Chapter 2 – Background and Context for Working Group Recommendations

The WG started its work by canvassing literature and developments in other jurisdictions and continued to observe and take note of continuing new initiatives for the duration of the project. A summary of that research is attached at Appendix 2.

General Trends in Provincial Court

The Provincial Court has jurisdiction over criminal, child protection, and small claims matters, FMEA enforcement matters, and under the FLA, has jurisdiction over proceedings concerning parenting arrangements (parenting responsibilities and parenting time), child support, contact, guardianship, spousal support, protection orders and relocation. In the 2017/18 Annual Report for the Provincial Court, of a total of 48,847 new civil cases, 28,657 or 59% were FLA matters.[2] Family files take up a disproportionate amount of court time, with many more events per case, three times more adjournments, and twice as many hearings.[3] Research conducted by Professor Julie Macfarlane in 2013 suggests that approximately 40% of parties in provincial family court are not represented by legal counsel.[4] However, her research notes there are limitations in that measurement, suggesting the percentage may actually be significantly higher.[5] The Provincial Court does not charge filing fees for family matters because it is understood that access to justice requires a no cost option for families in transition.

British Columbia's Family Justice Services

BC is well placed to respond to the known problems in the family justice system because it has strong building blocks in the form of programs and services that align with the recommended path forward. Family Justice Services Division (**FJSD**)'s assessment, parenting education, and mediation programs are well established and have been the subject of a number of evaluations. Court Services Branch is exploring a host of new, innovative user-focused service delivery models and is also looking at ways to improve users' interface with the court process through developments such as the Online Divorce Assistant (https://justice.gov.bc.ca/divorce) and a protection order application which is currently being tested by users.

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[2] Provincial Court of British Columbia, "Annual Report 2017/2018" at 31. Accessed at https://www.provincialcourt.bc.ca/downloads/pdf/AnnualReport2017-2018.pdf

[3] Susan Goldberg, "The time for action" (2013). Accessed at: https://web.archive.org/web/20160306154905/http:/nationalmagazine.ca/articles/recent4/the_time_for_action.aspx

[4] Julie MacFarlane, "The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants, Final Report" (May 2013) at page 33, accessed at: https://representingyourselfcanada.com/wp-content/uploads/2016/09/srlreportfinal.pdf

[5] *Ibid* at 33.

These initiatives provide an opportunity for considering a new approach to forms that is easier for the user to interact with. LSS has recently launched an online dispute resolution pilot which has potential to extend the reach of mediation services to a broad range of citizens.[6]

LSS also provides a range of legal services to families including duty counsel, family advice lawyers, tariff lawyers for unbundled legal services and a range of public legal information tools. Appendix 2 which summarizes the research reviewed for this project also includes references to some of the existing evaluation research on some of BC's programs.

National Action Committee on Access to Justice

As one of the project's objectives was to embrace the vision and direction of the National Action Committee (**NAC**)[7] on Access to Justice's reports in this area, the WG took note of the many findings about users of the family court system with particular reference to the Family Justice Working Group (**FJWG**) report[8]:

- They are typically parties who have had limited to no previous experience with the justice system and lack a sophisticated understanding of the law and legal processes;[9]
- Parties often face significant financial, interpersonal, and psychological stress while navigating their family matters, which can further complicate their legal issues;[10]
- Parties may be particularly vulnerable, since violence and physical safety may be part of the relationship dynamic and/or there may be significant power imbalances;[11] and

Families are often required to interact and problem solve long after their legal issues are resolved, so parties require post-resolution support mechanisms and dispute resolution processes that mitigate the relationship and separation damage.[12]

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[6] Legal Services Society, "MyLaw BC Family Mediation" (2019).
Accessed at: https://mylawbc.com/mediation/

[7] The National Action Committee on Access to Justice in Civil and Family Matters is a group broadly representative of all sectors of the civil and family justice system as well as of the public. It was convened at the invitation of the Right Honourable Beverley McLachlin, Chief Justice of Canada in 2008 and since that time, more than fifty individuals and groups from all sectors of the civil justice system in Canada have participated in this work. The Committee, under the leadership of the Honourable Thomas Cromwell, has issued a number of reports on civil and family justice reform.

[8] FJWG, *supra* note 1.

[9] *Ibid* at 16-17.

[10] *Ibid* at 14-15.

[11] *Ibid* at 16.

[12] *Ibid* at 15.

