliding scale upon which various legal processes sit, with most processes combining aspects of adversarial and non-adversarial practice to varying degrees."*⁴⁰

The FJWG proposes a change in this status quo, but a change not so much in kind, as in degree. That is, we suggest that the balance on adversarial/consensual continuum should be adjusted to shift more deliberately and more fundamentally in the direction of CDR processes. This proposal is premised on two assumptions:

- notwithstanding the significant movement that has already occurred in this respect, the full potential of CDR approaches has not yet been fully exploited; and
- expanded use of CDR approaches, while not the only way, is probably the single most attainable, efficient and effective way to enhance access to family justice.

The relative use of adversarial and CDR processes

Adversarialism is a deep habit of our culture. It is a default position, an attitude that people in western cultures learn early and tend to employ quite automatically. It is embedded in our public values and reflected in our public institutions. The influence of adversarial thinking in the court system corresponds to the pervasiveness of adversarial values and attitudes in public life.⁴¹ King et al observe:

⁴⁰ *Supra*, note 36, p. 5.

⁴¹ See Deborah Tannen, *The Argument Culture: Stopping America's War of Words*, New York: Ballantine (1998)



The justice system is not the sole repository and advocate of adversarialism... It reflects cultural attitudes and norms that exist in the wider community... Adversarialism exists in the media, academia, business, politics, religion, sport and families... It is part of the argument culture where taking an aggressive, argumentative approach is seen to be important in addressing differences between people...⁴²

Research gives us some objective information about the relative measure of consensual and adversarial approaches in the family justice system. Studies from the United Kingdom and the United States suggest that “most family lawyers seek to defuse conflict, manage client expectations of what they can achieve and regularly encourage clients to settle.”⁴³ One study found that:

family lawyers consciously made an effort to reduce tension between parties, regularly encouraged parties to discuss matters and provided a significant amount of practical support and reassurance to clients, in addition to legal advice.⁴⁴

Professor John Lande reviews American research showing that family lawyers “dampen legal conflict far more than they exacerbate it and generally try to avoid adversarial actions.”⁴⁵

On the other hand, critics argue that there is a stream of family law practice that uses CDR approaches far less. This stream is characterized by lawyers who employ “an aggressive, or even adversarial, form of negotiation practice”, who are “too quick to use court processes”, and who try to force bargains using “the threat of court”.⁴⁶ Lande qualifies the American research by noting, “some contemporary lawyers act in a very adversarial manner when the stakes are high enough or when parties’ or lawyers’ adversarial motivations predominate.”⁴⁷

While this research is not Canadian, it should not be controversial to assume that family law practice styles in Canada are similarly mixed. That is, the day-to-day

⁴² *Supra*, note 36, p. 4

⁴³ *Supra*, note 36, p. 133.

⁴⁴ *Ibid*, at 134

⁴⁵ John Lande, *Revolution In Family Law Dispute Resolution*, 24 *Journal of the American Academy of Matrimonial Lawyers*, (2012) 411 at p.427, online at: www.Ssrn.Com/Abstract=2035605

⁴⁶ *Supra*, note 36, p. 134

⁴⁷ *Supra*, note 43, p.427.



practice of a majority of family law lawyers, most of the time, reflects an informed and unambiguous endorsement of the consensual dispute resolution perspective. At the same time, a significant number of lawyers practice a relatively more aggressive and adversarial style of family law.

If we consider the extent to which CDR values and processes have penetrated into the courts, the situation is somewhat similar. A recent account of American family courts describes, at least approximately, many Canadian courts:

The primary role of family courts has shifted from adjudication of disputes to proactive management of the family law-related problems of individuals subject to their jurisdiction. Thus family courts have moved from primarily “umpiring” to include a “rehabilitative” or “problem-solving” role... Under the old system, family courts were not expected to plan and manage cases, only adjudicate them. With a new therapeutic goal, judges essentially direct a process to diagnose and treat family disputes and dysfunctions in addition to managing litigation and adjudicating legal rights... In many courts, especially in larger communities, courts, lawyers, and other family professionals can choose from a range of services to help families deal with problems entering the family courts.⁴⁸

While this more or less describes the situation in a number of Canadian courts – most particularly in the unified family courts – it is certainly not what happens in all courts. Here again, we see a range of approaches. Some judges employ a managerial, problem-solving approach to family disputes, drawing on an array of family services, while other judges work under the “old system”, primarily engaging in “umpiring” in the more traditional adversarial mode, with little or nothing available by way of family services to draw on for support.

Goals for enhanced CDR

A shift towards a more fundamental integration of CDR into the family justice system and a more thoroughly consensual justice culture could be organized around three objectives:

1. To expand significantly the availability of integrated family programs and services to support the proactive management of the family law-related problems and to facilitate early, consensual, family dispute resolution.

⁴⁸ *Supra*, note 43, p.431 and 432.



2. To reduce the use of representation strategies that employ aggressive adversarial approaches and/or resort to the courts in cases where it is not needed and, correspondingly, to establish in the Bar a more universal working presumption in favour of CDR as the first option.
3. To support a broader and deeper integration of consensual values and problem-solving approaches into justice system culture.

The first of these objectives translates largely into a need for more resources. The family justice system already understands very well how to design effective programs and provide successful services to accomplish what is proposed; it is simply a matter of senior decision-makers thinking differently about resource priorities.

The second and third objectives go to institutional culture. They are premised on the belief that the shift towards CDR is far from beginning but far from over, and that there is much that can yet be achieved. Our statutes, rules of court, court forms, codes of conduct, law school curricula, models of advocacy, etc. continue to be premised, not exclusively but very substantially, on the adversarial values that the family reports advise us so strenuously to contain. To complicate matters, clients – the general public – default quite readily to adversarial postures and have a relatively limited understanding of CDR.

It is important to attend to the values and beliefs that inform our broader legal culture. As the Australian Law Reform Commission has suggested, “Significant and effective long term reform may rely as much on changing the culture of legal practice as it does on procedural or structural change to the litigation system.”⁴⁹

B. Law School Education

Is legal education preparing students to maximize their effectiveness in modern multidisciplinary, integrated and collaborative family justice systems? Canadian reports on family justice reform have not undertaken any in-depth study of this issue, but other jurisdictions have. In 2006 in the United States, the Family Law Education

⁴⁹ *Review of the Adversarial System of Litigation: Issues Paper* (Australian Law Reform Commission, 1997), online: www.austlii.edu.au/au/other/alrc/publications/issues/20/ALRCIP20.html.



Reform Project Final Report (the “FLER Report”) was published.⁵⁰ This report proposes that family law curricula prepare lawyers for “the realities of contemporary practice” by doing the following:

- “... teach law students that the family court of the early 21st century is often an interdisciplinary enterprise, where psychologists, social workers, non-lawyer mediators and others may wield extraordinary power. At times, these professionals may work as partners...In other cases, the attorney’s role is to help the client navigate the often bewildering world of mandatory mediation, mandatory divorce education, court-appointed custody evaluation, parenting coordination, and more;
- ... Emphasize the multiplicity of dispute resolution processes and treat litigation as but one alternative, useful only in a minority of cases. Students would be introduced to mediation, mediation advocacy, collaborative law, cooperative law, and advanced techniques in negotiation...
- Continue to emphasize strong grounding in the law and analytic rigor, but add a focus on competence and skills, and teach budding lawyers to be reflective and self aware in the practice of law...A family practice demands a broad – based expertise. To represent clients adequately, family lawyers must be knowledgeable in such fields as tax, contracts...real estate...as well as family systems theory, child psychology and family violence. Practitioners also need strong skills in interviewing, listening and counseling emotionally troubled clients.”⁵¹

There are aspects of this proposal that some might argue with, such as whether it is the proper function of law schools to provide students with training of this kind. The fact remains that students need – and their future clients would benefit from – a more comprehensive preparation for the complex realities of family law practice.

⁵⁰ Mary E. O’Connell and J Herbie DiFonzo, *The Family Law Education Reform Project Final Report*, (2006) Family Court Review, Vol 44, online www.onlinelibrary.wiley.com/doi/10.1111/j.1744-1617.2006.00107.x/abstract, p. 524. The project - cosponsored by the Association of Family and Conciliation Courts and the Center for Children, Families and the Law at Hofstra Law School - brought together law professors, law students, practitioners, mediators, child custody evaluator, court administrators and judges to explore what a family law curriculum should cover if its goal is to “prepare students who are well versed in the law, sensitive to legal context, and competent to serve their clients needs in an ethical manner.”(p.524)

⁵¹ *Ibid*, p. 525.



