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ONTARIO DISPUTE RESOLUTION CENTRE



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Submission to Attorney General Chris Bentley

CREATING A FAMILY LAW PROCESS THAT WORKS

**FINAL REPORT AND RECOMMENDATIONS
FROM THE HOME COURT ADVANTAGE SUMMIT**

**Co-Hosts: Ontario Bar Association (OBA), ADR Institute of Ontario (ADRIO) and
Ontario Association for Family Mediation (OAFM)**

**Supporting Organizations: Ontario Collaborative Law Federation (OCLF) and
Association of Family and Conciliation Courts, Ontario (AFCC-O)**

November 22-23, 2009

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SUMMARY OF INTERIM RECOMMENDATIONS: CREATING A FAMILY LAW PROCESS THAT WORKS

**HOME COURT ADVANTAGE SUMMIT
Co-Hosts: OBA, ADRIO and OAFM
Supporting Organizations: OCLF and AFCC-O**

November 22-23, 2009

The Family Law system needs significant structural change to strengthen the process so that couples resolving family issues can do so with greater efficiency, at less cost and in a non-adversarial manner. Ontario families deserve a paradigm shift in family law and equitable access to services. The interconnected pillars of change are:

- 1. *Providing early information for separating spouses and children***
- 2. *Assessing parties and directing them to appropriate and proportional services using a triage approach***
- 3. *Facilitating greater access to legal information, advice and alternative dispute resolution processes***
- 4. *Developing a streamlined and focused family court process.***

Interim recommendations under each pillar arising from the consensus achieved at the Summit are as follows:

Pillar 1: Providing early information for separating spouses and children

- i) **Awareness** campaign, through enhanced Ministry website, brochures, advertisements and Help Lines, to provide legal and process information regarding separation and increase the public's knowledge of services available.**
- ii) **Mandatory Family Information Sessions (FIS)** on Separation and Dispute Resolution and on Parent Education offered in courthouse and community locations. To be implemented in all OCJ/SCJ co-located sites**

across the province beginning in 2010 and completed by 2011. FIS to be implemented in all remaining court locations by 2012.

- iii) Appropriately resourced **Family Law Information Centre (FLIC)** to service every court house, with **trained Court Registrars** and **counter staff** to redirect people to FLIC.

Pillar 2: Assessing parties and directing them to appropriate and proportional services using a triage approach

- i) **Case Assessment Coordinator(s) (CAC)** providing intake, screening and referral to potential litigants prior to commencement of action. To be appointed in all OCJ/SCJ co-located sites across the province beginning in 2010 and completed by 2011. CAC in all remaining sites by 2012.
- ii) **Provincial standards** of practice, qualifications, description of role and responsibilities, and training established for CAC position to ensure effective triage.
- iii) A **provincial and local management structure** established to effectively support the role of the CAC.

Pillar 3: Facilitating greater access to legal information, advice and alternative dispute resolution processes

- i) **Advice counsel, duty counsel and on-site mediation services** provided at every courthouse.
- ii) **Rosters** of qualified private mediators, collaborative lawyers, parenting coordinators and family arbitrators compiled and made available.
- iii) **Increased access to independent legal advice** available through issuing of Legal Aid certificates prior to filing of application, facilitating access to certificates for ADR processes, adjusting the financial eligibility criteria and unbundling legal services.

Pillar 4: Developing a streamlined and focused family court process

- i)** Develop and implement **court processes**, and **review and improve the Family Law Rules** to simplify forms and streamline proceedings. This can be accomplished by reducing the number of court appearances and implementing cost consequences for abuse of court resources.
- ii)** Support appropriate **case management** to provide for case continuity of judges under the principle of “**one family, one judge**” with **family law specialist judges** assigned to remaining high conflict or complex cases.
- iii)** Provide a **Support Recalculation Service** to facilitate variation without use of court and judicial resources.

