



**Association of Family & Conciliation Courts, Ontario Chapter**

**www.afccontario.ca**

**2018-19 Executive & Board of Directors (Partial List\*):**

Brian Burke, President  
Archana Medhekar  
Robyn Switzer  
Dr. Kimberly Harris  
Dr. Dan Ashbourne  
Maxine Kerr, Secretary

Dr. Shely Polak  
Michelle Hayes  
Nicholas Bala.  
Anisa Ali  
Hayley Glaholt

\*Some Board members have a conflict of interest and did not participate in decision to submit this Brief

Ms. Lindsey E. Park, Parliamentary Assistant  
Ministry of the Attorney General  
McMurtry-Scott Building,  
720 Bay Street, Floor 11  
Toronto, ON M7A 2S9

[lindsey.park@ontario.ca](mailto:lindsey.park@ontario.ca)

July 24, 2019

Dear Ms. Park

**Review of Family Justice Legislation & Processes**

We writing to you on behalf of the Ontario Chapter of the Association of Family and Conciliation Courts in response to the request of July 9, 2019 for submissions concerning the government's review of family justice legislation and processes.

We welcome this opportunity to participate in this timely review. However, the time for responses is not long, so this Brief is not as detailed as we might have liked. We would appreciate the opportunity to meet with you at some future point to expand on the comments here.

***Association of Family & Conciliation Courts, Ontario Chapter (AFCC-O)***

The Association of Family and Conciliation Courts is an international organization with over 5000 members from a range of professions including lawyers, family court judges, mental health professionals, social workers, psychologists, mediators, court administrators, researchers, and other professionals working in the family dispute resolution field.

The AFCC-O is the Ontario Chapter of this international organization, and has over 400 members in the province who are dedicated to the resolution of family conflict. Our members share a strong commitment to education, innovation, research, and collaboration in order to benefit communities, empower families, promote a healthy future for children, and improve access to family justice. Our focus is on the promotion of the interests of children and parents involved in the justice system and family dispute resolution.

We are submitting this Brief with the authorization of the AFCC-O Board, but we must emphasize that members of the Board and Chapter who are judges, employees of the governments of Ontario or Canada, or Legal Aid Ontario, took no part in the decision to submit this Brief and take no position on its contents.

### ***Background***

It is widely acknowledged there is a need for major changes to the family justice process in Ontario, and indeed more broadly in Canada. While there are many dedicated and skilled professionals working in the family justice field, too often the process of dispute resolution is slow and inefficient. Too often family conflict is exacerbated by the family justice process, and the needs of vulnerable parents and spouses, and their children, are not met. Lack of access to family justice services is a major concern, and recent cuts to government funding for these services raise concerns that there will be growing numbers of litigants who lack access to appropriate advice, assistance and representation, with a concomitant increase in delay, and potential for miscarriages of justice and harm to children.

The 2018 federal budget allowed for the extension of Unified Family Courts, and an expansion of the Unified Family Courts was undertaken in Ontario in 2019. That was an important step to help address issues of access to family justice and improve the efficiency of the family court system, though these courts must still be extended throughout the province. On June 21, 2019, Royal Assent was given to Bill C-78, amendments to the *Divorce Act* and other family legislation. The enactment of this federal legislation requires a timely provincial response, including enactment of similar reforms in Ontario.

### ***Unified Family Courts***

The AFCC-O has long advocated reforms to the family justice process to increase efficiency, and reduce delay and family conflict.<sup>1</sup> Having a Unified Family Court throughout the province is a vitally important part of these reforms.<sup>2</sup> These courts allow for judicial and administrative specialization to address the unique challenges of family disputes, and facilitate the provision of alternative dispute resolution services, such as mediation.

The two tier system of family courts has led to inefficiencies with unnecessary duplication of services, and in some cases concurrent proceedings in two different court systems. The process of appeals from a specialist family judge of the Ontario Court of Justice to a single generalist judge of the Superior Court of Justice, another aspect of the two tier model, is a waste of judicial resources, and a relic of an era when judges in the “provincial court” lacked legal education. Pending completion of the expansion, legislation should be amended to omit this wasteful stage of the appeal process; appeals in family cases from the Ontario Court of Justice should follow the same appeal route as family appeals from Superior Court.