The FLER Report emphasizes that none of its suggestions "... would displace the central emphasis on analytic thinking that is a hallmark of all legal education," but the challenge it posits is "... to take family law beyond the analytic – not to leave the analytic behind – to pose additional and related problems arising from the reality of family law practice."⁵²

The FLER project ultimately generated a comprehensive framework for family law training. A similar review of family law education in Canada could support the ongoing adaptation of legal culture to the realities of family law practice while stimulating student interest in family law.

Family law courses designed and delivered along the lines recommended by the FLER Project would hopefully not be the only place in law school where students would be exposed to consensual or problem solving approaches. Ideally, CDR knowledge and skills would be available or reinforced in more than one place in law school curricula.

Recommendation 1:

That stakeholders across the family justice system, led by the law schools, collaborate on a study of family law curricula and make recommendations for changes that would better prepare students by providing them with the unique knowledge and diverse skills needed to assist children and families through the contemporary family justice system.

Recommendation 2:

That changes to the family law curriculum be accompanied by a greater emphasis on CDR skills and knowledge across the entire law school curriculum.

For family law education to be advanced in Canada, however, we first need a larger pool of academics working in this area. Over the past twenty years, family law has lost its place in most Canadian law schools, with fewer full-time professors teaching the subject and more part-time teaching by practising family law lawyers. Family law has been de-emphasized by law schools, in favour of subjects more attractive to large law firms and global practice. It is important to those working in the family justice system to have access to Canadian research and writing in family law, as well as to the latest research in other jurisdictions. It is also important that law schools encourage students to consider a career in family law after graduation, in part by

⁵² *Ibid*, p. 526.



offering a full range of courses in family law and dispute resolution within the law school.

Recommendation 3:

That Canadian law schools hire and develop more full-time professors with an interest in family law.

C. Continuing Professional Development

The range and depth of knowledge and skills proposed by the FLER Report demand, in a real sense, lifelong learning. The learning objectives identified in the FLER report, or any such similar objectives identified in any future Canadian report, should continue after law school. Continuing professional development (“CPD”) family law training opportunities should go beyond traditional, substantive family law content to support training in the following areas:

- knowledge of, and skills in the entire range of resolution processes available for family disputes;
- the dynamics of separation and divorce, particularly as they affect children including issues of power and family violence;
- effective interviewing, listening and communication;
- the interdisciplinary nature of family law practice; and
- informed and effective referral to non-legal family services.

Recommendation 4:

That Law Societies recognize the unique knowledge and skills needed to practice family law by accepting training in these areas as meeting ongoing obligations for continuing professional development; and, that continuing legal education organizations develop courses to support the full range of skills needed by family law lawyers.



D. Professional Codes of Conduct, Ethical Guidelines & Best Practices

Legal scholar Leonard Riskin speaks of the adversarial perspective embedded in the traditional lawyer's "philosophical map".⁵³ Contemporary family law practice requires that the family lawyer's philosophical map be redrawn so that she sees herself first and foremost as a conflict manager and problem solver. Family law lawyers should have expertise not only in substantive family law, litigation procedures, and traditional advocacy, but equally, in the theory and practice of CDR and conflict resolution advocacy.

The factors that make family law a unique area of practice dictate that family law lawyers should have a range of expertise that is broader than that of non-family lawyers. They should possess a specialized understanding not only of substantive family law, litigation procedures, and traditional advocacy, but also, and equally, in the theory and practice of CDR. The traditional role of champion and zealous advocate is too restricted for the unique and diverse demands of this particular area of practice. Family lawyers must be as knowledgeable and skilled in dialogue as in debate while embodying the values of what Professor Julie Macfarlane calls "conflict resolution advocacy." Macfarlane uses this concept to reconcile the tensions inherent in a role that prefers settlement but assumes both "fighting" and "settling":

Here is the heart of all the tensions that arise in a model of conflict resolution advocacy. The new lawyer must learn how to wear the two hats of fighter and settler and understand when to take one off and put the other on... or even when hats need to be worn at the same time (for example a last ditch settlement meeting before initiating litigation proceeding to trial).⁵⁴

Even family lawyers who might choose to restrict their practices to the smaller number of cases where only adversarial skills are appropriate should have a sound appreciation of the competencies and the methods of the conflict resolution advocacy.

While law societies across Canada have already made some regulatory adaptations to these relatively new demands upon practitioners,⁵⁵ further work could be done to

⁵³ Leonard Riskin and James E. Westbrook, *Dispute Resolution and Lawyers*, 2d ed. (West Group, 1997).

⁵⁴ Julie MacFarlane, *The New Lawyer*, (UBC Press, 2008), p. 119.

⁵⁵ For example, rules that accommodate and govern lawyers expanding role as mediators and collaborative practitioners and unbundling.



ensure that codes of conduct and ethical guidelines endorse the values and support the behaviours required by contemporary family law practice. A Law Society of British Columbia Task Force on ADR observed, with respect to civil law generally, that the professional expectations enshrined in existing ethical guidelines and codes of professional do not entirely accommodate the consensual perspective:

Lawyers are now using these processes, whether called “participatory” or “alternative” or “consensus-based” — within a framework of guidelines written largely for adversarial practice. With the growth of alternative processes, existing rules and guidelines do not speak to all of what now constitutes practice for many lawyers.⁵⁶

Recommendation 5:

That Law Society regulation of family lawyers explicitly address and support the non-traditional knowledge, skills, abilities, traits and attitudes required by lawyers to optimally manage family law files.

Various jurisdictions have responded to the unique demands of family law practice by articulating best practices guidelines specifically for family law lawyers, including for example, the Family Law Counsel and the Family Section of the Law Council of Australia, the Law Society in the United Kingdom, the American Bar Association Section of Family Law, and others.⁵⁷

The British Columbia branch of the Canadian Bar Association has recently articulated best practice guidelines for family law lawyers. The matters addressed in such guidelines include, for example, that:

Lawyers should keep their clients advised of, and encourage their clients to consider, at all stages of the dispute:

- a. the risks and costs of any proposed actions or communications;*
- b. both short and long term consequences;*
- c. the consequences for any children involved; and*
- d. the importance of court orders or agreements.*

Lawyers should advise their clients that their clients are in a position of trust in relation to their children, and that

⁵⁶ Law Society of BC, *Alternative Dispute Resolution Task Force Report*, (May 4, 2007), p. 12

⁵⁷ *Supra*, note 36, p.136.



- a. it is important for the client to put the children's interests before their own; and*
- b. failing to do so may have a significant impact on both the children's well-being and the client's case.*⁵⁸

Recommendation 6:

That the family law Bar in each jurisdiction review and consider adopting guidelines similar to those promulgated by the BC branch of the Canadian Bar Association for lawyers practicing family law.

E. Public Understanding of Dispute Resolution

As noted earlier, the adversarial orientation of the court system is part of a broader adversarial perspective that informs our entire social structure. As such, the broader culture contributes to the resilience of adversarial attitudes in family law.

Accordingly, any effort to shift the culture of the justice system should include an effort to enhance public understanding of collaborative values and CDR procedures.

The media play a powerful role in perpetrating the narrow identification of the justice system with the courtroom and the assumption that dispute resolution is always a matter of trial by combat. While such influences are formidable and difficult to offset, it is critically important for civil society that the public better understand the justice system and the full range of dispute resolution options the system offers.

Recommendation 7:

That ministries of justice, Bar associations, law schools, mediators, collaborative practitioners, PLEI providers and – to the extent appropriate – the judiciary, contribute to and advocate for enhanced public education and understanding about the nature of collaborative values and the availability of CDR procedures in the family justice system.

F. Array of Dispute Resolution Options

It is probably useful to make explicit what is implied by this entire discussion: that the full range of existing dispute resolution options should be readily accessible to

⁵⁸ Canadian Bar Association, BC Branch, *Best Practice Guidelines for Lawyers Practicing Family Law*, online: www.cba.org/bc/bartalk_11_15/08_11/guest_dundee.aspx.



families. The concept of the “multi-door courthouse” was originally articulated in 1976 by Harvard Law Professor Frank Sander⁵⁹ and since that time has been the basis for reform in many jurisdictions. We endorse the notion of a multi-door courthouse where a wide range of processes and services are not only available, but are also accessible to help people resolve their family law problems.

Recommendation 8:

That the family justice system offer an array of dispute resolution options to help families resolve their disputes, including information, mediation, collaborative law, parenting coordination, and adjudication.

