



ACCESS TO FAMILY LAW JUSTICE

**BACKGROUND/ DISCUSSION PAPER
NOVEMBER 25, 2011 THINK TANK**

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ACCESS TO FAMILY LAW JUSTICE

BACKGROUND/DISCUSSION PAPER

The lack of access to justice is causing concern all across Canada.

The Chief Justice of Canada, the Honourable Beverley McLachlin, frequently raises it and has established a national committee to explore ways to increase access to justice.

The Canadian Bar Association has discussed it at length, established the Canadian Forum for Civil Justice, commissioned research papers, and begun a legal action about access to legal aid.

Justice Canada has conducted research into how legal aid is working and how people who lack access to justice are often involved in a number of related and often unrecognized legal issues.

Universities have conducted research and held conferences.

Territorial and Provincial Governments have conducted studies within their own jurisdictions and implemented strategies to increase access to justice.

Individuals, equality-seeking organizations, and legal education agencies have researched and advocated for increased access to the justice system, especially family law for many years.

The problem exists primarily with civil matters. Civil law covers anything and everything other than criminal law. Family law, which is part of the civil system, “covers everything to do with families. It includes: divorce, spousal support, child support, custody, access, division of assets and liabilities because of family breakdown, adoption, parental rights, and paternity.”

Family law issues are those which cause most Canadians to come into contact with the justice system. Family law is the area in which lack of access to justice is most common.

The situation in Prince Edward Island is no different from elsewhere in Canada. There is a family legal aid program for the poorest Islanders who have children or who face violence in their family relationship,

but legal aid is not available to those whose income level is above the cut off. Nor is it available to those who have no dependent children. There is a huge gap between the income level to qualify for legal aid and the income level where people can actually afford to pay for a private lawyer to take their case. Many lawyers ask for a retainer of \$1,500 to \$5,000 before agreeing to take on a case. Family cases take a long time to resolve and are often complex. Every day at Community Legal Information Association (CLIA) staff hears from people who have spent all their discretionary funds, and more, on legal services without getting any results. Likewise, year after year at the Advisory Council on the Status of Women (ACSW), most calls for referral are from women who want legal advice, especially for family law matters.

When CLIA conducted research on self-representing litigants, staff was told that cost is a major reason for self-representation. We were told that it is common to spend about \$30,000 for legal services before becoming a self-representing litigant. CLIA promotes alternative dispute resolution in family matters but this is not readily available for people with little or no income. The family court mediator works less than full-time and there are relatively few private family mediators on our mediators list.

Access to justice in Prince Edward Island needs to be discussed. The good work that has been done to date must continue and all of us involved in the civil justice system, whether directly or peripherally, need to put our heads together to find new ways to provide access to family justice in a time when economic stresses are getting harder to deal with and there are real possibilities of cut-backs to existing funds and programs.

The goal of this paper is to be brief and suggestive rather than comprehensive. It looks at developments in PEI since the Ross Report¹ in 1999 and provides a snapshot of information from national research, national initiatives, and initiatives and strategies from other Canadian jurisdictions.

ACCESS TO JUSTICE INITIATIVES IN PRINCE EDWARD ISLAND SINCE 1999

¹ A Review on Family Law Services, Government of Prince Edward Island Legal Services Division, by Norman A. Ross, 1999

Using the 1999 Ross Report commissioned by the Legal Services Division of the Department of Community Services and Attorney General as the baseline, it is obvious that there have been positive developments in access to family justice in PEI. When “A Review on Family Law Services” was written by Norman Ross, he detailed the existing government services as shown on the left in the table below. The services available today are in the right-hand column.

ROSS REPORT SITUATION 1999

Legal Aid services to family law clients were confined to clients who were victims of family violence and parents whose children had been apprehended by the Director of Child Welfare. Four lawyers were employed to deal with criminal and family law cases. An estimate of 10% of their time was spent on family law. Recommendation: an enhanced, re-focused Domestic Legal Aid Program which would address the needs of low-income unrepresented parties.