---

<sup>1</sup> For a discussion of changes needed to the family justice system, see N. Semple and N. Bala, *Reforming the Family Justice System: An Evidence-Based Approach* (AFCC-Ontario, 2013) <http://afccontario.ca/wp-content/uploads/2015/11/Semple-Bala-Family-Justice-Reform.pdf> (copy attached)

<sup>2</sup> For recommendations about key elements of an effective Unified Family Court, see *AFCC-Ontario: The Ideal Family Court* (Nov. 2014) <https://afccontario.ca/ideal-family-court/> (drafted by Andrea Himel, then AFCC-O president) (copy attached).

The decision of the Conservative government to expand the Unified Family Court in the Spring of 2019 was most welcome, but it still leaves half of the Ontario population with the two tier family court structure. We urge a clear commitment, planning and establishment of a Unified Family Court in Toronto and other large urban centres where there is no such court (e.g. Brampton and Milton) as soon as possible. We note that the Justices of the Ontario Court of Justice who deal with family cases are a very capable, experienced and highly regarded. We submit that having as many of them as possible appointed to fill the new Unified Family Court positions would make for a more efficient and effective Court, than appointing individuals without any prior judicial experience. We appreciate that the appointment of individuals to the new court will be a federal responsibility.

### ***Single Judge Case Management and Triage***

There is wide recognition in the research literature about the value of single judge case management for high conflict family cases. Having a single judge deal with one family is more efficient than having multiple judges involved in a case, is more likely to lead to a settlement, and more likely to result in compliance with court orders.<sup>3</sup> However, it does require that the court is able to identify (or triage) higher conflict cases, and that the court is organized and administered to facilitate this. One of the successes of the Ontario Court of Justice has been its use of single judge case management, but the Superior Court of Justice, outside of the Unified Family Court sites, has made much less progress in this regard. Court administrators need to be encouraged and supported to make more use of single judge case management.

### ***Ontario Legislation Should Adopt the Bill C-78 Divorce Act Reforms***

Bill C-78 encourages less adversarial and more child focussed approaches to parenting after separation and divorce. Key provisions will:

- replace archaic concepts of “custody” and “access” with more child-focused terminology based on “parenting time” and “parental decision-making;”
- create an expectation that parents will make a “parenting plan” to share decision-making responsibilities and time, but if parents cannot agree, judges will be allowed to make a parenting order;
- encourage parents and their lawyers to use of non-court family dispute resolution processes;
- clearly identify “best interests of the child” factors, including the views of children and the willingness of each parent to support the child’s relationship to the other parent;
- explicitly recognize the significance of “family violence” in making parenting decisions, and make protection of safety and well-being of a child a “primary consideration”; and
- establish a new legal framework for dealing with relocation of a child.

There have already been legislative reforms to the parenting laws in Alberta, British Columbia and Nova Scotia, as well as decisions of the Ontario Court of Appeal in other provinces that have encouraged moves towards use of the “parenting plans” and “parenting time”

---

<sup>3</sup> Bala, Birnbaum & Martinson, “Differentiated Case Management for Family Cases: ‘One Judge for One Family’” (2011), 26 *Canadian Journal of Family Law* 339-394.

rather than the historic terms “custody orders” and “access.” Bill C-78 will promote effective co-parenting rather than a “winner” and “loser” mentality. Bill C-78 has very significant support from family lawyers, judges and scholars, as well as arbitrators, mediators and mental health professionals.<sup>4</sup> We attach the Brief that the AFCC-O presented at the Senate hearings on Bill C-78 in June of this year, a Brief that was very supportive of enacting the new law.

The AFCC-O is preparing for implementation of Bill C-78 through various educational efforts, and is preparing its *AFCC-O Parenting Plan Guide* and the *AFCC-O Parenting Plan Menu* to help parents and their professional advisors make developmentally appropriate parenting plans for their children.