G. Participation in a CDR Process

There is now sufficient experience with family law mediation and collaborative practice, both in Canada and in other jurisdictions, to confidently assert that, with the appropriate support and protections, they are a safe, fair and efficient way to resolve many family disputes. The fact that they are more affordable and better adapted to the needs of most separating families is behind the many reports that have recommended using them more. As well, they are widely experienced as “user friendly” and participants tend to report high rates of satisfaction.⁶⁰ Yet, rates of uptake are not as high as might be expected. As noted in the BC Family Justice Reform Working Group Report:

There was once an expectation that if mediation and other “alternative dispute resolution” (ADR) options were simply made available, people would recognize their advantages and seek them out, rather than choose to go to court. This has not happened to the extent expected.⁶¹

Reasons for this include, but are not limited to:

- As the BC report goes on to observe, “although more and more families are aware of ADR, public awareness of these options still competes with a lifetime

⁵⁹ Address by Frank E.A. Sander at the National Conference on the Causes of Dissatisfaction with the Administration of Justice (April 7-9, 1976), reprinted in Sander, *Varieties of Dispute Processing*, 70 FRD, 111 (1976).

⁶⁰ Bobby McAdoo and Nancy A Welsh, *Look Before You Leap and Keep On Looking: Lessons From Institutionalization Of Court Connected Mediation*, Nevada Law Journal, Vol. 5:399 at 400, online: www.ssrn.com/abstract=1910172

⁶¹ *Supra*, note 10, p. 39.



of exposure to the court system.”⁶² Put another way, the inertia of doing things the way they have always been done is a powerful force.

- The court process continues to be the central framework, and litigation the primary format around which family dispute resolution is organized. That is, in many respects CDR processes are add-ons to a more fundamentally adversarial framework.
- For many litigants, including for example self represented parties, it is difficult for services such as mediation, for which the parties often have to pay, to compete with “free” services like the courts.

Participation in CDR processes (specifically, either mediation or collaborative practice) should be mandated by statute or court rule. Mandatory participation here means that participation in one session is required before the first contested step in an action is taken. We have considered the possible objections to mandatory participation and have concluded that they can be addressed. These include:

- CDR is, by definition, a voluntary process - Agreement continues to be fully voluntary; it is only participation in a single mediation that is mandated.
- Mandatory CDR impairs access to justice by increasing delay and cost and by impeding access to the courts - Rates of settlement and user satisfaction in mediation are sufficiently high to conclude that it is an effective and justifiable investment of time and resources. Mandatory exposure to a CDR process facilitates early resolution of the majority of participating cases. Further, where cases fail to resolve in mediation, typically the facts are better understood and the issues are narrowed in a way that facilitates earlier negotiated resolution. In any event, many family justice systems already mandate out-of-court events within the litigation stream and outside the litigation stream.
- CDR may be dangerous where relationships are characterized by violence or power imbalance - Any system of mandatory CDR must fully take into account the realities of power imbalance and family violence in the context of family breakdown. It is well recognized that mandatory CDR could put vulnerable spouses at risk, and that the goal of encouraging early out-of-court resolution by agreement cannot be implemented at the expense of the goals of ensuring

⁶² *Ibid*, p. 39.



safety, security and well-being and reaching fair agreements. Necessary and appropriate safeguards include:

- recognizing a broad definition of family violence which includes, among other things, psychological or emotional abuse, controlling behaviours and direct or indirect exposure of the child to family violence;
- Requiring, in every case, screening to assess for violence to determine whether or not all family members would be safe if CDR were to proceed, or whether some other process or service is indicated;
- in cases where danger is not initially apparent, imposing ongoing duties on mediators and other justice system professionals to monitor throughout the process for signs of violence and power issues;⁶³
- creating exemptions for cases involving urgency or danger, and allowing a qualified dispute resolution professional to identify those cases that are not appropriate to proceed to CDR – and doing so without requiring that the purpose for the exemption be disclosed;
- ensuring that judges, lawyers, mediators and other neutrals involved in a CDR process are educated about family violence.

In framing the larger context for this recommendation it should be noted that there have been calls for mandatory mediation in Canada from a variety of sources⁶⁴ and that mandatory family law mediation has been the rule in a number of American jurisdiction since the early 1980s and is now the rule throughout Australia.

Mandatory family law mediation processes could not be implemented without ensuring the availability of qualified professionals to conduct the mediations. Mediation is not a regulated profession and, in a voluntary system, parties are

⁶³ See Noel Semple, *Mandatory Family Mediation and the Settlement Mission: A Feminist Critique*, Canadian Journal of Women and the Law, Volume 24, Number 1, 2012, pp. 207-239. Available online at: www.ssrn.com/abstract=1929974 and Lene Madsen, *A Fine Balance: Domestic Violence, Screening and Family Mediation* (2012), 30 Canadian Family Law Quarterly, pp. 343-365.

⁶⁴ Justice Jennifer Mackinnon of the Ontario recently recommended that “Prospective family litigants should attend at least five hours of mediation or a joint settlement meeting of the same duration officiated by a neutral evaluator prior to issuing an application.” See Justice Jennifer Mackinnon, Superior Court of Justice (Ontario), *Family Law Rules: “Fixing a Hole” and Other Cost Effective Reforms*, 21st Annual Institute of Family Law (April 2012), p. 5. The Chief Justice of Ontario called for mandatory mediation in 2010. The British Columbia Report Of The Family Law Reform Working Group called for mandatory CDR in 2005.



generally free to choose any mediator. In a mandatory system, however, governments must take some steps to ensure that the services are delivered by properly trained professionals with some measure of oversight. Also, funding for CDR services is essential if they are to be sincerely asserted as a legitimate priority.

Recommendation 9:

That before filing a contested application in a family matter (but after filing initial pleadings), parties be required to participate in a single non-judicial CDR session. Rules should designate the types of processes that are included and ensure they are delivered by qualified professionals. Appropriate safeguards should be in place and exemptions should be available where the parties have already participated in CDR, for cases involving family violence, where there is real risk of an unfair agreement or where it is otherwise urgent for one or both parties to appear before the court. Free or subsidized CDR services should be available for those who cannot afford them.

8. Recommendations Related to Services and Administration

A. Early Front-end Family Services

Front-end services typically include:

- assessment;
- triage;
- linkages with and referral to external family-serving agencies;
- legal information, parenting and children’s information programs;
- self-help resources;
- CDR services;
- legal advice; and
- financial advice.

Many reports emphasize the importance of early, front-end services for separating families. It is widely recognized that the provision of services early in a dispute helps



to minimize both the cost and duration of the dispute and thus to mitigate the possibility of protracted conflict and the corresponding harm to family relationships.

The more that families can effectively take responsibility for the resolution of their own disputes, the better. The reports emphasize the importance of helping families to take as much responsibility as possible for the resolution of their own disputes. This push toward family autonomy with respect to dispute resolution is balanced by a corresponding public obligation to ensure that these families are given appropriate help in doing so.

Legal scholars Robert Mnookin and Louis Kornhauser observe about the role of the formal family justice system:

We see the primary function of contemporary divorce law not as imposing order from above, but rather as providing a framework within which divorcing couples can themselves determine their post dissolution rights and responsibilities.⁶⁵

To the extent that they can do so safely and appropriately, families should be able to exercise self-determination and self-help in resolving family problems. The place for this help is at the front-end of the justice system. We concur with the perspective taken by the BC Family Justice Reform Working Group in 2005 and its support for:

... a fundamental shift of resources and services to the "front-end" of the family justice system, to provide coordination and support for the broad range of services now being provided in the public and private sectors, as well as for enhanced access to consensual dispute resolution processes.⁶⁶

In this context, we reiterate our earlier argument that this shift requires that resources be rebalanced within the civil justice system so that we spend less on supporting litigation and more on those services and processes that will help families to resolve their family law problems quickly and affordably.

Recommendation 10:

That the provision of early, front-end services in the family justice system be expanded. This means:

⁶⁵ Robert H. Mnookin and Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, *The Yale Law Journal*, Vol. 88, No. 5, Dispute Resolution (Apr., 1979), pp. 950-997

⁶⁶ *Supra*, note 10, p. 21.



- **making front-end services highly visible, easy to access and user-friendly, as has been done through initiatives such as the Family Law Information Centers in Alberta and Ontario, Justice Access Centres in British Columbia, and les Centres de justice de proximité in Quebec;**
- **coordinating and integrating the delivery of all services for separating family whether provided by lawyers, governments or non-government organizations; and**
- **allocating new resources and/or rebalancing and reallocating existing justice system resources in support of expanded front-end services.**

B. Information services

There is a broad consensus in the literature that early information is enormously helpful to separating families, especially - but not only - where spouses are unrepresented. The separation and restructuring of the family is a multi-dimensional and complicated task. Important information includes:

- the impacts of separation and conflict on children;
- how to parent when going through separation and divorce;
- what resources are available to help manage legal as well as non-legal problems;
- what legal issues arise;
- what the law says about parenting, support and property division;
- options for responding to problems relating to violence, finances or housing;
- what procedural options are available to resolve legal issues; and
- how procedural options are accessed, how long they take and how much they cost.

