



**Modernizing Our
Family Law System:**
A Report from Manitoba's
Family Law Reform Committee

June 2018

Family Law Reform Committee Report

Introduction

In 2014, the Supreme Court of Canada gave its decision in a case known as *Hryniak v Mauldin*. It was not a family law case but it was a powerful statement from Canada’s highest court that the time has come to change the way we resolve disputes.

The court said “meaningful access to justice is now the greatest challenge to the rule of law in Canada today”. It went on to say “the balance between procedure and access struck by our justice system must reflect modern reality and recognize that new models of adjudication can be fair and just”.

On October 17, 2017 the Manitoba Court of Appeal delivered its decision in the case of *Dunford v Birnboim* in which it stated:

“Report after report has stated that the adversarial system is ill suited for ...couples who are seeking to reframe their familial relationships in a fair and prompt manner. It is ill suited for essentially two reasons. First, conflicts between spouses are not comparable to disputes between strangers given that they entail much more than resolving legal differences. There are emotional, psychological and financial aspects that also need to be resolved. Second, unlike other types of disputes, marital disputes have an ongoing nature to them either because of spousal and/or child support issues or of continued parenting responsibilities.”

In October of 2017, Manitoba’s Minister of Justice announced an initiative to reform family law in Manitoba. She said the goal was to make it more accessible and improve wellness and outcomes for families. The Minister of Justice created a committee of judges, lawyers and public representatives (the Committee) to provide advice and recommendations on an alternative model that could be faster, less complex, less expensive for families and less adversarial. (A list of the Committee members is attached as Appendix “A” to this report). While the Committee benefited greatly from the input, expertise and practical experience of the five judges on the Committee, all of them limited their participation to an advisory role being mindful that their role as judges is not to make policy and indeed they might someday be called upon to adjudicate on the policies being developed.

The Minister also mandated that the Committee work to an aggressive timetable, asking it to report in early 2018 with the idea that any legislative change needed could be introduced as early as the spring 2018 session of the Legislature.

Family law deals with some of the most difficult and important issues in our lives. It is about our children, our financial security and sometimes our personal safety. It is little wonder that emotions run high when relationships change and the parties need to sort out the detail of their now separate lives. How often will I see my children? How will important decisions about their lives be made? How will I support myself when I now have to pay to maintain a second home? What property will I have to share?

The Access Problem

About a dozen years ago lawyers and judges began to identify a problem with the way family law disputes were being resolved. Many people were having trouble affording the legal services they needed. More and more people were appearing in court without lawyers because they could not afford the legal services they needed. This issue (along with similar concerns about civil and criminal justice) became known as the “access” problem. A number of significant studies were undertaken in Canada (and elsewhere in the world where similar problems were emerging). (A partial list of the studies and other materials that the Committee reviewed is attached as Appendix “B” to this report.)

The Chief Justice of Canada initiated a major study of the access issue in October 2013. The Action Committee on Access to Civil and Family matters produced a final report (a number of interim reports and sub-committee reports had previously been produced) titled “*Access to Civil and Family Justice: A Roadmap for Change*”. A month later the Canadian Bar Association released its major report on access challenges titled “*Reaching Equal Justice*”.

These studies of access to legal services in the family law area came to the same conclusions. There is a significant gap: the very poor may qualify for Legal Aid assistance and get the help of lawyers. The very rich can afford the legal services they need. There exists however a very large group of people in the middle who often struggle to afford the legal services they need.

Many initiatives were undertaken to address the access issue. Public legal education organizations produced a wealth of valuable resources that people could use to better understand the system. In Manitoba for example, the Community Legal Education Association (CLEA) and Manitoba Justice both developed plain language publications to help people understand their rights and how to navigate the legal system. The Law Phone In service (run by CLEA) gives legal information to thousands of people each year. The public has access to the law library at the faculty of law at the University of Manitoba, and to CanLII (canlii.org) an on-line free legal research resource.

A number of “pro bono” services were created to provide some legal advice and assistance to those who needed it including the highly regarded Legal Help Centre which provides legal advice and assistance using law students and volunteer lawyers. Court staff created resources to give information to people trying to navigate the court system. The Law Society of Manitoba undertook a pilot project, acting as a kind of broker for people needing assistance in retaining lawyers in family law matters. Legal Aid Manitoba expanded its financial

eligibility guidelines. The courts actively developed new initiatives to better support self-represented litigants in family law matters.

The courts also introduced process reform incorporating mandatory case conferences for family matters (which had been in place in Manitoba since 2004). These conferences are often successful in resolving issues, moving cases forward and in narrowing the issues in dispute. The Family Justice Resource Centre was created to provide information and referrals and also draft court orders for self-represented litigants.

Yet, in spite of all of these initiatives a fundamental problem continues to exist: many people cannot effectively represent themselves in family matters and yet cannot afford the legal services they desperately need. The system remains complex and on serious issues where emotions often run high, the many self-help resources are simply inadequate. They are particularly ineffective for those with limited experience in the justice system, those with limited literacy skills or for whom English or French are not their first language, or, in situations where there are significant power imbalances between the parties.

The Adversarial System

While access issues emerged relatively recently, for a very long time those involved in family law had been discussing whether a court based adversarial model that works well for the resolution of other types of issues, is appropriate for family law disputes. In other types of cases, while stakes may be high, the emotional engagement is much lower. In other types of cases, having a “winner” and a “loser” is not necessarily a bad thing as it is a final resolution to a problem. In family law, often the relationship between the parties is ongoing and significant. Issues such as the joint parenting of children, child and spousal support are long-term and having a winner and loser often contributes to an ongoing relationship of conflict.

In the early 1990’s some lawyers began to offer an alternative process called collaborative family law. There the goal is to resolve matters without going to court by building consensus among the parties with the help of a professional team – two lawyers, two social workers or psychologists and occasionally a financial specialist, who coach the parties through the process.