Family Court employed two family court counsellors who were responsible for mediating custody and access issues, providing limited individual counseling and preparing home studies. These are court ordered custody and access reports. Home studies were taking four to six months to complete.

Child Support Guidelines Offices had recently opened in Charlottetown and Summerside, employing two clerks to provide assistance to clients seeking child support or to vary an existing order or agreement.

CURRENT SITUATION 2011

Legal aid services to family law clients are available to victims of family violence, parents whose children have been apprehended, and parents seeking child custody, access and visitation. Clients must meet the financial income test to be accepted. Three full-time family law lawyers are employed in Charlottetown and two in Summerside. One of the Summerside lawyers is paid for by the Law Foundation.

Family Court employs two family court counsellors who are responsible for conducting home studies. These are taking about one year to complete. Family court also employs one mediator in a .8 position who will mediate child custody, access and visitation.

Child Support Guidelines Offices operate in Summerside and Charlottetown. In Charlottetown there are two employees, in Summerside there is one employee. These staff persons support people seeking to obtain or vary child support orders through the court process.

ROSS REPORT SITUATION 1999

The Maintenance Enforcement Program (MEP), begun in 1988 was short staffed and essentially limited to collecting payments from those prepared to cooperate.

The Family Support Orders Program instituted through the Department of Health and Social Services in 1994 employed three lawyers and had a mandate to seek maintenance and support agreements for single parents receiving financial assistance while [sometimes] dealing with intertwined legal issues such as custody, access and visitation.

The Supreme Court Trial Division reported that the vast majority of civil litigation was family law related and approximately fifty percent of litigants were unrepresented and ill prepared.

Members of the family bar, according to Ross, were underutilized due to the cost of their services. Potential clients chose to represent themselves because they could not afford legal services.

Community Legal Information Association of PEI (CLIA), which runs the lawyer referral service dealt with about 200 family law related inquiries a month. This represented about 60% of the callers. CLIA also actively promoted mediation through its inquiry line and regularly referred callers to mediation as well as to lawyers.

CURRENT SITUATION 2011

In 2011 the MEP has 7 staff, including four enforcement officers and 3,000 active cases. The Act has been amended and there are a number of strategies in place to enforce compliance. MEP can suspend licences, schedule notice of default hearings, hold resolution hearings, garnishee wages and government payments. The ISO Act allows MEP to enforce files from other jurisdictions.

The Family Support Orders Program no longer exists. The three lawyers who staffed this service have joined legal aid as designated family law lawyers.

The numbers remain more or less the same in 2011, but now some litigants have counsel for a portion of the case. They may retain counsel on an issue basis, or retain counsel at the beginning and then dispense with their services because of cost factors, or disagreements, or some other reason.

Potential clients still choose to represent themselves because they cannot afford legal services.

The demand for family law information and lawyer referrals for family purposes remains high. However, there has been a decrease in the number of lawyers willing to accept family law referrals. In Charlottetown only five lawyers remain on the family law list. In Summerside in November 2011, only one lawyer will accept family law referrals. A second lawyer accepts one referral per week.



ROSS REPORT SITUATION 1999

Recommendation: the establishment of a mandatory Parent Education Program.

Recommendation: the use of pre-litigation alternatives including mediation and early neutral evaluation.

Recommendation: government commit to re-organize Family Legal Services in a cohesive and centralized facility, in or close to the court house, under the direction of the family justice counselor with a primary objective of promoting voluntary, non-judicially imposed agreements by delivering a variety of integrated family legal services.

CURRENT SITUATION 2011

Positive Parenting from Two Homes, a Parent Education Program, is delivered by trained facilitators. It is not mandatory. The program is delivered 12 times each year. Average attendance is 12. A program for children is delivered with the assistance of school guidance counselors, through the schools, up to 20 times a year.