Considerable family law information is now available through online and print materials, workshops and courses, in-person government supported information programs, from court staff and in-person and over the phone from both private and publicly funded lawyers. However, it is not always easy for people with family justice problems to access the information they need. The Law Commission of Ontario found there may actually be too much information available and it may not be as effective as



it might be. As well, online information is hard for many individuals to access.⁶⁷ In this same vein, the Working Group on Access to Legal Services observed:

*There is little or no coordination of either the content or the way in which the public can access this information. There is considerable duplication, an overwhelming amount of information, and no way for people to know whether they are accessing the best source of information for the problem they are trying to deal with.*⁶⁸

Research has shown that information and self-help services that are supported by person-to-person assistance significantly improve case outcomes. Facilitated self-help is particularly important for the many people who find print resources challenging to use.⁶⁹

The benefits of front-end information, including “live” help, have been endorsed in the broader civil context by the other National Action Committee Working Groups. The FJWG finds that these recommendations align with its own conclusions.

Recommendation 11:

The Family Justice Working Group supports recommendations made by other NAC Working Groups with respect to making early information available to citizens, and supports the following as particularly useful for families:

- **information that is accessible, in plain language, neutral and accurate;**
- **information that responds to the needs of self-represented litigants; and**
- **information that is available in a variety of forms including in-person (through law information centres and phone lines), online, and printed guides.**

C. Mandatory Information Programs

In a number of jurisdictions, people commencing a family law proceeding are required to attend some form of information session. BC, Alberta, Saskatchewan,

⁶⁷ Law Commission of Ontario, *supra*, note 10, p. 8-10.

⁶⁸ *Report of the Access to Legal Services Working Group* (Action Committee on Access to Civil and Family Justice, May 2012), p. 6, online: www.cfcj-fcjc.org/?q=node/159

⁶⁹ *Middle Income Access to Civil Justice Initiatives: Background Paper* (University of Toronto Faculty of Law, 2011), online: www.law.utoronto.ca/visitors_content.asp?itemPath=5/1/18/0/0&contentId=2113 pp. 31-34.



Manitoba, Quebec and Nova Scotia provide mandatory parenting after separation programs. In Quebec, before proceeding with any contested application involving children, the parties must meet with a mediator who provides information about the mediation process.

In Ontario, upon filing an application, parties must attend an information session about the effects of separation and divorce on parties and children, the nature of court process, and alternatives to litigation. In BC, parties in selected Provincial Court registries must attend an information meeting with a Family Justice Counsellor before proceeding to court. In Alberta, unrepresented parties filing a contested application for an order under the Family Law Act must meet with a caseflow manager who, among other things, informs parties about the process and helps them to explore options.

Beyond the obvious value of orienting and helping to organize the parties, these programs are premised on two ideas. The first is that information is essential to a fair resolution. The second is that information is a dispute resolution tool, or put in the negative, misinformation can generate and prolong disputes. The approaches taken by different information programs in different provinces vary in terms of what information is delivered, who delivers it, when it is delivered, where it is delivered, and who must receive it, but the underlying motives and the general objectives are similar. Early information has been demonstrated to be sufficiently effective in reducing conflict and expediting resolution that many provinces have elected to make it mandatory.

Recommendation 12 :

Except in cases of urgency and consent orders, that information sessions be mandatory for self represented litigants and all parents with dependent children. The session should take place as early as possible and before parties can appear in court. At a minimum, the following information should be provided:

- **how to parent after separation and the effects of conflict on children;**
- **basic legal information;**
- **information about mediation and other procedural options; and**
- **information about available non-legal family services.**



D. Triage⁷⁰

In the legal context, the triage function refers to the initial and ongoing assessment of a case to determine such matters as degree of urgency, pressing needs, and the most efficient and appropriate path to resolution. Family law cases are highly dynamic and as such, the need for triage is ongoing. Triage in the family justice system typically includes:

- an early and ongoing assessments of each party's unique situation and needs;
- making effective referrals to appropriate and proportionate services;
- information about available family services;
- identifying a pathway to resolution; and
- reducing the possibility of gaps and overlaps in services by serving as a point of integration for the legal and non-legal family services in the justice system and in the broader community.

Many reports have recommended that some form of triage be used to assess the needs of people entering the family justice system in order to help steer them through to the most appropriate services.⁷¹ This service creates efficiencies for litigants in the face of the daunting substantive and procedural complexities of the justice system. Presumably, it also creates efficiencies in the administration of justice by helping to reduce duplicative, ineffective or inappropriate use of registry staff and the courts.

Recommendation 13:

That triage services, including assessment, information and referral, be made available to people with family law problems.

E. Legal Advice, Legal Aid, Paralegals and Representation

Access to Legal Services

⁷⁰ Note that the idea of triage is more fully developed at Recommendation 4.1.2 (page 14) of the report of the Action Committee's Prevention, Triage and Referral Working Group.

⁷¹ For example, many of the reports cited at note 10.



Lawyers have been the traditional gatekeepers to the family justice system and remain the entry point to the system for many separating families. Access to lawyers and to legal advice is an important element of access to justice. Cuts to legal aid budgets over the last decade have generally resulted in a steady decline in the funding for family cases. In some cases, family legal aid is cut directly. Even where reductions are not targeted, family legal aid can lose out when limited funds are redirected to meet the constitutional imperatives of representation in criminal cases. While criminal legal aid clients are overwhelmingly men, family legal aid clients are mostly women.⁷² This means cuts to family legal aid have a disproportionate effect on women and children, particularly those who are most vulnerable (e.g. aboriginal, immigrant and disabled women).

Financial eligibility criteria for legal aid have not been adjusted upwards over time, steadily restricting legal aid to the poorest of the poor. As a consequence, family legal aid is simply not available to large numbers of the "working poor" even though there is virtually no prospect that they could afford representation. The position of the middle class is really no better. Even middle-income levels typically cannot support the cost of any significant amount of legal representation.⁷³

The sharp decline in family legal aid budgets, the high cost of legal services and the rise of self-help culture have all contributed to the dramatic increase in the number of parties attempting to represent themselves in family cases.

Legal Aid

The FJWG supports an increase to legal aid in family matters. This support is premised on the assumption that legal aid includes, but is not limited to, legal representation. Our vision of family law legal aid includes:

- full legal representation;
- modified forms of legal representation such as duty counsel and limited scope retainers (also known as "unbundled" services);
- online, print, telephone, in-person information and self-help resources; and

⁷² BC statistics from 2004/05 show that woman made up 77% of family legal aid recipients but only 17% of criminal legal aid recipients. See Alison Brewin, *Legal Aid Denied: Women and the Cuts to Legal Services in BC*, Wescoast LEAF and Canadian Centre for Policy Alternatives (September 2004), p. 6.

⁷³ See generally: Michael Trebilcock, Anthony Duggan and Lorne Sossin, *Middle Income Access To Justice*, (University of Toronto Press, 2012).



- the use of properly trained and supervised paralegals or other justice system workers to help people to resolve family law problems.

Ideally, every province would provide a continuum of legal aid services ranging from full representation through to integrated public legal education services. The legal aid plans in some provinces are restricted to legal advice and representation, although all would routinely refer clients to information sources where these are available.

The FJWG also supports the expansion of legal service providers. As the Access to Legal Services Working Group observed:

Assistance with legal problems can come from a variety of sources. Paralegals, law students and articling students, as well as a variety of non-lawyers, particularly those who have specialized expertise, can provide effective assistance with a range of legal matters. There is a vast array of organizations and individuals who provide legal assistance and advice although they are not licensed or regulated by any law society.

Some law societies specifically exempt from regulation a variety of non-lawyer organizations and individuals who provide legal advice. For example, in Ontario, the Law Society Act exempts a number of legal service providers, including persons working in other regulated professions and employees or volunteers with trade unions who represent a member before a tribunal. The law society's bylaws exempt a further number of groups including Aboriginal Court Workers, legal clinic or student legal clinic staff and volunteers, employees of not for profit organizations and persons who act for friends or family, among others. The law society also has broadened the role of paralegals and law students, especially articling students.

The activities and initiatives of the LSUC demonstrate how law societies are increasingly recognizing that non-lawyers have a role to play in assisting people with their legal problems.⁷⁴

A recent evaluation of family services offered by the BC Legal Services Society establishes:⁷⁵

⁷⁴ *Supra*, note 66, p. 10.