CREATING A FAMILY LAW PROCESS THAT WORKS

INTERIM REPORT AND RECOMMENDATIONS FROM THE HOME COURT ADVANTAGE SUMMIT

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The following recommendations reflect the contribution of more than 120 judges, lawyers, mediators, mental health professionals and members of the public from various locations in Ontario. We were significantly aided by the excellent Summaries prepared by Professor Nick Bala and Phil Epstein as well as an additional submission by Alf Mamo. We consulted with several Summit participants on our drafts to ensure broad support for these recommendations.

OBJECTIVE:

The overall goal of these reforms is to create a paradigm shift in our approach to separating families. The shift is from a focus on court based resolutions to a more cooperative, interdisciplinary, forward looking approach that addresses the legal as well as the emotional needs of families facing this difficult life transition.

The reforms will provide families with early access to the information and resources they need to work out a safe and preferably non- adversarial resolution to their separation issues. Cooperative resolutions are encouraged where appropriate, with litigation being the default for high conflict couples. These reforms are also intended to result in a more efficient family justice system, and better use of public and private resources.

There was a broad consensus that there needs to be far greater public awareness of alternatives using advertising that emphasizes the AG's support for families using cooperative approaches rather than litigation to resolve family matters.

ASSUMPTIONS:

- When we look at a system from the perspective of either the service providers or the clients, we arrive at very different structures and priorities. We wish to be clear that our recommendations are based on the **clients' perspective**.
- Family Law is distinctive from all other areas of law and requires a blend of law and mental health knowledge and skills to address what is fundamentally a restructuring of the family at a time of crisis. In order to adequately resolve both the legal and emotional issues you cannot ignore the interdisciplinary nature of family law.
- When children are involved, family members remain financially, emotionally and practically interdependent indefinitely. Adversarial strategies for restructuring the family undermine the cooperation needed after a separation. Cooperative strategies promote constructive post-separation parenting, financial responsibility, and resilience in children.
- The existing family court structure in Ontario creates a serious inequity in access to justice for families. All families should have access to comprehensive adjunct services such as those which are available at Unified Family Courts.
- From a client's perspective, the current system is confusing, frustrating, expensive, stressful and emotionally devastating. It takes too long, fosters animosity and does not adequately address issues of domestic violence and often results in inconsistent outcomes. Options for resolving issues are not understood and are difficult to access. Litigation results are inconsistent and the court process does not protect vulnerable people.
- The current economic reality means that not all desirable changes to the family law system are possible immediately. Our recommendations can be rolled out over several years across the province, starting with sites where there will be the greatest impact, namely OCJ/SCJ co-located sites. This will ensure that there is time to adjust to a fundamental shift in the way family law is practiced, that adequately trained staff are put in place to carry out their new functions competently and to ensure that the public is educated about the range of options available for resolving their family issues. We do not support the idea of a "Pilot Project" since in the past this has not resulted in a timely and orderly systemic change of the kind that is needed and unanimously supported.

THE FOUR PILLARS:

Pillar 1. Providing early information for separating spouses and children

Pillar 2. Assessing parties and directing them to appropriate and proportional services using a triage approach

Pillar 3. Facilitating greater access to legal information, advice and alternative dispute resolution processes

Pillar 4. Developing a streamlined and focused family court process

Specific Recommendations for each Pillar follow

Pillar 1. Providing early information for separating spouses and children.

The first need is for mandatory *Family Information Sessions* to be offered across the province to better inform couples at the first opportunity about the various process options for resolving their separation issues. These sessions should be supplemented with resource information about how to access the various options. Attendance at such a session should be a prerequisite to filing a court application, except in cases of emergency.