In 2001, Legal Aid Manitoba began promoting collaborative law and in 2004 a Collaborative Family Law Pilot Project was initiated that required legal aid clients, when both parties were legally aided, to use a collaborative law process. Parties were provided with lawyers trained in that process. That project ended in 2011 but while legal aid no longer makes it mandatory, collaborative dispute resolution is still funded by legal aid for those who qualify financially and choose to use it.

It is important to understand from the outset that in spite of the challenges of resolving family disputes in an adversarial way (especially without access to affordable legal services) the courts play a key role now that must continue. The courts remain an independent body of highly skilled impartial adjudicators funded by governments as a public service. They carry the authority to make binding and enforceable orders. They are mandated by legislation and constitutionally to decide matters and give those decisions the weight of law. Courts create a body of jurisprudence (decisions which interpret the law) and which form precedents that are relied upon to help users of the justice system understand the law and what to expect from it.

It is clear however that problems of access and problems associated with an adversarial process require those the court process to change so that those valuable resources and the expertise they bring to bear are available to all who need them, in a timely way.

Another important thing to keep in mind is that the problems of access are not generally, as some believe, driven by lawyers being too combative or too expensive. It is true that lawyers can be expensive and some are combative. But lawyers act for clients and their role is to give clients the best advice they can while recognizing that ultimately decisions and instructions come from the client. Sometimes when a lawyer is being combative it is because their client gave those instructions.

Lawyers represent clients and the adversarial system is often the only game in town. They bring expertise, independence, and constitutional protections like solicitor/client privilege. Later in this report we will discuss the role that lawyers could play in a new system we are proposing.

The Goal

When the Minister of Justice announced the creation of a committee to try and improve the family law system in Manitoba, the goal was not to study the problem further but rather to explore a potential alternative model that in her view held potential to be faster, cheaper and less adversarial. The committee was given a general description of the model and asked to vet it. If it held promise the Committee was asked to fill in some detail that might help it to succeed.

The Committee met regularly and sought input from a broad cross section of stakeholders. The Committee reviewed many of the studies and reports on the problems of access and the problems with the adversarial approach to resolving family disputes. Public announcement of the Committee's creation prompted a large number of people who had some personal experience with the family law system in Manitoba to reach out to the Committee and share their stories. (A list of stakeholders contacted and feedback received is attached to

this report as Appendix "C").

Slowly a consensus emerged that the proposed model had "legs". It would not solve every problem, but it held potential to significantly improve the system. The Committee is recommending a new initiative be undertaken as a three-year pilot project.

Why a Pilot Project?

There are four reasons for recommending a pilot project. First, a pilot project is low risk and will enable the model to prove its value (or not) without committing to large investments of resources or permanent infrastructure.

Second the short time available to the Committee meant that we were not aiming for perfection. Instead we aimed for progress, knowing that the model will undoubtedly need "tweaking" if it is to be successful. A pilot project which includes a robust evaluation, starting from day one, will allow for analysis of what worked and what didn't and if carefully planned, the pilot will include continuous monitoring and continuous adjustment to improve its chances of long term success.

Thirdly, no one on the Committee wanted to do a report that would sit on a shelf. In the current fiscal climate, proposing a model that requires any investment of resources even with promise of longer term savings, is a hard sell. We believe this initiative will be cost neutral in the long term but it does require an initial investment to create additional conflict resolution resources. A pilot project allows for "proof of concept" so that those responsible for Manitoba's finances have evidence that the investment is a good one.

Finally, the committee was struck by the limited data that is available about the current system of resolving family disputes. It is impossible to make meaningful projections about the results of a new initiative without adequate baseline data to work from. Not only will a pilot project with a well-planned evaluation component give us that data, but it allows for testing of a model without, as noted above, investing the wrong resources to create unnecessary or inappropriate infrastructure.

The Model

The model described by the Minister of Justice began with a simple application form to court. An administrator would then assess the issue and refer the parties to the resource with the best likelihood of resolving the dispute by consensus using a non-adversarial approach. If the matter was resolved, the administrator would assist the parties to do what is needed to implement their agreement (for example a separation agreement or a consent court order). If the parties cannot resolve the matter the administrator would refer the

matter to an adjudicator who would adjudicate the matter in an expedited way. The decision of the adjudicator could be appealed to the Family Division of the Court of Queen's Bench.

The committee, after much discussion and after considering the input we received from stakeholders, thought that the model makes good sense and can work. Our view was that the model could be improved by eliminating the separate adjudicator role and combining many of those functions with the intake and triage role.

Our model would by legislation, require all matters proceeding under the Family Maintenance Act to be commenced by an application form which would be simple enough that an individual could complete it with or without the assistance of a lawyer. There are already a number of examples of these kinds of initiating documents including the form used by Manitoba's Provincial Court to initiate family law matters (the Provincial Court has jurisdiction to deal with some family law matters in areas of the Province where there is not a Court of Queen's Bench presence, and has concurrent jurisdiction with the Court of Queen's Bench in some communities such as Thompson.) The other party would be served with the initiating document and invited to complete and file a response document within 20 days.

While restricting this pilot project to Family Maintenance Act matters will significantly limit the scope of this initiative, we believe there will be a large volume of matters, sufficient to test the effectiveness of this approach during the pilot phase. Later in this report we discuss the problems and potential of including Divorce Act matters as well.

No Response?

Should there be no response, default provisions would apply (default is the current process to obtain a court order when the other side has failed to reply or participate within the time frame allotted for that). Our information is that these default matters cause great frustration because even when the other side has not responded it still requires significant resources to resolve both the administrative details of the case and to get a resolution of the substantial matters at play. These matters often fill dockets, especially in the Provincial Court, and particularly in more remote areas of the Province.

In our proposed model, where there is no response filed and the matter proceeds by default, we see no reason why most of those matters cannot be adjudicated by the Chief Resolution Officer (CRO), (a new administrative official whose role is laid out in more detail later in this report). The CRO could be given authority to deal with matters such as compelling disclosure of financial information, suspending maintenance enforcement, and issues regarding service of documents.