A limited amount of free mediation on matters of custody, access and support is offered by the family court mediator who is employed in a .8 position.

The Hon. C. R. McQuaid Family Law Centre, was “established to provide programs and services in a coordinated manner to families going through separation and divorce.” Most services are housed together close to the courts, and staff routinely refer clients to other family legal services and to alternatives to court.

In 2003 a Recalculation Office for child support was opened as part of the Family Law Centre. This offers automatic recalculation of child support in some cases to bypass court.

In his “Action Plan for Family Law Services” Ross listed the four recommendations noted above and added two more. He recommended:

An early neutral evaluation program utilizing the skills of under-employed private family lawyers who would provide pre-court dispute resolution services. He said that lawyers who specialize in family law should be recognized by government as a valuable community asset. He called for them to be involved in a paid, mandatory, court-connected early neutral evaluation project delivering neutral dispute

resolution services to parties before matters proceed before a judge. Ross noted that a program like this in Ontario resulted in 70% fewer cases going forward to court.

That professional development opportunities for judges focused on the impact of divorce on families and that new initiatives be undertaken in response to his report.

PEI TASK FORCE ON ACCESS TO JUSTICE

In 2001 the Honourable Gerard E. Mitchell, Chief Justice of Prince Edward Island, in co-operation with the Office of the Attorney General, the Law Society of Prince Edward Island and the Prince Edward Island Branch of the Canadian Bar Association, established a Task Force on Access to Justice²

The Task Force mandate was to undertake an “internal review” of the Civil Justice System in the Province, in an effort to improve access to the legal system. The work of the Task Force concentrated on four areas:

- 1) Self-Represented Litigants
- 2) Technology
- 3) Court Process
- 4) Legal Aid

While each committee submitted a report with specific recommendations in its area of study, the general recommendations of the Task Force included the following statements that addressed access to justice overall:

- There must be greater attempts undertaken to educate the public about the justice system.
- There should be greater co-operation between the Judiciary and the Community Legal Information Association to develop self-help kits and information booklets, packets, videos, etc., for use by the public and the litigants who represent themselves in court proceedings.

² Task Force on Access to Justice Prince Edward Island: Final Report, July 2002

- The Community Legal Information Association office needs to be located in a more accessible location and be given a higher profile in the community.
- The government should take steps to ensure the teachers in the school system have the adequate information, textbooks and other resources they need to educate children about our legal institutions and the justice system.
- The language, procedures and accessibility of the civil justice system ought to be simplified, made more user-friendly and made easier for all to understand.
- The pressure now being experienced by court staff [should] be relieved by providing legally trained staff to assist the public and self-represented litigants with general legal information.
- Technology [should] be used to increase accessibility and awareness.
- The public need to be informed about rights and responsibilities and the effective use of all means of dispute resolution.
- Consideration ought to be given to the establishment of a court volunteer program whereby members of the community become directly involved in the work of the court as volunteers.
- The Civil Justice System needs to be adequately resourced to meet its objectives.

The Legal Aid Committee was concerned about the complexity of the process for accessing legal aid. As noted in the Table above, this has been eased since 2001. The Committee also identified problems with the lawyer referral service operated by Community Legal Information Association on behalf of the Law Society. This service is aimed at helping members of the public find a lawyer who will advise them on their need for further legal assistance. In 2001, a fee of \$10 provided a half-hour with a lawyer. In 2011, the fee for the lawyer referral service was increased to \$25 and the amount of time with a lawyer was increased to 45 minutes. The service is still facing major challenges with the small number of private family practice lawyers who choose to participate. Currently, there is only one fully participating lawyer in this area of law in Summerside and five participating lawyers in Charlottetown.

A Steering Committee established to carry forward the recommendations of the Task Force ceased operations in 2003 when it became obvious that no additional resources were available to implement Task Force recommendations.

ACCESS TO JUSTICE AND FAMILY LAW RESEARCH

There are two pre-eminent Canadian researchers in family law, access to justice and legal aid. They are Dr. Melina Buckley and Dr. Ab Currie.