We urge the Ontario government to enact amendments to the *Children’s Law Reform Act* that mirror Bill C-78. These amendments will affect those governed by the CLRA, mainly parents who have not married, and hence are not able to obtain a divorce. Provincial variations from this federal law would create confusion and inefficiencies, and invite *Charter* challenges.<sup>5</sup> Adopting these changes will also avoid significant confusion that would otherwise arise in Ontario’s Superior and Unified Family Courts, which apply both the federal and provincial legislation.

Our Brief to the Senate focused on the reforms in Bill C-78 as they relate to parenting, but we would note that the other provisions of Bill C-78 are also important, including those facilitating obtaining and enforcing support orders.

### ***Court Mandated Services & Parenting Co-ordinator***

To encourage reducing the conflict in the divorce process, Bill C-78 provides that “to the extent that it is appropriate to do so, the parties to a proceeding *shall* try to resolve” matters through some form of non-court “family dispute resolution process,” which is defined to include “negotiation, mediation and collaborative law.” Bill C-78 also provides that a court dealing with a divorce may order the parties to attend a family “dispute resolution process,” like mediation, but only if permitted under provincial law in the jurisdiction. British Columbia has legislation that allows for court orders for such services.<sup>6</sup>

We submit that Ontario should amend the *Children’s Law Reform Act* to have provisions similar to those in the British Columbia *Family Law Act* that allow a court to order parents to have a parenting co-ordinator, and that encourage use of mediation.

One important form of court response for higher conflict separations is the possibility of a court requiring both parents, and often their children as well, to attend counselling or other services, to help them gain a better understanding of their relationship problems, improve communications, facilitate resolution and ensure compliance with parenting plans and orders. These services can be especially useful for cases involving problems where children are resisting contact with one parent (which may be alienation or estrangement).<sup>7</sup>

One area of disagreement in Ontario jurisprudence is whether a family court can order or direct attendance of parents and children at counselling services. Some judges recognize that the best approach to high conflict cases may require collaboration between courts, lawyers and counselling or social service providers, and that judges may need to receive reports on whether

---

<sup>4</sup> See e.g. Submission of Family Law Section of the Canadian Bar Association, to Minister of Justice, Dec. 22, 2017.

<sup>5</sup> See *Coates v. Watson*, 2017 ONCJ 454.

<sup>6</sup> s. 16.1(6)

<sup>7</sup> See e.g. Bala & Hebert, “Children Resisting Contract: What’s a Lawyer to Do?” (2016) 36 Can Fam L Q 1-57, for a discussion of interventions and strategies to help reduce conflict and promote the interests of children.

parents are attending and meaningfully engaging in counselling, as this can be critical for ensuring effective responses to some high conflict cases.<sup>8</sup> Other judges, however, are concerned that such orders might violate the voluntary care requirement of the *Health Care Consent Act*. It is our submission that the *Health Care Consent Act* provisions about voluntary care and consent to treatment are not intended to apply to cases in family court where parents or children are required to attend counselling as apart of the response to their involvement in family litigation, but it would be highly desirable for this to be made clear in amendments to the *Children's Law Reform Act*.

### ***Modernizing the Family Courts & Using Technology Effectively***

The family justice system in Ontario is using the technologies of the last century. It is an inefficient and very paper intensive. It also requires countless unnecessary attendances for filing purposes in contested family law cases or at times use of outdated fax machines. While private service providers like *Divorcemate* are addressing some of the issues, the government and court administrators should be encouraging and supporting more use of telephone and video conferencing, and we should be moving towards electronic filing for all family law disputes.

Internet based (and print) information provided by Community Legal Information Ontario (CLEO) with its Steps to Justice is valuable, but technology should also be used to facilitate the completion of forms. It is, however, important to recognize that while technology can play a significant role in improving access to justice and increasing the efficiency of the justice system, many of these technological advances may not be accessible to those with limited education and poor literacy, cognitive problems, disabilities, cultural differences or limited financial resources.

### ***Improving Access to Justice: Limited Scope Family Retainers, Law Students and Paralegals***

The AFCC-O has long been concerned about the costs of access to family legal services. While technology can provide valuable information, most people going through separation and divorce require some individualized assistance, advice or representation from knowledgeable, human advisors. Each case is unique, and many of those experiencing separation or divorce need assistance and a “reality check,” as they transition from being intimate adult partners to being effective co-parents leading separate lives.