The CRO could also deal with more substantial orders under the Family Maintenance Act including orders of table amounts of child support. (Child support is an example of a matter that is largely determined by a set of guidelines and we already have in place a system where an administrative officer can vary these orders.)

While we believe there is an opportunity to direct a significant number of these default matters into this administrative process and keep them from clogging courts, it is important to remember that there will still be many matters that need to go to the Court of Queen's Bench even on a default basis because the matter is one that falls within the exclusive jurisdiction of that court. The most common example of this are matters under the Divorce Act. Our committee noted that while divorce is a federal responsibility in the exclusive jurisdiction of the Court of Queen's Bench, the procedure related to it is in provincial jurisdiction. Currently that jurisdiction has been given to the Court of Queen's Bench and procedure is established by a committee of that court. It may be in future that there are opportunities to create a role for the CRO even in divorce matters and some on the Committee feel strongly that all matters, including divorce should be directed to the CRO to explore the option of early resolution. Their vision is that the initiating document could request relief under both the Divorce Act and The Family Maintenance Act (similar to the way a Petition for Divorce now does). The CRO could refer it to the appropriate resolution resource on the understanding that if it was not resolved there, it would need to go to the Court of Queen's Bench for resolution. The committee did not however reach a consensus on Divorce Act matters, and simply wanted to flag it as an option, perhaps for consideration after some experience is gained with the pilot project.

Response Filed?

Where a response has been filed the initiating documents would then be used by the CRO to assess what resources had the best likelihood of successfully resolving the issues in a non-adversarial way. The CRO who would perform a triage function, gathering whatever information he or she needs to make that assessment, including whether there were any safety or protection issues to be considered. The CRO would also assess a resolution fee based on guidelines that take into account the means of the parties. This fee could, where the CRO deems it appropriate, be paid over time. (While this might add to the administrative burden, the committee is of the view that it is worth trying during the pilot phase, because it will contribute to affordability for some users.)

The CRO will also consider, as part of the triage function, whether the matter is better directed to court right away rather than to some non-adversarial dispute resolution resource. If that is the case the CRO will direct the matter

into the ordinary court based system. If the matter is being directed to some form of non-adversarial dispute resolution, the CRO will then determine the best resource for the matter and arrange for an early initial meeting of the parties with the resource provider (usually a mediator). The CRO would have the power to order financial disclosure where appropriate in order to expedite the mediation process. This CRO would monitor (but not direct) the progress of the mediation process. If the dispute is ultimately resolved, the CRO would encourage the parties to get legal advice if they are not already represented by lawyers, in order to ensure that the agreement is adequately documented and adequately meets their needs. If the parties are unable to do that, the CRO will assist them in documenting the agreement.

Resolved Through Mediation?

If a matter is resolved through the mediation process a number of options are available to the parties. Many matters can be concluded by an agreement without the need for a court order. An agreement can be amended fairly easily when custody arrangements or support arrangements change, and in those cases there is no need to undertake the more involved process of going to court to vary the order.

Sometimes however a court order is appropriate or necessary. For example, if there is a concern that one of the parties will move to another province or country. In this case a court order setting forth the custody and support arrangements makes the provisions easier to enforce. In cases where an order setting out the details of the agreement is appropriate, given that the matter is proceeding by consent (with the agreement of both parties) we believe the CRO should have authority to issue the appropriate consent order. If it is a matter outside the CRO's jurisdiction (for example a divorce) the CRO will prepare a report for the parties which outlines their agreement and identifies the nature of the court order being requested.

Not Resolved by Mediation?

While the CRO role is generally intended to be adjudicative only on default matters, and for matters where there is consent some members of our committee believe that certain contested matters could also be adjudicated by the CRO. The CRO in those cases would have to allow the parties an opportunity to be heard, but we see no reason why contested applications for child support, termination of child support after the child becomes an adult in appropriate circumstances, and interjurisdictional support matters could not be adjudicated by the CRO. In the end however most members of the committee felt that it made more sense to leave that to after the pilot phase and we are not recommending this for the pilot project.

In our recommended model for the pilot, where the parties have been unable to reach an agreement, the CRO would prepare a report. This report would set out the process that had been undertaken and confirm that that process was now complete and did not produce a resolution of some or all of the issues. It might also include a recommended resolution in situations where the CRO believes that would be appropriate. The report might, among other things influence an order of costs against one of the parties when the matter gets to court.

The parties would then be responsible for initiating a court process and in order to do that, they would need to file the CRO report along with the appropriate documents to initiate a court process. With the benefit of a report, analysis and sometimes a recommendation from an independent officer (the CRO) the court may be able to create a “fast-track” system to adjudicate these matters. It is also possible that having had the benefit of the mediation process the parties will have gained a better understanding of the other side's position and the level of hostility will be significantly reduced as a result, even if the matter did not fully resolve.

It should be noted that there is already an example of a simplified process for submitting a specific type of family law application to the Manitoba court. The legislation that applies to this specific type of application requires the court to give effect to documents that are in a different form or use different terminology than a formal Court of Queen's Bench pleading in cases where an out of province person wants to obtain or vary a child or spousal support order in Manitoba. In addition, these inter-jurisdictional support applications are specifically exempted from the case conference requirements. Manitoba residents can take advantage of the same type of process to request or vary support in another province without making an application to the Manitoba court. This type of less formal procedure for entry to the court system might be a model to adopt in legislation creating the CRO process where a court order is required following the CRO process.

Is This “Legal”?

The committee was mindful of the constitutional and jurisdictional challenges associated with family law. Some family law issues are in Federal jurisdiction and some Provincial. Some powers are exclusively given to the Superior Courts (in Manitoba the Court of Queen's Bench and Court of Appeal) and the independent jurisdiction of the court is an inherent part of our democracy. The committee has tried to be mindful of the limits of provincial jurisdiction and the independence of the Courts. Historically in Manitoba, court procedure has been the responsibility of the court itself and any change needs to be mindful and respectful of the institutional independence of the courts.