Dr. Melina Buckley, a lawyer and legal policy consultant working in the areas of human rights, access to justice and dispute resolution has carried out extensive research on legal aid and advocated for enhanced legal aid for over a decade. I would like to acknowledge that many of the ideas and much of the information in this paper originated in her work.

Dr. Ab Currie, Principal Researcher: Access to Justice Research and Statistics Division Justice Canada is the leading Canadian authority and scholar on legal aid matters. In his paper, “The Legal Problems of Everyday Life: The Nature, Extent and Consequences of Justiciable³ Problems Experienced by Canadians”⁴, Dr. Currie writes, “It is widely accepted that many people with serious civil justice problems do not have access to the courts and thus do not appear as un-represented litigants. It is also part of the growing orthodoxy that many problems could be better resolved using alternative means, without engaging in expensive and lengthy court proceedings.”

He continues, “It should not be surprising to find that civil justice problems occur frequently in societies with extensive regimes of civil law. Civil laws regulate a great many aspects of life in western legal-bureaucratic societies such as family relations, the purchase of goods and contracting debt, conditions pertaining to rental housing, and other areas. Civil law defines rights and obligations in many areas of life; it is designed to protect people against the unscrupulous actions of others, and it allows people to pursue a just claim. However, these defining features of civil law do not take effect only at the courthouse door; they operate in all the corners and crevices of daily life where activities regulated by civil laws take place.”

³ Hazel Genn, *Paths To Justice: What People Do and Think About Going to Law*, Hart Publishing, 1999 defines a justiciable event as “a matter experienced by a respondent which raised legal issues, whether or not it was recognized by the respondent as being “legal” and whether or not any action taken to deal with the event involved the use of any part of the civil justice system.” p. 12.

⁴ *The Legal Problems of Everyday Life: The Nature, Extent and Consequences of Justiciable Problems Experienced by Canadians*, by Dr. Ab Currie www.justice.gc.ca/eng/pi/rs/rep-rap/2007/rr07_la1-rr07



In February 2011, the Right Honourable Beverley McLachlin, P.C., Chief Justice of Canada was keynote speaker at the “Access to Civil Justice for Middle Income Canadians Colloquium” organized by the Faculty of Law at the University of Toronto. The colloquium was the wind-up activity of a year-long initiative focused on generating concrete proposals to increase access to justice for middle-income Canadians. Chief Justice McLachlin has long been concerned about access to justice. “People expect they can turn to the legal system for a resolution,” she said. “They are ‘hard-wired’ for justice. Access to justice affirms the rule of law, and promotes social stability.” The chief justice referred to access to justice as an evolutionary process. “Needs change over time. One hundred years ago, family law wasn’t a big issue. Now it is.”⁵ The Chief Justice has established a committee of experts to explore Access to Justice in Civil and Family Matters. This ongoing committee is working to promote equal and effective access to civil and family justice nation-wide, encouraging and supporting concrete steps to improve access to justice.

The colloquium capped off a year-long [University of Toronto-based initiative](#) on middle income access to justice that drew on the expertise of experts in the Canadian bar and bench and also from the United States, United Kingdom and Australia. Current strategies in use in the UK and the US, such as community advice bureaus, non-lawyer forms of assistance, and legal insurance plans were also part of the research.

A 122 page [Background Paper](#) written to provide an overview of the issue and to identify the most acute, unmet civil legal needs in the province for middle-income Ontarians across different key areas of law is available in PDF on the colloquium website.⁶ The impetus for this initiative on middle income access to justice was the 2008 “[Report of the Legal Aid Review](#)”, prepared by the law faculty's Professor Michael Trebilcock . “A key finding of the Report is that there is an acute lack of access to justice for the working poor and middle class in Ontario, evidenced most strikingly by the increasing phenomenon of unrepresented litigants.”⁷ Much of the information and most of the discussion in this report is relevant to the situation in PEI.