What:

Mandatory Family Information Sessions (FIS) to include:

Family Information Session A – Separation and Dispute Resolution

One 2 ½ hour session for all couples explaining:

- The separation process and its impact on parties, including domestic violence and conflict
- An overview of the family justice process

- An overview of process options for high and low conflict situations and where to obtain further information on mediation, collaborative practice, circle processes, custody assessments, med-arb, arbitration and parenting coordination, etc., (Resource list with definitions of options, including a roster of qualified family ADR practitioners)
- Basic family law information regarding legal rights and responsibilities and where to obtain further information (Resource list)

Family Information Session B – Parent Education

Second 2 ½ hour session for parents of children under 16 years of age to address:

- Impact of separation on children and suggestions to maximize positive outcomes
- Constructive communication between parents to reduce conflict
- Overview of a Parenting Plan
- Overview of options and resources for creating and implementing a Parenting Plan, dealing with future disputes or changes in circumstances and to assist with adjustment (Resources for parenting programs, improving communication and conflict resolution)

When:

- As soon as possible following the decision to separate and before issuing an application, except in cases of emergency or danger.

How:

- Meet with a Case Assessment Coordinator (CAC) for a brief screening and referral to FIS.
- Spouses attend FIS separately, pre-registration required.

Where:

- FIS to be implemented first in all OCJ/SCJ co-located sites across the province beginning in 2010 and completed by 2011. FIS to be implemented in all remaining courts by 2012.
- Sessions to be held at court houses and also the community (e.g. in schools, community centres, the Office of the Children's Lawyer, religious institutions, libraries, shelters, theatres, municipal buildings, etc.). Community spaces may be available at different times (including evenings and weekends) and should include day care. Note: As most people will not be litigating the location should not necessarily be in a court house. Also, suitable space is at a premium in most courts.

Details:

- Scripted program offered jointly by a lawyer, mediator, and Mental Health Practitioner(MHP) with an honorarium paid to encourage quality and long term commitment by professionals.
- The applicant should not be delayed or penalized if the respondent declines to attend the FIS within a reasonable time (e.g. 30 days).
- Applicants with urgent matters and cases of domestic violence should be fast-tracked to court.
- Advertise FIS and other resources in family doctors' or counsellors' offices, shelters, schools, grocery stores and pharmacy, on public transit, on radio and TV, etc. with brochures, posters, infomercials, etc.
- Offer programs and materials in diverse languages.
- For those who cannot attend in person, or who need additional resources, provide teleconference, DVD's (including lectures), websites (skype), interactive booklets, pamphlets, etc.

Further:

- Mandatory DV training for all court staff, including judges, renewed every 2 years.
- Appropriately resourced Family Law Information Centre (FLIC) to service every court house (including space, clerical/administrative staff, as well

as a Case Assessment Coordinator) Note: Some CAC's may be located outside the court house as determined by local committees.

- Computer programs to calculate child and spousal support, Provincial Help Line and enhanced websites to offer basic information re locating resources, general legal information, glossary, filling out forms, etc. (scripted, offer choice of topics).
- Trained Court Registrars and counter staff to redirect people to FLIC and FIS. Provide a brief questionnaire asking clients if they have tried ADR options, and what options, prior to arriving in court.
- Additional workshops at community or professional organizations e.g. Family Service Associations, ADR organizations, Office of the Children's Lawyer, Legal Aid, University clinics, etc. regarding introduction to family law, parenting after separation, communication, financial planning, etc.
- Provide resources directly to children using websites, pamphlets, books, etc. at schools, libraries and community centres.
- Kids help line regarding separation issues and resources.

Pillar 2. Assessing parties and directing them to appropriate and proportional services using a triage approach

The second need is to have highly trained Case Assessment Coordinators (CAC's) assist parties by screening for domestic violence and level of conflict and then helping parties select resources that are appropriate to address their needs in an effective and efficient manner. The CAC's will make referrals and monitor compliance to maximize the success of matching resources to client needs. This front-end court service will ensure that each court attendance is necessary and appropriate.