Triage and Adjudication

Our recommendations have the CRO wearing two very different hats. The CRO will be looking for the most effective non-adversarial option and referring the matter to those resources. The CRO will also be adjudicating default and consent matters as discussed earlier. We considered carefully whether this would work and the majority of the committee are comfortable that it can work, especially given that adjudication is limited to default and consent matters. The committee does want to make it clear that it would be possible, to phase in the initiative starting with the triage function alone, which as noted below is in and of itself a key part of making the system better.

Non-Adversarial Dispute Resolution

A key to this initiative will be the opportunity to direct people into non-adversarial dispute resolution resources at a very early stage. The literature we reviewed suggests that even if a party is reluctant to enter into some form of mediation process there is a very good chance of a successful resolution. Getting into this process early, before positions are entrenched, bad feelings are allowed to fester, and significant resources are invested in adversarial posturing and positioning, enhances the likelihood of success.

We know mediation, structured collaborative conversation and consensus based resolution tools work. We know that a consensus based resolution is generally better for families than one that comes from an adversarial process. We know these resolutions have better likelihood of long term stability and lay a helpful foundation for what is usually going to be an on-going relationship between the parties around issues related to children and support. We also know that even when non-adversarial dispute resolution does not resolve the dispute, it does often ratchet down the level of hostility and provides the parties with greater insight into the position of the other side. We believe that having mandatory non-adversarial dispute resolution for most Family Maintenance Act cases will contribute to the goal of healthier families after a spousal relationship ends.

What Knowledge and Skills Does the CRO Need in Order to be Successful?

The Committee brainstormed about this question and identified a long list. The CRO will need to know the law. The CRO will need a deep knowledge of the resources available for referral. The CRO must be able to process a large volume of cases in a timely way. The CRO must be able to deliver culturally appropriate service. The CRO will benefit from a background in mediation and dispute resolution. The CRO will benefit from the skills of a social worker and of a

psychologist. The CRO will need to be a good communicator. The CRO will need to be a good administrator. The CRO will need a good understanding of systems and have excellent analytical skills. The CRO must be able to write well and clearly. The CRO must be able to provide services in both official languages.

It became obvious that no one has all of these skills. In order to resolve that fundamental problem, we recommend the creation of an Office of the CRO. It would be led by a CRO with a team built around him or her to supplement the skill set. The CRO could then rely on his or her team to advise and assist in the role. These resources might be in-house, but many could be retained externally on a contract for service basis. The CRO would identify which skills were most efficiently contracted for (presumably those needed less frequently) and which were most efficiently delivered by having in-house capacity. During the pilot phase it is expected that many services would be contracted for to avoid building infrastructure that needs to be dismantled if the project is not a success.

Who Should be in this New System and Who Should be Out?

The Committee debated whether this model should be mandatory or voluntary. We consulted with mediators about the effectiveness of involuntary mediation. We heard from many that the key to success will be getting even reluctant parties into a structured mediation process as early as possible. In the end we recommend that everyone be required to commence a Family Maintenance Act proceeding by using the Office of the CRO with two exceptions. One is urgent matters, (discussed below). The other is where one or both parties wish to use the current process, in which case they can ask the CRO to exempt their matter (see below).

Both parties may also wish to use their own mediator or collaborative resolution resources. We would expect them to indicate this preference in the initiating document. The CRO would normally approve that choice, but would have discretion where the proposal did not seem reasonable or timely. There is a wealth of private mediation resources in Manitoba and we see no reason that generally, if the parties prefer private mediation, it should not be an option for them.

The other constraint on who is in the proposed new system, at least during the pilot phase, will be the resources available to deliver service in this model. Because the data is inadequate it is difficult to know exactly how much need there will be. We do know that the numbers are very large and as such, during the pilot phase, we propose to have the CRO triage cases into the non-adversarial resources with the most promise for effective collaborative resolution into the system. Once those resources are at maximum capacity, cases will be triaged into

the regular system until capacity opens up again. This allows the CRO to tailor the demand to the supply of resources available and ensures there is no significant backlog during the pilot.

As indicated earlier, the Committee is of the view that a party should be able to make an application to the CRO to opt out. That decision would be an administrative one but fairness requires that when that application is made, the other party be allowed to make a submission on that issue. The basis for an opt out will be exceptional circumstances only, in order to deliver the clear message that without exceptional circumstances the default is to remain in. The Committee initially felt that if both parties agreed to opt out of mediation and go directly to court, they should be able to. Further discussion identified risk of abuse in allowing that, except in exceptional circumstances. The majority of the Committee has concluded that opt out, without good reason, should not be permitted.

What About Matters that Require Attention on an Urgent Basis?

Often when a couple separate there are matters that need urgent attention. One party may need financial support because until then they had relied on the income of the other party to support the family. There may be an urgent need to deal with custody or access to children and in some cases there may be a need for a protection order. In our proposed model someone seeking urgent help could go directly to the court and as part of the remedy they seek, also ask the court to waive the requirement to commence the proceeding through the office of the CRO. This would ensure that those in need of urgent relief were able to access the court without any delay and in appropriate circumstances get the remedies they needed, just as they do now.

What about Cases Where there is a Significant Power Imbalance or a History of Intimate Partner Violence?

Is mediation appropriate in these situations? We put that question to many knowledgeable stakeholders and the clear consensus was yes, provided that the mediation process is carefully designed to accommodate those kinds of relationships. There are a large variety of mediation models and several of them are designed to successfully address power imbalances or situations involving family violence. Mediation can, as one example, take place without the parties ever in the same room. Most importantly, however, we have learned that because the parties will usually have a need for an ongoing relationship around access to children and payment of support, a mediated resolution is desirable in

most circumstances because it carries the greatest likelihood that the ongoing relationship will be a cooperative one rather than continuously adversarial.