Although many cannot afford or do not want full representation by a family lawyer, there is a range of ways of providing some access to legal services; many individuals can afford to pay for some services. The *Family Legal Services Review (The Bonkalo Report)* (2017) provided a useful analysis and made some sound recommendations.

In particular, we support the implementation of the recommendations in the *Review* to allow law students, articling students and law clerks, acting under a lawyer’s supervision (but not necessarily in the presence of a lawyer in court) to have greater access to the courts, providing representation at some types of hearings. This would reduce costs to clients and to Ontario Legal Aid. Changes to the *Family Law Rules* are required to facilitate this, especially in the unified Family Courts and Superior Courts.

---

<sup>8</sup> See e.g. *Leelaratna v. Leelaratna*, 2018 CarswellOnt 16633 (Ont. S.C.J.) where Audet J. held that she had jurisdiction to make a counselling order, though discussing cases where judges took a different view.

The AFCC-O is a partner in the Ontario Family Law Limited Scope Legal Services Project,<sup>9</sup> a project that shows significant promise in providing lower cost access to legal services. We are, however, concerned that the Ministry of the Attorney General, in particular Court Services, has to date not been very supportive of this important initiative to reduce costs for individuals and the court system.

While though the AFCC-O has significant concerns about allowing independent paralegals provide representation in the courts (copy of response to *Bonkalo Report* attached), we recognize that there is a role for paralegals in the family justice process, and look forward to working with the Ministry and the Law Society in developing a role for appropriately educated paralegals, especially in document preparation and navigation of the family justice system. Ensuring that paralegals have good relationships with family lawyers for case transfer and advice will be critical. We also believe that monitoring and research on any implementation of any scheme for paralegal involvement in the family law field is critical.

***Government Funded Resources: Mandatory Information Program, Family Law Information Centre, Mediation, Office of the Children’s Lawyer, Supervised Visitation & Family Legal Aid***

While “user pay” services are and should remain a pillar of the family justice process, there is also a vitally important role for government support or subsidization for range of family justice services, beyond providing access to judges and the courts. We are very concerned about recent cuts to a number of these services, and believe that parents and children are being negatively affected. We also believe that some of the cuts may result in immediate savings, but will result in increased delay and costs for the litigants and the courts, and will have long term social and financial costs far exceeding any immediate savings.

The family law information services that the Ontario government provides without charge include the Mandatory Information Programs and Family Law Information Centres, as well as supporting the funding by Legal Aid Ontario for family justice information provided by Community Legal Education Ontario. Providing basic information to all citizens about the law and court system is a core government mandate, and is especially important in the family justice field, both for those who have lawyers and those who do not.

The Ministry of the Attorney General provides funding support for mediation at all family court sites in Ontario, which allows for limited access to family mediation services that are free or geared to income. While there are measures that can be taken to improve the effectiveness of these services and increase their use, they already provide a valuable cost-effective method of resolving many family disputes in a child focused way, outside the litigation process.<sup>10</sup> Funding for mediation saves in government spending on the courts and builds a more timely and efficient court process (for those that require it).

The Office of the Children’s Lawyer (OCL) provides invaluable legal and clinical services to some difficult cases involved in the family courts. The OCL not only promotes the interests of children, but also plays a critical role in promoting settlements, saving costs in the justice system. It is vitally important to adequately fund this Office, which has been under recent pressures because of increased obligations under the *Child, Youth, Family and Services Act*.

---

<sup>9</sup> <https://www.familylawlss.ca>

<sup>10</sup> Whitehead & Birnbaum, Family Mediation: Exploring the Benefits and Challenges of Publicly Funded Mediation Services in Ontario (AFCC-O, 2019) <https://afceontario.ca/wp-content/uploads/2019/04/Whitehead-Birnbaum-Family-Mediation-Report-Final-2019.pdf> (copy attached).

Ontario has a network of Supervised Visitation Centres which receive government support to allow subsidies for low income parents. These centres play a critical role in ensuring safety to children and parents (mainly mothers), while allowing parents to maintain a relationship with their children, especially in high conflict cases. The AFCC-O has recommended some changes in the operation of these Centres and increased government support,<sup>11</sup> though we recognize these Centres already play a very important role in advancing the interests of children and families.