What:

- Case Assessment Coordinator(s) (CAC) to be appointed initially in all OCJ/SCJ co-located sites across the province beginning in 2010 and completed by 2011. CAC in all remaining courts by 2012.
- The CAC role is critical to the functioning of this paradigm shift. There is a concern that, if the CAC's report solely to the local court, they may be drawn into a more traditional court-oriented role and the necessary level of qualifications may not be met. Therefore a management structure should be put in place that supports and monitors the role of the CAC on a provincial level. This structure should ensure consistent standards for qualifications, training and continuing education and oversee research regarding efficacy across the province. Local committees would have input into local job descriptions.

How:

- Parties complete preliminary questionnaire to highlight issues (potentially) in dispute, background information, ages of children and current plan if any for parenting, level of conflict and risk and whether any ADR options have been tried. Questionnaire available on line, at court house, in offices of lawyers, mental health professionals, doctors, etc.
- Face-to-face individual meeting (if possible) with participants to determine who might benefit from ADR and who is at risk or inappropriate for ADR. CAC meeting to:
 - Screen for high conflict (domestic violence, power and control, mental illness, substance abuse, child abuse or neglect) vs. low conflict

- Clarify issues in dispute or potentially in dispute
- Offer education on dispute resolution process options
- Act as service brokers, that is make referrals to appropriate resources and follow up with parties to ensure compliance and obtain feedback re efficacy
- Fast track emergency cases to court

When:

- Triage all parties as soon as possible after the FIS and before filing any court application (except in an emergency).
- Triage if return to court to change existing Agreement, Order or Award.

Standards:

- Establish provincial training standards for Case Assessment Coordinator (CAC) - likely a Mental Health Professional (MHP) and family mediator, possibly a Family Law Lawyer.
- Obtain input from various cultural and ethnic groups regarding training standards.
- Training should meet the standards of the ADR Institute of Ontario Certified Family Mediator or OAFM entry requirement for Child Protection Mediator (both include 2 days of DV Screening), as well as:
 - Cultural sensitivity training
 - 30 hours of Family Law for non lawyers (on Custody, Property and Support and the court process)
 - Basic training in other ADR options i.e. Collaborative Practice, Circle processes, Custody Assessments, Med-Arb, Arbitration and Parenting Coordination, etc.

- Knowledge of various community resources (i.e. for substance abuse, mental illness, shelters, financial advice, welfare, supervised access, etc.)
- Continuing education requirement
- Require liability insurance and protection for CAC's from vexatious complaints

Details:

- Develop a province-wide standardized interview tool to guide screening regarding level of conflict, ability to communicate, risks to spouse and children, understanding of legal rights and responsibilities.
- Create local committees made up of lawyers, mediators, MHP, members of the public to oversee local rosters of qualified ADR professionals and to encourage different delivery models in different communities (have a provincial roster to include all local CAC's and qualified ADR professionals).
- Refer appropriate cases to ADR options, including legal information and counseling, prior to/instead of using court system (i.e. to mediators, lawyers, collaborative practitioners, divorce financial specialists, counselors, coaches, etc.).
- Fast track cases deemed inappropriate for ADR and urgent matters to court.
- If face-to-face meeting is not possible, provide teleconference, email, DVD, print information and interactive questionnaires in a variety of languages; however Screening for DV must be done in person.
- CAC's could also provide their services in other organizations servicing separating people i.e. Family Service Associations, Office of the Children's Lawyer, community centres, religious organizations, etc. as determined by local committees. Clients could be seen at more flexible hours, including evenings or weekends and the burden on courts to provide space would be reduced. This would provide a less adversarial environment to meet with family members.

Pillar 3. Facilitating greater access to legal information and advice and alternative dispute resolution processes

The third need is to ensure that parties are connected to the resources they require as soon as possible to facilitate an early resolution to any issues related to their separation. For parties who choose to resolve their issues cooperatively, referrals will be made to both legal and appropriate problem solving options.