- the value of modified forms of legal advice and use of trained non-lawyers in helping people resolve family disputes; and
- the fact that family law disputes very often involve "non-legal" dimensions such as housing, income and employment, health, and mental health means that legal and non-legal services for family should be coordinated and integrated at the front-end of the justice system.

Recommendation 14:

That legal aid be defined, for the purpose of both funding and service delivery, as consisting of a broad range of services and service providers, including:

- full legal representation, partial representation, duty counsel, advice counsel, summary advice, brief services and limited scope retainers;
- legal information and self help services, including guided self help;
- mediation, parenting coordination, counselling; and
- programs or services linking or coordinating legal help with non-legal services.

Recommendation 15:

That funding for family law legal aid be increased.

Recommendation 16:

That professional Codes of Conduct and court rules in all jurisdictions be reviewed to authorize and support the use of limited scope retainers.

Recommendation 17:

That jurisdictions expand reliance upon properly trained and supervised paralegals, law students, articling students, and non-lawyer experts to provide a range of services to families with legal problems.

⁷⁵ Focus Consultants, *An Evaluation of Family Legal Services of the Legal Services Society*:

Final Report, Legal Services Society, May 1 2012



Recommendation 15 speaks explicitly of the importance of new funding to support legal aid. The need for new resources however is not limited to legal aid. It is implicit in many of the recommendations made both in this part and throughout this report.

In part 3 of this report we suggest that family law is the "poor cousin" in the justice system. We note that despite high rates of engagement with the family justice system on an individual basis, the general public pays relatively little attention to family law and that the media focus, and therefore political attention, tends to be much more on criminal law. A number of provinces have seen their family law legal aid budgets shrink, some considerably, over the past several years.

Many factors argue for the importance of an effective and accessible family justice system: the sheer number of families who need the system, the individual and social costs associated with an inaccessible justice system, the potential impact of poorly managed conflict on children, and so on.

The utility of a great many of the programs and services recommended in this report has already been established on the ground. The experience of the last 25 years has shown that they respond to the problems that arise on separation in a much more constructive and effective way. A significant part of closing the "implementation gap" is ensuring that these programs and services are adequately funded.

Recommendation 18:

Recognizing the scale of unmet family law need, the individual and social cost of failing to meet that need and the existence of programs and services that have demonstrated their value to separating families, that funding be significantly enhanced for all family justice programs and services.



9. Recommendations Related to Court Organization, Procedures & Substantive Law

A. Unified Family Court

Many of the recommendations in this report involve proposals for systemic and cultural changes in the way we resolve family conflicts. Practically, it is very difficult to realize the full benefits of those changes without the creation of unified family courts in all parts of Canada.

Canada's first unified family court in Hamilton-Wentworth just celebrated its 35th anniversary this year. Unified family courts are now available in much of Canada, but not all of Canada. Not a new idea, not a radical idea, but one that has not yet reached its full potential.

What is meant by the short-hand expression “unified family court”? First, it is a single court that has legal authority to hear *all* family matters. Second, it is a specialized court, with judges and staff who only deal with family matters. Third, it is a court that provides a range of dispute resolution methods that reflect the distinct needs of families and children. Fourth, it operates not just as a court of law, but also as one of the hubs in a network of legal, community and social services for families and children.

Legal authority

Because of Canada's *Constitution Act*, some family law matters can only be decided by our superior courts, notably property claims by married or common-law couples, divorce and parenting and support claims following divorce. Most other family law matters can be dealt with by provincially-appointed judges, like non-divorce parenting and support claims, parenting and support claims by common-law couples and unmarried parents, adoptions, child protection proceedings and domestic violence protection orders. This fragmented legal jurisdiction confuses spouses, partners and parents, who will often have to go to more than one court to resolve their family disputes, and makes it difficult for the justice system to respond consistently and coherently to family disputes.

Because of those same constitutional provisions, the creation of a single unified family court has to take place at the superior court level in Canada, as a distinct “family division” of the superior court. The creation of a “family division” requires the cooperation of both federal and provincial governments, as the federal



government must appoint the judges and the provincial government must provide the court and related social services.

Specialization

Modern family law requires specialized knowledge, interpersonal skills and dispute resolution methods. A unified family court consists of judges, professionals and staff who have the experience, aptitude and commitment to work with families and children. A specialized court is best suited to handle the volume and complexity of the work, while at the same time experimenting and innovating with new services and methods of dispute resolution.

A Range of Dispute Resolution Methods

The main theme of this report is the need for culture change and, as much as possible, a further shift away from the adversarial process. Inevitably, some disputes will wind up in front of a judge in a courtroom for adjudication at a hearing or trial. Our object is to reduce their numbers, through providing a wide range of dispute resolution methods, before any family member darkens a courthouse door and even afterwards once they have to go through that door. Inside the courthouse, a unified family court can maintain a range of non-adversarial methods, thanks to the commitment of specialized judges and court staff. In this respect, unified family courts differ significantly from most other civil courts. The difference starts with the intake procedures at unified family courts, which must differ from the “passive registry” approach of civil courts generally. At the unified family court intake stage is where the necessary triage and referrals take place. And, for those who enter the court process, at the “front end”, there is lots of room for non-adversarial procedures and work by non-judicial professionals. Family court judges should be reserved for those disputes that require a judge.

Services

What also makes a unified family court different from other courts is its operation as one of a number of hubs within the family services system. Sometimes the family court is the first place separating parents go, sometimes it’s the last place. Triage and referral at the intake stage is a critical part of the process, to be conducted by skilled professionals with good knowledge of the services and functions of various agencies within the broader system. Family law matters require a distinctive mixture of legal and social services, and both must be available before and after disputes wind up in the court system. The modern approach to family law is inter-disciplinary and that can only happen when a range of community and social services are available, inside and outside the justice system. Again, a unified family court can take a consistent and



coherent approach towards its place within this broader system, unlike fragmented or non-specialized courts.

The Current Situation

Despite these clear advantages, we still do not have unified family courts in every part of Canada. There are now unified “family divisions” within the superior courts in the following provinces, going from west to east: all of Saskatchewan, all of Manitoba, about 40 per cent of Ontario, all of New Brunswick and Prince Edward Island, 60 per cent of Nova Scotia and 60 per cent of Newfoundland and Labrador.

In the rest of Canada, there are no unified family courts: all of British Columbia, Alberta and Quebec, all of the Territories, most of Ontario, and much of Nova Scotia and Newfoundland and Labrador. In each of these areas of Canada, family matters are still divided between two levels of courts.

Recommendation 19:

Recognizing that each jurisdiction would have its own version of the unified court model, to meet the needs of families and children in each jurisdiction, that the two levels of government cooperate in the completion of unified family courts for all of Canada.

In making this recommendation we see the following principles as essential to the design of a unified family court: unified legal jurisdiction, specialized courts, simplified rules and procedures, a range of dispute resolution methods, and ancillary, integrated legal, community and social services. We see the following principles as essential to its implementation: accessible to all areas of the province (province-wide implementation) and adequate resources for all necessary services.

Distinctive and Simplified Procedures

One risk of unifying family jurisdiction in a superior court is that family law procedures will become more formal, more paper-dominated, slower and more expensive. Often lost in unification are the benefits of the provincial family courts – simpler forms, stripped-down procedures, more orality, more informality and, ultimately, more user-friendly.⁷⁶ It is critical that a unified family division of a superior court have its own specialized family rules, its own forms, and its own dispute resolution processes that reflect the distinctive needs and limited means of

⁷⁶ In Quebec, family matters, other than child protection, are heard in the Superior Court.



family law participants. Their needs are not the same as those engaged in civil matters generally, as we have demonstrated earlier in Part 5, the Unique Nature of Family Law.

Recommendation 20:

That a unified family court retain the benefits of provincial family courts, including their distinctive and simplified procedures, and that it have its own simplified rules, forms and dispute resolution processes that are attuned to the distinctive needs and limited means of family law participants.

B. Court Procedures

Simplified procedures

Even in the absence of a unified family court, there are many family law disputes that do not require the “full meal deal” of family law procedure. Many family property cases do not involve much property. For those with lower incomes, child and spousal support can be resolved more simply, and more quickly. Even with distinctive family law procedures, there is still a great need for proportionality in smaller and more limited family law disputes. Simplified procedures could significantly reduce the cost of family law dispute resolution, thereby reducing legal fees for some clients and legal aid costs for others.

Recommendation 21:

That family courts adopt simplified procedures for smaller or more limited family law disputes.