Is There a Role for Lawyers in this Model?

Because it will be simple to apply to the CRO office and to respond to an application a lawyer is not going to be necessary as an entry point into the system. Users of the system will need to understand their rights and obligations under the law and the Committee contemplates additional resources being available to help with that. Lawyers can also play a role. They can assist clients to understand their rights and their options. They can facilitate the process as it moves through the various stages. They can advocate effectively for their clients before the CRO and the court. They can draft documents and agreements. It should be noted that many lawyers already practice fully or partially in the area of collaborative family law. Collaborative practitioners point to the value of users of the system being well informed and having good advice available. For those who can afford it a lawyer will be a benefit but for those who choose not to use a lawyer or who can't afford one, the system will be much easier for them to access until the mandatory mediation phase is completed.

To be clear, an expedited and less adversarial process will mean a changed role for many lawyers. If fewer matters end up at a contested hearing there will be less need for vigorous advocacy. If processes are simpler there will be fewer hours spent drafting documents and bringing procedural motions. Some family lawyers will need to develop new skills.

While some clients may choose to take advantage of a simpler system with supports from the office of the CRO to self-represent, in our view the opposite may well happen. A cheaper, faster and less complex system will mean that many people who currently are self-represented because they cannot afford the legal services they need, will be able to afford the invaluable legal services that a lawyer will provide.

It is also possible to save legal fees by paying for only limited legal services, a process commonly called “unbundling”. Some people may retain legal services for the purpose of advice only, which will be considerably cheaper than full representation. To be clear however, if the matter does not resolve at the CRO level, the system will be no less complex than it is today and for those who must go to court, this will not be a great help. The real benefit of this initiative will be to significantly reduce the number of matters going to court.

There is another development worth bearing in mind. The Law Society of Manitoba is actively exploring the concept of licencing trained paralegals. It will be important to monitor this work, because it is entirely possible that for some, a trained

and regulated paralegal can provide advice and representation, especially for those unable to afford even the reduced cost of retaining a lawyer in these matters. In November of 2017 the Law Society of Ontario made a decision to allow licenced paralegals to provide services in the family law area, in part because they believe it to be part of the solution to providing affordable legal services in family law matters.

How Does This All Get Paid For?

The goal of the committee was to develop a cost neutral model (cost neutral over the long term) because we believe in the current fiscal environment, developing a model that can be cost neutral over the long term provides the best chance that the model will be supported and adopted.

There are four ways to pay for the additional resources needed. First, the model contemplates user fees (a fee for the resolution and a fee for those matters that require the court to adjudicate). There are already filing fees for court matters but they are relatively modest. We recommend significantly higher fees but on a sliding scale based on the ability to pay. We believe this is fair because users of the system will get significant value and achieve significant savings and therefore reduced legal fees. Many users of the current system noted that they had paid very large amounts in legal fees, and many told us they elected to self-represent or to concede on issues, or to simply not to proceed at all, because they could not afford the legal fees.

To be clear, we believe the amount people pay in legal fees is driven by the adversarial system they are engaged in, the high stakes and the emotional component of this area of law. Changing the system to a focus on a conciliatory model should significantly reduce legal expenses while producing significantly better outcomes. In short, we believe some of the savings in legal expenses can be used to fund this new model. We also believe that more people will use the model because it is affordable and many who now choose to self-represent will be able to afford legal representation.

Secondly, some of the costs of this model will be offset by reduced expenses in the existing system. Most of the existing system infrastructure will have to remain intact and some of it is not in the control of the province. The Court of Queen's Bench judges for example are Federally appointed and paid. There is however a lot of supporting infrastructure surrounding the court that is a provincial expense and it may be possible to reduce those costs. While it would be imprudent to expect big savings in these areas, it may be possible to achieve some modest systemic savings. It may well be also that freed up resources can be allocated to other areas where there is a need, producing benefits to other parts of the justice system.

Legal Aid Manitoba is primarily funded by the province. Legal Aid family law services are currently delivered at an average cost that is significantly below market rates with over 57 per cent of all family law matters being handled by private bar counsel province wide. Further efficiencies may be achieved if, as a result of this initiative, Legal Aid Manitoba were able to deliver more “unbundled” services. In addition, if the demand for Legal Aid family law services declines because consensus based outcomes are less likely to require continuous contested revision, further savings may be achieved. Legal Aid Manitoba will want to assess the most effective service delivery adjustments to take advantage of the benefits of this model. Legal Aid also devotes resources to matters that proceed by default because these matters still must go to court to get orders of financial disclosure or other administrative orders, such as custody, child support and protective relief. If the CRO is able to dispose of these matters in a way that does not require the assistance of a lawyer to gather and file evidence, it will save Legal Aid some of the resources now dedicated to those default matters. While we do not expect significant savings during the pilot project phase (because of its limited nature) if this initiative is successful in significantly reducing the number of matters that go to court, savings will be there.

A third area for long-term savings will result from the benefits of a collaborative process. Demand for many of the social services that families rely on for support as they lurch from crisis to crisis will be lessened in the end because parents are working together in the best interests of their children and not fighting out the battles of a bad marriage or relationship through the proxy of their children's lives.

The Canadian Forum on Civil Justice conducted a survey in 2014 to try and get a handle on these social costs. The study was not limited to family law problems but it did produce some startling numbers that give at least some sense of what the hidden costs are as they relate to unresolved, or unsatisfactorily resolved family law matters.

Over the three years covered by the study about 3.4 million people reported experiencing a physical health problem and/or significant stress as a direct consequence of their legal problem. Beyond the impact on the individual, these legal problems can often lead to considerable other costs to government. They can increase the cost of publically funded services and programs. Consider that over the three years covered by the study,

- Over 200,000 people reported receiving social assistance as a direct result of their legal problem.
- Almost one million people reported losing employment because of a legal problem they experienced.
- Over 900 000 reported visiting physicians more frequently than usual as a consequence of their legal problem.