5 Globe and Mail, February 11, 2011

6 www.utoronto.ca/documents/conferences2/AccessToJustice_LiteratureReview.pdf

7 Report of the Legal Aid Review by Prof. Michael Trebilcock, Attorney General of Ontario ,2008

THE DELIVERY OF LEGAL AID

Legal aid is technically cost shared by the Federal and Provincial governments under the Canada Social Transfer (CST). In reality it's funded by the province. There is no specific cost sharing for civil legal aid and no willingness to even discuss funding civil legal aid federally.

All provinces and territories of Canada participate in a reciprocal family law legal aid agreement. This is to facilitate cases where spouses live in different jurisdictions.

In PEI, family legal aid was added to the legal aid program in 1980⁸ when the program was expanded to include family and civil matters. In addition to family cases, civil legal aid is also available for child protection cases and involuntary hospitalization or residential orders under the Mental Health and Adult Protection Acts. The majority of applicants for family and civil legal aid in PEI are women. They outnumber men two to one.

To quote from the 2008 – 2009 Annual Report of the Office of the Attorney General, PEI, “The objective of family legal aid is to provide legal assistance to those who cannot afford the services of a lawyer in the most urgent family situations.” Legal needs are prioritized on two levels:

“Level One, the highest priority, refers to cases where domestic violence has occurred or where the personal security of applicants or children in their care is endangered in a family situation.

In Level Two situations, applicants who require legal assistance to meet the needs of dependent children are given priority. Legal needs in this category include: custody, access, financial support, and housing. Due to the high demand for those services, only very limited resources remain available to assist applicants with legal needs not directly related to the support of dependent children.”

The Annual Report continues, “...approximately 30 percent of family and civil applications are never completed by the applicant and about 18 percent are refused. Reasons for refusal may include coverage, restrictions, financial eligibility, case merit or failure to comply with legal aid procedures. The most

⁸ Annual Report 2008 - 2009, Office of the Attorney General, PEI

common reason for non-completion is a failure by the applicant to provide financial information within a 30 day period.”

In 2008--2009:

- 464 family and civil applications were received, 144 of these were withdrawn and 89 were denied.
- The number of applications approved for full service included 44 applications related to the Child Protection Act, 24 Family Level One and 115 Family Level Two and other civil matters.
- Another 48 applications were approved for summary assistance and 53 were referred to private sector counsel.
- Six applications were received from other provinces or territories and two applications were sent to other provinces or territories.

In 2001, the top payment level for private sector lawyers through legal aid was \$60.00 per hour for a family case, and the usual allocation was for ten or twelve hours with a possibility of an extension. In 2011, the legal aid tariff is \$70 per hour for lawyers with less than four years experience and \$80 for lawyers who have been practicing for more than four years. In theory, there is still a cap on the number of hours per case. In practice this is difficult to enforce and is reviewed case by case. Certificates are issued for 12 to 15 hours. Beyond this limit lawyers have to negotiate additional client hours in advance of billable hours.

The financial scale eligibility can be flexible depending on the seriousness of the legal issue. Each case is considered on its own merit. The following amounts do not indicate an absolute cut off. In 2011, the amounts are set at \$15,778 for a single person, \$19,722 for a family of two, \$24,527 for a family of three and \$29,680 for a family of four. Beyond this the level increases by \$3,800 per person in the family. Interestingly the Market Basket Measure of Low Income published by Human Resources and Skills Development puts the poverty line at just over \$30,000 in PEI.

Kent Brown, Q.C., the Director of Legal Aid, is concerned about the increasing financial gap between the poor and rich. Middle income families are caught in a legal vise grip; they cannot access legal aid nor afford the services of a private lawyer. Research in Ontario has indicated that this one fact is largely responsible for the increase in self-represented litigants.