Interactive simplified forms

Court forms serve a critical function for self-represented family litigants in their efforts to navigate the system. These users may never look at the court rules, but they will use the forms, along with self-help resource, to guide them through the process. Family courts in many jurisdictions have moved away from using traditional narrative pleadings in favour of simplified forms with check boxes and fill-in-the-blanks questions that allow limited space for exposition.

Ontario has utilized interactive technology - also widely used in the United State – to allow users to generate court forms simply by answering a series of online questions,



often supported by the inclusion of pop-up instructions. Upon completion, software organizes the answers given and enters it onto the appropriate form.

Recommendation 22:

That the use of simplified, interactive court forms accompanied by easy to follow instructions be expanded.

Specialized judges

A number of reports have identified the need for judges in family matters to have specialized skill, knowledge and interest.⁷⁷ The qualifications sought in a family court judge include:

- expertise in substantive and procedural family law;
- willingness and ability to bring strong dispute resolution skills to bear on cases;
- training in and sensitivity to the psychological and social dimensions of family law cases (in particular, family violence and the impact of separation and divorce on children); and
- awareness of the range of family justice services available to the families appearing before them.

The most effective way, albeit not the only way, to ensure judges meet these criteria is to appoint family judges with extensive experience in family law practice. A recent op-ed in the Vancouver Sun noted that of the 31 federal judicial appointments in BC since 2009, only two had practiced family law. This increased the complement of judges on the court with family law background to 5, or less than 5% of the total court, a number seriously out of proportion to the number of family law cases in the court.⁷⁸

⁷⁷ For example, Mamo, et al, BC Justice Reform Working Group, Law Commission of Ontario, all cited at note 8.

⁷⁸ Marjorie Griffin Cohen and Donna Martinson, *Supreme Court of B.C.: Who's the judge?* Vancouver Sun, October 22, 2012, online at: www.vancouversun.com/technology/Supreme+Court+judge/7427983/story.html. The article also points out that of the 31 appointees, only 5 were women and only 1 was not Caucasian.



While we support appointing family lawyers to hear family cases, we also support the appointment of lawyers who do not come from a family law background, but are willing to build the specialized skills and knowledge necessary to work in this area. An added benefit of specialized judges is that they are well placed to provide needed institutional leadership for family justice reform.

Where there are no unified family courts, assigning specialized judges can be logistically challenging, particularly in smaller communities. Where those challenges are insurmountable, generalist judges hearing family cases should receive special training on these issues.

Recommendation 23:

That specialized judges be appointed to hear family cases and that these judges have, or be willing to acquire:

- **substantive and procedural expertise in family law;**
- **willingness and ability to bring strong dispute resolution skills to bear on family cases;**
- **training in and sensitivity to the psychological and social dimensions of family law cases (in particular, family violence and the impact of separation and divorce on children); and**
- **awareness of the range of family justice services available to the families appearing before them.**

One judge, one case

Having one judge hear all pre-trial matters in a given family case is widely accepted as ideal. This practice brings consistency and continuity to files, allowing courts to deal more efficiently with cases and bringing greater accountability to the parties. Again, geography can make the universal application of this approach very challenging. However, we endorse the notion that, wherever possible the same judge manage and preside over all pre-trial motions, conferences and hearings in a family law case. If the case is not resolved during the pre-trial process a different judge should conduct the trial. This approach is particularly beneficial in high conflict cases.

Recommendation 24:

That one judge preside over all pre-trial motions, conferences and hearings in family cases.

File Management and Problem Solving



As we have discussed, we have a hybrid justice system where both adversarial and consensual values are brought to bear on family disputes. Part of what needs to be done at the front end of a family case is to identify the legal issues, ensure each party has full and accurate disclosure and provide advice on legal rights and obligations. Rules of court authorize pleadings and define procedures sufficient to facilitate completion of these important tasks.

A general tendency exists, once pleadings are filed and the issues have been framed as competing rights, to proceed to manage the dispute as a potential trial. That is, procedurally, the dispute is put on a track toward trial. It is treated “as if” it will go to trial even though counsel know that the great probability is that it will resolve short of trial either through direct negotiation or a CDR process. In fact, the odds that it will actually go to trial are extremely low.⁷⁹

The difficulty with this approach is twofold:

- settlements often occur very late in the process, in close proximity to trial, after considerable time and resources have been expended by the parties (and by the courts); and
- working within the litigation framework, even while making use of CDR approaches, runs the risk of making the process more adversarial than it needs to be and of polarizing the parties more than is necessary.

The alternative strategy is commonly described as the “problem solving” approach⁸⁰. Problem solving will typically involve the front-end steps of identifying the legal issues, ensuring each party has full and accurate disclosure and providing legal advice; but at that point the parties neither assume that the matter will be litigated nor act as if it will go to trial. Rather, they step back and analyze the situation not as a legal issue to be litigated but as a problem to be solved. The problem solving approach involves a different way of thinking about and managing conflict. King et al. suggest that a lawyer utilizing a problem solving approach must go beyond the rights-based analysis to fully consider the needs, interests and goals of the client from a number of perspectives including legal, economic, social, psychological, political and

⁷⁹ Family law matters are rarely resolved by trial. In the British Columbia Supreme Court in 2011, for example, there were 12,759 family law filings and 226 family trials (a trial rate of 1.8%). see Supreme Court of British Columbia 2011 Annual Report, online at www.courts.gov.bc.ca/supreme_court/about_the_supreme_court/annual_reports/.

Note that child protection matters in British Columbia are heard in the Provincial Court.

⁸⁰ See for example Alex J. Hurder, *The Lawyer's Dilemma: To Be Or Not To Be A Problem-Solving Negotiator* (2007) *Clinical Law Review*, vol. 14 at p.253



moral.⁸¹ It is as if the lawyer, after completing an initial rights-based evaluation of the case, pauses before the multi-door courthouse and considers what other kinds of analysis and what other procedural options should be explored before the path to resolution is selected.

The CBA Systems of Civil Justice Task Force linked the problem-solving approach to enhanced access to justice. It observed that:

... Achieving a multi-option civil justice system will require a basic change in orientation on the part of many lawyers, judges, court administrators, educators and clients... The traditional approach to litigation has not emphasized problem-solving. Rather the adversarial aspects of the system not only shape but permeate the entire approach to dispute resolution...⁸²

This "basic change in orientation" is well underway in the family justice system, but the FJWG believes that there is still room to explore the extent to which adversarial values influence family court rules, file management and dispute resolution strategies.

Recommendation 25:

That court rules committees, justice policy analysts and court administrators review legislation, rules, procedures and administrative mechanisms for ways to encourage a broader problem-solving approach to dispute resolution, especially in early stages, while minimizing the predisposition to manage all family issues as if they will be resolved at trial.

Pre-trial management of cases

Case management has been strongly endorsed by the Court Process Simplification Working Group. We believe that aggressive pre-trial management is particularly important for the fair and efficient resolution of family cases. However, not all cases required the same degree of management and not all cases should be put on the same procedural track once they enter the court process. Instead, cases should be triaged

⁸¹ *Supra*, note 36, pp. 76 and 77

⁸² *Supra*, note 5, p. 31



at an early stage and proportional forms of case management should be applied based on the needs of the case.⁸³

Recommendation 26:

That the following measures be considered:

- **each case be assessed and placed on different procedural track that is proportional and appropriate to the needs of the case;**
- **enhance judicial discretion to impose proportional processes on the parties;**
- **all court appearances be meaningful;**
- **parties be required (where possible) to agree on a common expert witness;**
- **both courts and parties be encouraged, where appropriate, to engage in a short, focused hearing under oath and without affidavits or written briefs to allow the court to hear oral evidence and, thus, reduce the cost and time of preparing legal materials;**
- **jurisdictions explore using non-judicial case managers to help the parties move their cases forward and, where appropriate, narrow and resolve many issues in a proceeding;**
- **case managers should have and use the powers, in appropriate circumstances, to limit the number of issues to be tried and the number of witnesses to be examined;**
- **judges should use costs awards more freely and more assertively to contain process and encourage reasonable behavior.**

Less Adversarial Trial Models

Family courts have moved away from a purely adversarial trial model, with the use of independent assessments, legal representation of children and other approaches to hearing the voice of the child, and more active judicial management, particularly with self-represented litigants.

In Australia, the courts have gone one step further, developing an inquisitorial model for cases involving children. In these cases, while the rules of natural justice and procedural fairness apply, many of the traditional procedural conventions have been

⁸³ See Justice Mackinnon's recommendation regarding differential scheduling. She recommends a fast track for one or two issue cases where there is no disputed expert evidence the income of the payer is less than \$50,000 or the expected equalization payment is less than \$100,000 There would be another track for financially complex and high conflict custody cases, *supra*, note 62.



eliminated. The court actively directs and controls the conduct of the proceedings in a manner intended to promote cooperative and child-focused parenting by the parents.