The WG focused on examining recommendations from the FJWG report that could be specifically enabled by the Rules. Decisions around appointment of specialist judges and the resourcing decisions around "one family one judge" were not within scope of this procedural reform project.

The following FJWG recommendations were a particular focus for the WG.

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 consensual dispute resolution (**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.[13]

The appeal of mediation in the family law context has long been recognized, with its use dating back more than 35 years, to the late 1970s. Mediation is generally considered to offer parties a dispute resolution mechanism that reduces conflict and cost while increasing parties' cooperation and control over their dispute.[14] As referenced in the FJWG report, families are often managing a restructuring rather than a termination of relationships. Dispute resolution processes that sustain relationships and post-resolution support mechanisms are to be supported.[15]

However, despite the benefits and increasing availability of family mediation and other CDR services throughout BC, uptake has continued to be relatively low. The continued low uptake of CDR on a voluntary basis, coupled with the positive experiences of jurisdictions that have required parties to attend CDR (e.g. Australia), led the FJWG to recommend participation in CDR processes be required. The recommendation in favour of requiring participation in CDR processes is conditional on a comprehensive screening process for family violence and power imbalances.

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.

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[13] *Ibid* at 36.

[14] Noel Semple, "Mandatory Family Mediation and the Settlement Mission: A Feminist Critique", (2012) 24:1 Canadian Journal of Women and the Law 207, at 210. Accessed at https://core.ac.uk/download/pdf/72788888.pdf

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

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.[16]

The FJWG discussed the philosophy and value of requiring parties to attend parenting information sessions about the effects of separation and divorce on families. 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, while misinformation can generate and prolong disputes. The approaches taken by different information programs in different provinces vary, 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 to the extent that many provinces have elected to make it mandatory.[17] The growing body of research on separation and divorce as an adverse childhood experience suggests supporting positive parenting skills and building parental resilience can help to mitigate negative impacts on children.[18]

Recommendation 13:

- That triage services, including assessment, information and referral, be made available to people with family law problems.[19]

The FJWG emphasizes the importance of the front-end of the family justice system including the use of "triage". It explicitly agrees with and supports the recommendation of the BC Family Justice Reform Working Group that resources should be reallocated to the front end of the system. This is 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.[20]

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[16] FJWG, *supra* note 1 at 40.
[17] *Ibid* at 40.
[18] Pam Jarvis, "Adverse Childhood Experiences Too High?" (2018) at 7. Accessed at: http://www.leedstrinity.ac.uk/blogs/Adverse-Childhood-Experiences-too-High.
[19] FJWG, *supra* note 1 at 41.
[20] BC Justice Review Task Force, "A New Justice System for Families and Children: Report of the Family Justice Reform Working Group to the Justice Review task Force" (2005) at 37-38. Accessed at https://www2.gov.bc.ca/assets/gov/law-crime-and-justice/about-bc-justice-system/justice-reform-initiatives/final_05_05.pdf.

The NAC report suggests: "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.

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."[21]

The NAC report recommends a robust front end with early resolution services, including triage and referral, to enhance the legal system to reflect and address everyday legal problems. In particular, it recommends expanded, early front-end services that are highly visible, easy to access and user-friendly; coordinating and integrating the delivery of all services for separating families. An early needs assessment meets this objective by providing assessment, information and referral for all people with family law problems. This provides effective channeling of people to needed services.

Recommendation 21:

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

The need for procedures to be tailored and simplified for the issue in dispute could significantly reduce the cost of family law dispute resolution, thereby reducing legal fees for some clients and legal aid costs for others. [22]

Recommendation 22:

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

While users and in particular self-represented litigants may have less interface with the court Rules, they will use the forms, along with self-help resources, to guide them through the process. As the FJWG reported, 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. Many jurisdictions, including BC, are now utilizing interactive technology to allow users to generate court forms simply by answering a series of online questions, guided pathways, pop up questions and population of forms based on the answers to the questions.[23]

Recommendation 26:

- That the following measures be considered:

[21] FJWG, *supra* note 1 at 41.
[22] *Ibid* at 49.
[23] *Ibid* at 50.

- 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.[24]

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.[25]

The FJWG took note of some jurisdictions where family courts have moved away from a purely adversarial trial model and more active judicial management, particularly with self-represented litigants. Australia is referenced as one of the jurisdictions that has developed an inquisitorial model for cases involving children.

[24] *Ibid* at 54.
[25] *Ibid* at 44.