The study attempted to calculate the cost to governments of dealing with those social problems and concluded the Canada wide cost to be:

- \$248 million in additional social assistance costs.
- \$458 million in additional employment insurance costs.
- \$40 million in additional health care costs.

While these numbers are clearly estimates and cover more than just family law matters, they do show the impact and potential benefit of a less adversarial and more accessible dispute resolution system.

Finally, the committee is aware that the Federal government has a great interest in access to justice and it may be possible to receive grant money from the Federal government for the purpose of a pilot project to test a new and promising delivery model that has potential to significantly improve access to affordable resolutions of family disputes.

What Will it Cost?

The pilot project will be very helpful in developing a clear picture of the potential this initiative holds and that will drive the level of investment that is seen to be appropriate. For the purposes of a pilot project there are two obvious cost points.

First, it will be necessary to create the Office of the CRO. That office will require staff, operating costs, space to work and a budget for contracted services. Secondly, it will be important to make sure that the CRO has the appropriate conflict resolution sources to refer people to. We believe the office might best be located where the resources are or at least in very close proximity, so referrals can be easy and seamless.

As for conflict resolution resources, many now exist. That said we believe some additional highly skilled resources should be added. The Comprehensive Co-Mediation Service is effective because it has a highly skilled lawyer/mediator running it. It is limited only by the capacity to deal with a larger number of matters that could be referred to it. There are significant resources now dedicated to family conciliation services that could be incorporated into this initiative. There is also an extensive network of private mediators and not-for-profit mediation services that could be used for overflow and highly specialized needs. We recommend budgeting for referral services to these outside agencies which avoids the need to add too much infrastructure during the pilot phase.

Earlier this report recommended that the pilot project include an evaluation component. We recommend budgeting for an evaluation.

Finally, we believe there is great value in expanding the quality and amount of public legal education that is available in the area of family law. People need to know their rights and obligations and what to reasonably expect from the system. Family justice and family law resources are available on the provincial government website, the website of CLEA, and through other organizations such as the Legal Help Centre. The Manitoba Courts website, and the Family Justice and Family Conciliation Service websites of the provincial government, host information on a variety of government services that support families that are experiencing issues which bring them into contact with the justice system. Resources such as the widely distributed “Family Law in Manitoba” publication produced by Manitoba Justice are available in hard copy and electronically. Forms for court and other family justice related processes as well as instructional information and videos are also available on these sites. Because there are many components to a comprehensive resolution, we recommend the development of a “cheat sheet” outlining in plain language all of the issues that should at least be considered as part of the process of reaching a comprehensive consensual resolution.

CLEA already produces a number of excellent public legal education resources (including in the family law area). It might make sense to retain them to develop new material in both official languages and a wide variety of formats including social media. CLEA and Manitoba Justice already have the subject matter expertise and are also highly skilled in producing materials in plain and accessible language. This will be especially important for those who enter the system without a lawyer and who will have the best likelihood of success if they have complete information about their rights and obligations in a format that is clear, simple and easily accessed.

Can this Model be Delivered Outside of Winnipeg?

There is no doubt that the concentration of population and resources in Winnipeg make it an obvious location for the pilot project. It is also clear that families outside of Winnipeg have the same or greater challenges of affordability and access and the same need for a less adversarial option. The Committee is of the view that if the pilot project is a success that there is no reason not to make this initiative available outside of Winnipeg which may also include family matters heard in the Provincial Court. We are also of the view, however, that if that happens the services should be delivered locally and not concentrated in Winnipeg in order to ensure appropriate access. It would be possible to run the pilot project in a second location outside of Winnipeg, but doing that would require a second local infrastructure to be established which might make more sense to do after the pilot has proven its worth.

Summary

We believe there is an opportunity to address two long standing significant flaws in how family law disputes are resolved in Manitoba. The system needs to be more accessible and it needs to be less adversarial. We recommend a three year pilot project in Winnipeg to test an alternative model that is intended to reduce the complexity, the time and the expense of getting a family law matter resolved and to produce an outcome through consensus and collaboration whenever possible. We believe this can be done on a cost neutral basis over the long term and most importantly we believe that this holds real promise to improve the way we resolve disputes in family matters.

We are confident this model leaves many gaps and may have flaws. That is why a pilot project makes sense. We can identify the gaps and try to fill them. We can find the flaws and try to fix them. We can evaluate whether this initiative actually does what it promises. Are there better and more sustainable outcomes achieved? Do we resolve things faster using this model? Is it really significantly cheaper for users of the system? Is it really cost neutral?

For many years we have studied this problem. The time has come to do something about it. In our view the proposed pilot project has a reasonable likelihood of success and it is worth doing it for that reason.

APPENDIX “A”

Composition of the Family Law Reform Committee

Allan Fineblit Q.C. (Chair)

Allan is a lawyer at the firm of Thompson Dorfman Sweatman LLP and is the Chief Operating Officer for the firm. In 2015 he was awarded the Manitoba Bar Association President’s Award, and was also the winner of the Richard J. Scott Award, given by the Law Society of Manitoba to “an individual who advances rule of law through advocacy, litigation, teaching, research or writing.” Allan is a former CEO of the Law Society of Manitoba, and serves on numerous community and professional boards, including the Canadian Lawyers Insurance Association, the Board of Manitoba Council of Administrative Tribunals, Manitoba Blue Cross and End Homelessness Winnipeg.

Associate Chief Justice Marianne Rivoalen (Family Division)

Madam Justice Rivoalen was appointed a judge of the Manitoba Court of Queen’s Bench Family Division in 2005. Prior to her appointment, she was a Senior Counsel and Team Leader of Aboriginal Law Services with the Department of Justice Canada in 2004 as well as the Indian Residential School Litigation Counsel in 2003. She was a litigation lawyer with Aikins, MacAulay & Thorvaldson in Winnipeg (1998-2003), appearing before all levels of courts and administrative tribunals in Manitoba. She has also served as an arbitrator with the Manitoba Labour Board (2001-2005), Deputy Chief Commissioner of the Residential Tenancies Commission in Winnipeg (1993-2003), and a litigation lawyer with Pitlabo & Hoskin in Winnipeg (1989-1997).