In what are known as “Less Adversarial Trials” the judge, not the parties or their counsel, controls the case. The judge swears all of the parties at the commencement of the hearing and everything said after that is under oath. The judge identifies the issues to be decided (based on information provided by the parties before the hearing), the evidence to be heard, how the evidence will be heard, and what experts will be called. Before the hearing the family will have met with a court-affiliated ‘family consultant’. This person works with the family, provides an assessment to the court, and is available throughout the hearing as an expert witness.

As noted in the BC Family Justice Reform Working Group Report:

For nearly all family cases, quicker and less formal procedures can enhance access to court without compromising fairness. Sometimes described as a “get to the merits” approach, a less formal and more flexible hearing model would complement simplified forms and expedited pre-hearing procedures discussed earlier. The hearing itself would be actively managed by a judge who exerts considerable control over when and how evidence is received.⁸⁴

We share the Court Process Simplification Working Group’s interest in exploring the increased use of inquisitorial judging styles.⁸⁵

Recommendation 27:

That jurisdictions explore the use of less adversarial hearing models, including inquisitorial or modified inquisitorial models and, if appropriate, pilot and evaluate such alternative models in Canada.

Technology

Much has been written in recent years about efforts to use the Internet and related communication technologies to enhance access to justice through, amongst other things, the delivery of legal information and services, online completion of forms, and online dispute resolution processes.

⁸⁴ *Supra*, note 10, p.6

⁸⁵ *Report of the Court Process Simplification Working Group* (Action Committee on Access to Justice in Civil and Family Matters, May, 2012), p. 23.



Court administrators, ministry analysts, academics and entrepreneurs around the globe are aggressively exploring the question of how modern technology could be used by justice institutions to respond to the legal needs of citizens. The potential for the Internet to assist in this respect is particularly promising in an environment of flat or declining revenues.⁸⁶

There appear to be significant and diverse opportunities for efficiency gains. These range from cost savings that could be achieved in law firms through standardization and systematization of their documentation and business processes, through to using technology to deliver family mediation services to spouses living in different cities.⁸⁷

Recommendation 28:

That all justice system stakeholders support the exploration of the potential for the Internet and information technology to make family justice more affordable and accessible.

C. Substantive Family Law

Our family law statutes also have to pay more attention to language and values consistent with the approaches to family dispute resolution described above. Statutes should not presume that disputes will end up in courts in front of judges to be decided in hearings and trials. Our family law statutes should emphasize agreements and methods of reaching agreements. Statutes should encourage consensual dispute resolution. Court hearings and trials should be downplayed and treated as the residual “last resort” methods of dispute resolution that they are. The concepts and language of substantive family law provisions should reflect a less adversarial, more consensual approach. For matters involving children, for example, the language of “custody” and “access” should be replaced by the language of “parental responsibility”, “contact”, “time” and “schedules”.

⁸⁶ See for example: James E. Cabral, Abhijeet Chavan, Thomas M. Clarke, John Greacen, Bonnie Rose Hough, Linda Rexer, Jane Ribadeneyra & Richard Zorza, *Using Technology to Enhance Access to Justice*, Harvard Journal of Law & Technology, Volume 26, Number 1 Fall 2012.

⁸⁷ See details of the BC Distance Family Mediation Project on the *Mediate BC Society* website www.distancemediation.ca/about/



Recommendation 29:

That Canadian family law statutes encourage consensual dispute resolution processes and agreements as the norm in family law, and that the language of substantive law be revised to reflect that orientation.

Provisions governing disclosure should treat full disclosure as an affirmative obligation that rests upon all participants throughout, backed up by serious consequences for failure to comply with those obligations. Statutory provisions should be aimed at supporting the development of a culture of disclosure and good faith in family matters.⁸⁸

Recommendation 30:

That substantive family laws provide more support for early and complete disclosure by providing for positive obligations to govern all stages of a case and serious consequences for failure to comply.

Over the past 20-plus years, the financial aspects of Canadian family law have been increasingly governed by rules, presumptions and formulas: the presumption of equal division of matrimonial property, the equal division of pensions, the Child Support Guidelines, and the Spousal Support Advisory Guidelines. The advent of the federal Child Support Guidelines in 1997 was a signal event in the development of Canadian family law. Subsequently, a non-binding set of advisory guidelines were developed in 2005-08 for spousal support.

We have also largely removed some areas of family law finance from the courts, for example, child and spousal support enforcement through public enforcement agencies, or recalculation of child support. Further, the provision of public financial benefits to families and children occurs mostly outside of the court system too, for example, the Child Tax Benefit and social assistance.

In doing this, we have recognized that individualized family finance decisions made by courts can be very costly for those involved, as the legal fees, lost work time and out-of-pocket expenses are usually not warranted. Thus, we have substantive laws that generate average or default outcomes: less individualization, more rules and presumptions, but more money in the pockets of family members in the end. Further,

⁸⁸ For example, *BC Family Law Act*, ss. 5, 212, and 213.



from a public perspective, family law involves a large number of disputes, often for “smaller stakes” and often with typical fact patterns.

Look at the Child Support Guidelines. We used to litigate these case by case. The claimant parent would prepare an individual child expense budget and would have to prove her or his case for any amount of child support. The amount of support would then be assessed based upon the payor parent’s individual ability to pay. Negotiated and adjudicated child support outcomes were individualized, unpredictable, inconsistent and often inadequate. Usually a lawyer was necessary to do most of the work. Much of that expensive and time-consuming legal sub-structure has disappeared with the child support tables. The tables reflect a financial formula, but can be presented in table form – all a payor parent needs to know is the number of children and his or her Guidelines income, and the answer is there to see.⁸⁹ About two-thirds of child support cases are simply for the table amount.

Since 1997, there has been increasing pressure to find rules, formulas and presumptions to guide and resolve family law disputes. Where there are discretionary aspects of child support, people want more guidance: special or extraordinary expenses, shared custody cases, “adult children”, step-child support, undue hardship, second families. The same has been true in the law of spousal support. The Spousal Support Advisory Guidelines only address the amount and duration of support, but many would like these Guidelines to also provide formulas for entitlement to spousal support as well as other hard issues, like post-separation income increases, re-partnering or remarriage by the support recipient, retirement, illness and disability.

We also see pressure for more formulaic outcomes in property and pension division, as well as property claims by common-law couples. Some have suggested that there should be simpler laws and procedures for smaller amounts of property at the end of relationships, with much less individualized discretion for courts.

One area where presumptions and default outcomes have been resisted is disputes involving children. The “best interests of the child” standard requires parents, lawyers, mediators, courts and others to resolve each child’s case as an individualized exercise of discretion. As Justice Abella once said, the best interests test is “more useful as legal aspiration than as legal analysis.”⁹⁰ Fortunately, the vast majority of

⁸⁹ In Quebec the applicable Table considers revenues of both parties.

⁹⁰ *MacGyver v. Richards* (1995), 11 R.F.L. (4th) 432 (Ont. C.A.), at p. 443



parents resolve parenting issues without resort to court hearings or legal tests. For those that don't, however, the law is highly discretionary.

In some areas involving children, there have been moves away from pure discretion. In child protection matters, since the 1980's, legislation was passed to provide greater guidance for the difficult decisions involved in separating children from their parents where the state alleges child abuse or neglect. There is a move afoot now for greater legislative guidance in cases of parental relocation, typified by the provisions in the new B.C. Family Law Act.⁹¹ Whether we like it or not, more and more family law participants will not have lawyers, either because there is no legal aid available or because they cannot afford or get access to private lawyers. Those involved in the justice system still need legal advice to resolve their disputes, no matter what method is used. The more the substantive law provides guidance or "advice" on likely outcomes, the easier it is for family members to resolve their disputes. And the more likely it is that family members will also see family law outcomes as consistent, predictable, fair and legitimate.

Recommendation 31:

That substantive family laws be simpler and offer more guidance by way of rules and presumptions, where appropriate.

10. Post Resolution Support

Family cases are unique as the parties often need to maintain an ongoing working relationship, and orders and agreements are likely to change with changing circumstances. Resort to the courts can be minimized if families are given some assistance in responding to these changes. A comprehensive Australian report on family law reform recognized this and stated:

Parenting is a long-term endeavour that can often be more complex following separation. Many parents need support to manage the ongoing consequences of their post-separation decisions, manage the changing circumstances arising in their own and their children's lives, and resolve

⁹¹ See *BC Family Law Act*, ss. 65-71.