The cuts to Legal Aid Ontario, and in particular family legal aid, are a major concern. While these cuts will result in some immediate savings to the government, and the full effects of these cuts have yet to be assessed, there will be significant social costs, as well as the potential for greater burdens, costs and delays in the family courts. Recently introduced reductions on legal aid are expected to reduce in-court settlements...

The *Cost of Justice* report of Canadian Forum on Civil Justice (2018) examined the short-term financial, physical and mental impacts experienced by people struggling with legal issues. According to that study, 82 per cent of people who reported trying to solve a family law dispute experienced a “related health or social problem.” The Principal Investigator on that study, Prof. Trevor Farrow of Osgoode Hall Law School, recently observed:

We know that when people show up in court or at a court services office, it typically takes significantly longer to service someone who is self-represented as opposed to someone who has a lawyer. That’s just a matter of fact.... That’s just one example of how supporting individuals leads to benefits, and specifically, cost savings to the system.”

We know from some studies around the world that getting legal help leads to better results for people in different contexts,” he said. “We also know from emerging research ... that investing in justice typically pays off multiples of the investment in terms of benefits. What we want to do is add to that cost-benefit analysis by looking at actual clients receiving actual legal interventions and following those people over a period of time and getting a sense ... if their lives were improved because of the intervention and, if so, how. And that would include qualitative well-being, qualitative impacts, and also quantitative [impacts], including cost savings and cost benefits.”

I think it’s a false economy to say that saving money on justice to put it elsewhere in the system is a good idea.<sup>12</sup>

### ***Family Violence***

Bill C-78 and concomitant changes to the *Children’s Law Reform Act* should encourage parents to focus on the interests of their children rather than adult rights, and to reduce their conflict in the interests of their children. However, there are concerns that the encouragement in to reach out-of-court resolutions may result in victims of family violence accepting unfair

---

<sup>11</sup> Bala, Saini & Spitz, *Supervised Access as a Stepping Stone Rather Than a Destination: A Qualitative Review of Ontario Services & Policies for Assisting Families Transitioning from Supervised Access* (AFCC-O, 2016) <http://afcecontario.ca/wp-content/uploads/2015/11/Bala-Saini-Spitz-Supervised-Access-Sept-2016.pdf> (copy attached)

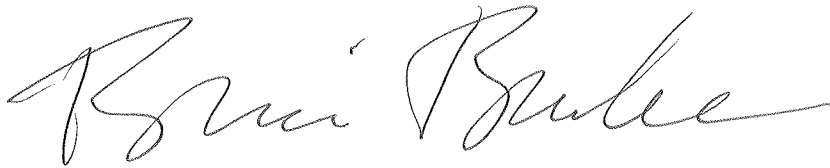
<sup>12</sup> “Researchers to follow legal aid clients for year-long access to justice research project,” July 10, 2019, *Lawyers Daily*.

settlements or being placed in dangerous situations.<sup>13</sup> These are important concerns, and implementation of Bill C-78 and other changes in Ontario must be undertaken in a way that ensures the protection for victims of family violence.

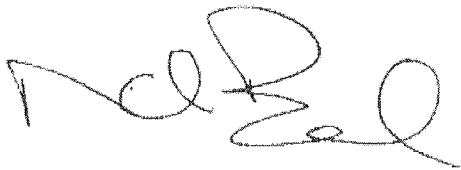
***Research and Monitoring***

There is will also be a need for on-going monitoring and research to ensure that the objectives of the reforms are achieved, and if necessary further systemic and legislative reforms are undertaken.

Respectfully submitted,



Brian Burke      BBurke@epsteincole.com  
President AFCC-O and Partner Epstein Cole LLP, Toronto



Nicholas Bala      bala@queensu.ca  
Board Member AFCC-O and Distinguished Professor of Law, Queen's University

---

<sup>13</sup> <http://www.ourcommons.ca/Content/Committee/421/JUST/Brief/BR10190233/br-external/NationalAssociationOfWomenAndTheLaw-e.pdf>