Judge Alain Huberdeau

Judge Huberdeau was appointed to the Provincial Court of Manitoba on September 24, 2014. He received a Bachelor of Laws from the Université de Moncton in 1996 and was admitted to the Bar of Manitoba in 1997. He practiced his entire legal career in Thompson, Manitoba with Law North LLP. He operated a general practice with a focus on both family law and child protection law. While in private practice he served on various community volunteer boards and in 2014 he received the Manitoba Bar Association Community Involvement Award. He was also a regular volunteer with the Manitoba CPLED program at the Law Society of Manitoba.

Justice Catherine Everett (Family Division)

Justice Everett was appointed to the Family Division of the Court of Queen’s Bench of Manitoba on November 23, 2006. She received a Master of Laws in 1993 from Duke University and a Bachelor of Laws in 1980 and a Bachelor of Arts in 1977 from the University of Manitoba. She was admitted to the Bar of Manitoba in 1981. Before being appointed to the Provincial Court in 1998, she practiced with the Family Law Branch of the Manitoba Department of Justice (1981–1989), and then with the Manitoba Crown Prosecutor’s Office (1990–1998).

Justice Allan Dueck (Family Division)

Justice Dueck was appointed to the Family Division of the Court of Queen’s Bench of Manitoba on April 14, 2014. Justice Dueck received a Bachelor of Laws from the University of Manitoba in 1996 and was admitted to the Bar of Manitoba in 1997. He joined Mercier Dueck in 2005. Prior to that, he practised with Gould Goszer from 1997 to 2005. His practice focus was family law. Justice Dueck has been a guest speaker for various organizations, including the Manitoba Community Legal Education and Manitoba Probation Services on family law issues. He has been a regular volunteer at Dakota Collegiate and George McDowell Community School.

Justice Kaye Dunlop (Family Division)

Justice Kaye Dunlop received her Bachelor of Laws from the University of Manitoba in 1983 and was admitted to the Manitoba Bar in 1984. She articulated and practiced civil litigation with D’Arcy and Deacon from 1983 to 1988 and family law with Simkin Gallagher from 1988 to 1992. In 1994 Justice Dunlop opened Kaye E. Dunlop, Q.C. Law and practiced as a sole practitioner specializing in Family and Aboriginal Law until her appointment to the Manitoba Queen’s Bench (Family Division) in 2015. In addition to her practice as a sole practitioner, Justice Dunlop held appointments as a Chairperson of the Worker’s Compensation and Criminal Injuries Appeal Board, a Labour Adjudicator with the Government of Canada and an Adjudicator with Indian Residential Schools. She served as Deputy Chief Adjudicator for Indian Residential Schools Resolution Canada from 2007 to 2015. Justice Dunlop has served as a Director on many Boards in Manitoba.

Greg Evans (Evans Family Law Corporation)

Evans is the principal at Evans Family Law Corporation and has practiced family law exclusively since 1998. Evans teaches the Clinical Family Law course in the Faculty of Law at the University of Manitoba, where is also a frequent speaker. He has also been a regular guest speaker on family law matters at the Law Society of Manitoba and the Manitoba Bar Association. Evans received a Bachelor of Laws in 1997 from the University of Manitoba.

Patricia Lane (Family law lawyer with Taylor McCaffrey)

Pat is a partner at law firm Taylor McCaffrey LLP and has extensive experience in family law. She serves as a guest lecturer for the Clinical Family Law course at the Faculty of Law at the University of Manitoba. She has long been a proponent for greater diversity and inclusion in the legal profession. From 1996-2014, Pat served as a volunteer with the Women's Legal Education Action Fund. She has received the University of Alberta Alumni Honour Award (2012) and the Canadian Bar Association SOGIC Ally Award (2010) for advancing the cause of equality of LGBTTTQ persons. Lane received a Bachelor of Laws in 1982 from the University of Manitoba and was admitted to the Manitoba bar in 1984.

Sam Raposo (Deputy Executive Director, Legal Aid Manitoba)

Raposo was a staff lawyer and supervising attorney for Legal Aid Manitoba. He also practiced family law privately. Since 2008, Raposo has been the Deputy Executive Director of Legal Aid Manitoba and is a member of the Law Society of Manitoba's Access to Justice Steering Committee.

Neil Cohen

Neil Cohen is Executive Director of Community Unemployed Help Centre and a lay bencher with the Law Society of Manitoba. He is chair of the Law Society's Access to Justice Stakeholders committee, co-chair of the Access to Justice Steering committee, and represents the Law Society on the National Action Committee on Access to Justice in Civil and Family Matters. He is also a member of the Law Society's Richard J. Scott award selection committee, discipline committee, and President's Special Committee on Alternate Service providers.

Susan Lewis

Susan is the former President and Chief Executive Officer of the United Way of Winnipeg and a respected community leader. She is currently a board member with End Homelessness Winnipeg. Lewis is the recipient of both the Order of Manitoba and the Order of Canada. In 2016, she was awarded an honorary Doctor of Laws from the University of Manitoba.

Raymond Poirier

Raymond is a businessman and activist dedicated to Manitoba's francophone community. He served as chair of the Société franco-manitobaine, where he contributed to the launching the Fédération des francophones hors Québec. He is the former president of the Manitoba Association of Bilingual Municipalities. He continues to promote cultural initiatives and economic development for the francophone population in Manitoba and across Canada. Raymond is a recipient of the Order of Manitoba and the Order of Canada.

Shauna Curtin

Shauna is the Assistant Deputy Minister for the Courts Division of Manitoba Justice.

Anna-Marie Konopelny

Anna-Marie is an Analytical Unit Manager for Manitoba's Treasury Board Secretariat.