*personal issues. This support is a key function of an effective family law system.*⁹²

We agree and note that a number of programs are in place to provide post resolution support to families. These programs also confer a distinct benefit on courts and court administrators by reducing the demand from returning family law cases. The most widely implemented of these are maintenance enforcement programs. Others include:

- Administrative recalculation - These programs⁹³ automatically recalculate child support amounts each year by applying the child support guidelines to updated income information. They are designed to prevent parents from returning to court with variation applications, while ensuring that the child receives support and that the quantum appropriately reflects the payor's income.
- Parenting coordination - Parenting coordinators help parents resolve day-to-day parenting conflicts that arise within the terms of existing orders and agreements. BC is the first jurisdiction to recognize parenting coordination in legislation. The new Family Law Act allows a judge to order or parties to agree on the appointment of parenting coordinator. Their determinations are enforceable when filed with the court.⁹⁴
- Supervised exchange and access - These programs provide support to families for whom exercising access (or contact) may result in conflict or raise concerns about the child.

Recommendation 32:

That existing post-resolution programs be expanded and that justice system policy-makers continue to explore additional ways to provide post-resolution support to families.

⁹² *Out Of The Maze: Pathways to the Future For Families Experiencing Separation*, Report of the Family Law Pathways Advisory Group (Commonwealth of Australia, July, 2001), p. 60, online: www.ag.gov.au/Publications/Pages/FamilylawssystemOutoftheMazeAugust2001.aspx

⁹³ The federal government has agreements with Newfoundland and Labrador, PEI, Manitoba and Alberta, i.e. where the service is available for both provincial and *Divorce Act* orders. As well, there are services under provincial law in BC (Kelowna region) and in Nova Scotia (Halifax and Cape Breton regions).

⁹⁴ *BC Family Law Act*, ss. 14-19, s. 45.



11. Data and Evidence-Based Decision Making

Most family justice reform reports include a call for improved data collection and evaluation within the family justice system. A recent report on criminal justice reform in BC pointed to the “the frequent use in justice system decision-making of data that was in substance anecdote: AnecData.” The report also referred to “a long history of scepticism around measurement in the legal world.”⁹⁵

In the UK, the concern about the lack of empirical research about the legal system led to an inquiry into why that was the case and what could be done about it. The inquiry was part of ongoing efforts “to take practical steps to ensure that we get an accurate picture of ‘law in the real world’.”⁹⁶ The introduction to the inquiry’s report states:

The report starts by making the case that research on how law works really does matter. Indeed, it argues that this is not only an enduring need but one that is increasing. As society spends more time ‘doing law’ and law gets involved in more and more aspects of our lives, we need more information than ever before about what this means in practice.

In making this case so powerfully, the authors have clarified one important issue. The thing we are especially missing is empirical research, whether quantitative or qualitative. We need to know how law or legal decision-making or legal enforcement really works outside the statute or textbook.

We have surprisingly little empirical information about the nature and scale of family dispute in society generally, or about the adequacy of the justice system's response or the consequences of adequate or inadequate resolution of family disputes. We lack an empirical understanding of what happens to family cases after they enter the justice system. We know that a very small percentage go to trial but we have no data about what happens to the remainder. We don't know how many cases settle, when or why they settle, or after what cost and on what basis they resolve.

Securing objective measurements and empirical data about the justice system would be very helpful in at least two respects. It would allow administrative decisions (involving everything ranging from court rules to family programs and services) to be

⁹⁵ Geoffrey Cowper, *A Criminal Justice System for the 21st Century*, BC Justice Reform Initiative (August 2012), p. 88, online at: <http://www.ag.gov.bc.ca/justice-reform-initiatives/index.htm>

⁹⁶ Hazel Genn, M. Partington and S. Wheeler, *Law in the Real World: Improving our Understanding of How Law Works* (Nuffield Foundation, 2006), p. iii, online: www.nuffieldfoundation.org/reports.



premised on objective information as opposed to assumptions and anecdotal understanding. It would also allow ministries of justice to better justify the resources required to meet the demands of justice and to create a more compelling business case for reform.

In some respects, Canada may actually be losing ground on this issue, even in the face of a growing appreciation of the need for data to support informed administration of the family justice system. In 1968 Statistics Canada began collecting and publishing demographic information from the Department of Justice Central Registry of Divorce Proceedings on all completed divorce proceedings. However, Canada stopped collecting divorce statistics in 2008 and the status of the database is now described by Statistics Canada as “inactive”.⁹⁷

The utility of many of the recommendations made in this report could be significantly enhanced if resources were available to conduct empirical research into their impacts and their effectiveness. Objective performance measures and operational metrics exposing the details of the workings of the justice system would enhance the effectiveness of justice administration while helping to secure support for family programs from both the general public and justice system decision-makers.

Recommendation 33:

That universities, ministries of justice, judicial and bar organizations, and non-government organizations cooperate in generating more and better empirical research into the operation and administration of the family justice system, particularly with respect to access to family justice.

12. Next Steps

As noted above, the FJWG is one of four Working Groups reporting to the Action Committee on Access to Justice in Civil and Family Matters. Each working group has now published a report and recommendations. Each of these reports will be discussed at the Canadian Bar Association’s Envisioning Equal Justice Summit: Building Justice for Everyone to be held in Vancouver April 25-27, 2013. Early in the fall the Action Committee will publish its final report. Using the Working Group reports as a point of departure, the final report will discuss a framework for enhanced access to civil and family justice. This will be followed in approximately

⁹⁷ See Statistics Canada online at:

www23.statcan.gc.ca/imdb/p2SV.pl?Function=getSurvey&SDDS=3235&Item_Id=1634&lang=en



October and November by broad dissemination and discussion of these reports. Early in 2014 the Action Committee expects to host a colloquium attended by senior justice system decision makers for the purpose of exploring concrete measures in response to the access problem.

13. Conclusion

Family law has a very broad reach. There is perhaps no single area of law that touches as many people. The quality or adequacy of a family's encounter with the justice system can shape their lives and influence their wellbeing for the long term. Accordingly, we have attempted throughout this report to look at the problems experienced by families, as well as the laws, services and procedures that our justice institutions offer them, primarily from their perspective. From this vantage point, we see the imperative need for timely and affordable outcomes as well as the considerable financial and emotional cost to spouses, parents and children when this need is not met.

From a broader social perspective we see additional risks associated with insufficient access to family justice. In a speech given to the Canadian Bar Association in 2011, the Governor General of Canada, the Right Honourable David Johnston spoke of the "social contract" that exists between the legal profession and society and the responsibilities of professionals in the justice system in the face of diminished access to justice. Referring to his experience to that point as Governor General, he says, "I have developed an even more profound admiration for how precious the rule of law is in our country, and how thin and vulnerable its veneer can be."⁹⁸

The linkage between access to family justice and the rule of law is direct and immediate. This is where most Canadians need the justice system. Family justice must be made affordable and accessible to ordinary Canadians.

⁹⁸ Right Honourable David Johnson, *The Legal Profession in a Smart and Caring Nation: A Vision for 2017*, Canadian Bar Association's Canadian Legal Conference (Halifax: August 14, 2011, online: www.gg.ca/document.aspx?id=14195)



APPENDIX A:**Feedback from Family Law Stakeholders**

An earlier draft of this report, dated December 19, 2012, was circulated for feedback. In response, the FJWG received more than 40 submissions from ministries, superior courts, provincial courts, the family law bar, mediators, academics, legal aid plans, and family-serving agencies. The FJWG wishes to acknowledge the contributions of the many individuals and groups who took the time to study the report and to provide commentary on the recommendations. In addition to the valuable substantive comments received, we were encouraged by the depth of commitment to family justice that the feedback clearly reflected.

The feedback respecting the substance of the report was generally very positive, with the report being seen, as one respondent put it, as "a constructive and innovative contribution to family law reform." The feedback strongly reinforced the Working Group's perception of both the gravity of the access problem and of the need for real and substantial change.

Respondents also made suggestions for additions or changes to the content of the report. They proposed additional family law initiatives for inclusion and identified various issues, arguments and elaborations that could be raised or could be discussed in more detail. The FJWG has made some changes to the final version of the report in response to this feedback. At the same time, it is not our goal to make the report a compendium of every innovation and every debate associated with the issues of access and family law reform. Such a comprehensive study of these matters is well beyond both the purpose and scope of this paper.

A final point emerging on a review of stakeholder's comments is that it is important for readers to bear in mind that the state of family legislation, programs and services varies – sometimes quite significantly – from one province to the next. Some of the advice received from individual stakeholders or groups generalizes from a unique provincial context. This report tries to speak to a national audience and assumes that a more detailed conversation about reform would play out differently in every province.