What, How, Where and When:

- Provide legal aid advice counsel and duty counsel and an on-site mediator for urgent, limited issues in all OCJ/SCJ co-located sites across the province beginning in 2010 and completed by 2011, with remaining courts implemented by 2012.
- In smaller courts, resources could be shared according to an equitable schedule based on need i.e. they could work part time in different courts.
- Enable Legal Aid to provide certificates before an action is commenced.
- Enable Legal Aid to provide sixteen hour certificates for mediation, collaborative practice, parenting co-ordination and med-arb (with discretion to increase).
- Encourage lawyers to offer “unbundled legal services” – i.e. not necessarily retained or on the record. Legal aid should be available for ILA and an opinion letter for mediating couples.
- Use Law School Clinics with students, paralegals and MHP’s supervised by a lawyer to assist in completing forms and offering legal information (especially for uncontested cases).
- Family Service Associations, Cultural groups and Law Schools, etc. offer public lectures on Family Law at nominal cost.

- Enable judges to order the services of a Parenting Coordinator to address parenting issues arising following an Agreement, Order or Award.
- Enhance the use of DRO's across the province and use lawyers for financial issues and mediators for parenting issues. Pay a per diem per half day to attract well qualified DRO's. Require attendance at a Family Mediation course as a prerequisite for DRO's.
- Require counsel and clients to sign an affidavit indicating that they have been offered information and advised of the alternatives to litigation.
- Create family law legal clinics for low income parties and within different cultural/linguistic communities.
- Adjust the financial eligibility criteria for legal aid to increase access to independent legal advice. This is essential to reduce the number of unrepresented litigants. Create a roster of family mediators and collaborative lawyers who are willing to provide services on a sliding fee scale through a

government-subsidized program in order to achieve an early and out-of-court resolution. This could be done through MAG or through a transfer payment agency such as the ADR Institute of Ontario.

- The delivery model should not award exclusive provision of adjunct services to one contractor as is done in the UFC model.
- Provide incentives to encourage mediators and lawyers to set up a locum in remote locations.

Pillar 4. Developing a streamlined and focused family court process

The fourth need is to make the court process more efficient, understandable, and accessible to those spouses who are not appropriate for out of court approaches. The court needs to adapt so as to better meet the needs of high conflict, complex cases.

What and How:

- Unified Family Courts are the desired goal, but require participation by the Federal Government and may not be possible in the near future.
- Once low conflict cases are diverted from the courts, family specialist judges can be assigned to the remaining complex, high conflict cases.
- Continuity of judges is very important. The principle should be “one family, one judge” to include separation, child protection and delinquency matters within a family, i.e. there will be consistency, efficiency and accountability if the same judge is familiar with the overlapping family issues and can oversee compliance with court orders.
- Increase efforts to reform Family Rules and Forms to improve the efficiency of the justice system. The objective is to reduce the number of appearances, simplify Forms (CLEO to put them in plain language), remove duplication of information and make greater use of technology.

- The custody affidavit in Bill 133 should not be required until it is known that the case is going to trial.
- Litigants who have not complied with a court order should not be allowed to file further motions without leave.
- Judges should be encouraged to use their power to order costs against litigants who fail to appear, or appear unprepared, or use other delay tactics.
- The payor should bear the burden of proof of income.
- Payors wishing to reduce their support obligations should be required to provide a copy of FRO's Statement of Arrears to a CAC or DRO before being permitted to file an application.
- Establish a Child Support Recalculation Service with provision for the recipient to object to the net income shown on the tax return by self-employed payors. All parties to a child support order should be required to sign a consent to allow Revenue Canada to provide their income tax information to this service.
- Establish a Help Line to assist clients with information and resources.
- Case History Report – computer and software to provide technological support required to effectively track cases.
- For those in arrears, the government should pay support and collect from the “payor” and impose a tax penalty.

Funding Ideas

- User charge on Marriage licenses & court applications.

- Increase Legal Aid for cooperation – Certificates directly to mediators and expansion of current pilot project to provide certificates to Collaborative lawyers across the province.
- Sliding Scale Charges.
- Lottery to help for Family Resources.