Committee Support

Tracy Morrow

Tracy is General Counsel and Section Head of the Family Law Section of the Legal Services Branch of Manitoba Justice. She provided expert support and advice to the committee.

APPENDIX “B”

Resources and Reports the Committee Reviewed

1. *Access to Civil and Family Justice: A Roadmap for Change*, 2013 report of Action Committee on Access to Justice in Civil and Family Matters;
2. *Family Justice Reform: A review of Reports and Initiatives*, 2012 report by Erin Shaw for the Family Justice Working Group of the Action Committee on Access to Justice in Civil and Family Matters;
3. *Meaningful Change for Family Justice: Beyond Wise Words*, 2013 final report of the Family Justice Working Group of the Action Committee on Access to Justice in Civil and Family Matters;
4. *Responding Early, Responding Well: Access to Justice through the Early Resolution Sector*, 2013 final report of the Prevention, Triage and Referral Working Group of the Action Committee on Access to Justice in Civil and Family Matters;
5. *Report of the Court Processes Simplification Working Group*, 2012 report to the Action Committee on Access to Justice in Civil and Family Matters;
6. *Report of the Access to Legal Services Working Group*, 2012 report by Alison McPhail for the Action Committee on Access to Justice in Civil and Family Matters;
7. *Reaching Equal Justice: An Invitation to Envision and Act*, 2013 final report of the Canadian Bar Association;
8. *New Directions: Divorce and Administrative Law*, 1999 article by Kathy Carmichael;
9. *Background Paper, Judicial Family Law Access to Justice Committee*, 2014 draft paper by Justice Freda Steel and Beverley Padeanu;
10. Civil Resolution Tribunal (British Columbia), slide deck presented by Shannon Salter at 2017 Pitblado lectures;
11. *Increasing Access to Family Justice Through Comprehensive Entry Points and Inclusivity*, 2013 report of the Law Commission of Ontario;
12. *Access to Justice*, 2015 final report of the Family Law Working Group of the Manitoba Access to Justice Steering Committee, prepared by Sam Raposo;
13. *An International Review of Early Neutral Evaluation Programs and Their Use in Family Law Disputes in Alberta*, a 2016 report by Joanne Paetsch and John-Paul Boyd of the Canadian Research Institute for Law and the Family;
14. *The Development and Evolution of Case Management (Judicial Settlement Conferences): Court of Queen’s Bench Family Division, Manitoba (Unified Family Court)*; by Justice Robyn Diamond for the third International Children’s Issues Forum in Hong Kong;
15. Information brochures prepared Ontario Family Law Information Centres about their mediation program (provided to the committee by Fay-Lynn Katz);
16. *The Practice of Family Law in Canada: Results from a Survey of Participants at the 2016 National Family Law Program*, by Lorne Bertrand, Joanne Paetsch, John-Paul Boyd and Nicholas Bala;
17. Slide Decks (2) from presentation to the Collaborative Law Conference (Niagara ON, 2017) by Connie Beck and Amy Holzworth-Munroe (co-authored by Amy Applegate) on the work of the National Institute of Justice (Washington DC) on the use of mediation where there is intimate partner violence;
18. *Justice Starts Here*, 2017 report of the Canadian Centre for Policy Alternatives written by Allison Fenske and Beverly Froese;
19. *Report of the Access to Family Justice Task Force*, 2009 report by the Government of New Brunswick;
20. *Evaluation of the 2006 Family Law Reforms: Summary Report*, 2009 report by the Australian Government and the Australian Institute of Family Studies; and
21. *The Government’s Response to the Family Justice Review: A system with children and families at its heart*, 2012 report of the Ministry of Justice and Department of Education (U.K.).

In addition, individual Committee members read many other reports and studies that assisted them in shaping their views and often generated ideas for discussion by the Committee.

APPENDIX “C”

List of Stakeholders and Contributors

The Committee identified a list of stakeholders and reached out to them, describing the model we were considering and asking for their advice. We also heard from many others who became aware of the work of the Committee and wanted to share their stories or offer advice based on their experience. This list is sometime “generic” to protect the confidentiality of those who asked for it or clearly need it.

1. IRCOM (immigrant and refugee service provider);
2. Ma Mawi Wi Chi (Indigenous family service agency);
3. Law Society of Manitoba (regulator of legal service delivery);
4. CLEA (Public legal education services);
5. Mediation Services (not for profit mediation service);
6. Canadian Bar Association (Manitoba Branch) (Representative body for the legal profession);
7. Manitoba Association of Women’s Shelters;
8. Legal Help Centre (not for profit legal advice and assistance program);
9. The Comprehensive Co-mediation program;
10. Family Conciliation Service;
11. Family Mediation Manitoba (a non-profit association organized to promote family mediation in Manitoba);
12. AJEFM (Association of French Speaking Lawyers);
13. Support group for women who are victims of intimate partner violence;
14. Support group for fathers who have had experience with custody and access disputes;
15. NDINAWEMAAGANAG ENDAAWAAD INC (service organization for youth);
16. Several private mediation services individually and a joint submission from four services;
17. Dozens of family lawyers from all over Manitoba and elsewhere in Canada;
18. Dozens of people from diverse backgrounds who shared their experiences and advice;
19. Several Judges not on our committee, from Manitoba and other provinces; and
20. Several academics from diverse backgrounds including one who is writing a book on family law and one who is developing software that might facilitate on line dispute resolution in family law.

The Committee benefited greatly from the input we received. Hearing from those with experience in the family law system was inspiring, and added a very important element of reality to our deliberations. This is especially appreciated because those people shared their very difficult stories with nothing to gain but an opportunity to make the system better for those that come after them.

We are indebted to the many professionals who work in the system and who took time to share their expertise. Some wrote extensive briefs and answered question after question that flowed back from the Committee. That expertise enhanced greatly the work of the Committee.

Modernizing Our Family Law System:
A Report from Manitoba's Family Law Reform Committee
June 2018