In her paper “Moving Forward on Legal Aid” for the Canadian Bar Association, Dr. Melina Buckley writes,⁹ “For the most part, eligibility levels for legal aid have not changed leaving more people without access to legal services. Quebec and Manitoba have expanded eligibility for legal aid by having clients whose incomes are just above the eligibility threshold pay for some of the services provided.”

To quote the Legal Aid Committee of the Task Force, “Under the CST, federal funds for such social services as health care, education and civil legal aid are lumped together and transferred to the provinces in one payment. Although the CST is intended to cover the complete range of social services, amounts are not identified for specific programs. Accordingly, if the province was to allocate more CST money to civil legal aid, that would mean less for health care and so on.”¹⁰

In the Annual Report 2008--2009 of the PEI Office of the Attorney General (the most recent on the government website), total civil and family legal aid expenditures reached \$859,041, substantially more than criminal legal aid at \$667,205. Fees paid to private counsel in the area of family legal aid, at \$81,299 were approaching double those paid for criminal legal aid, at \$48,827. This supports the contention that more than money is needed. Norman Ross in his report said¹¹, “Offering legal aid certificates to low income, unrepresented parties with carte blanche to engage in unrestrained family litigation is not the answer.”

Task Force members agreed, calling for:

- establishment of a Help Desk with a focus on Family Law
- creation of a video library for public loan
- establishment of early stage mediation in family matters
- more legal assistance, the assistance of mediators and/or the assignment of judicial resources to get cases settled at an early stage, and

⁹ Moving Forward on Legal Aid: Research Needs and Innovative Approaches by Melina Buckley, Canadian Bar Association
June 2010

¹⁰ ibid

¹¹ Report on Family Law Services by Norman A. Ross, February 1999

- hiring a lawyer to handle the recalculation function in family cases, and to provide lay litigants with some very basic suggestions and advice on how to present their cases and prepare them for court

PEI CALLS FOR IMPROVED ACCESS TO FAMILY LAW JUSTICE

Many people have advanced the cause of access to justice in PEI. Champions like Hon. Catherine Callbeck, through her provincial leadership and national work, and Daphne Dumont Q.C. through her family law practice and her term as president of the Canadian Bar Association have made substantial contributions. Supreme Court justices and court staff have done what they can within their positions or role in the court system to help self-representing litigants.

Non-governmental organizations such as the East Prince Women’s Information Centre and Women’s Network PEI have provided information to clients and advocated for changes to the system. In 2001, Women’s Network PEI published a comparative study of family legal aid¹² for the Social Justice for Legal Aid for Family Law project. In this document, Melissa Doucette reported that while there is need for a greater funding commitment from all levels of government there are other needs as well. She said that, “Particularly for women, family legal aid needs to have a broader scope in both who it reaches and what areas of law are covered.” She pointed out that women who have no children or whose children are now adults are not eligible for legal aid. This is still the case in 2011.

PEI ADVISORY COUNCIL ON THE STATUS OF WOMEN

In 2002, the PEI Advisory Council on the Status of Women issued a Policy Guide on Family Law.¹³ The Guide presented a gender-based analysis of legislation and practice affecting family law. Amongst the recommendations to government included in this Guide are some that directly affect access to family justice:

- Create legislation that establishes rigorous standards for the mediation profession.

¹² Family Legal Aid: A Comparative Study by Melissa Doucette, Women’s Network PEI, March 2001

¹³ Policy Guide: Family Law, Prince Edward Island Advisory Council on the Status of Women, February 2002

- Work with the federal government to initiate a nationally standardized, cost-shared family legal aid program that is available to all income-eligible applicants who require legal representation in matters of property division, child/spousal support, and custody arrangements.
- Establish an agency as a first point of entry for women, men, and children upon the breakdown of the family unit to provide information, assessment, and referrals for legal and non-legal professional services. Some non-legal services could include distributing self-help kits and enabling supervised custody, along with providing voluntary counselling, mediation, and parenting programs.

The PEI Advisory Council on the Status of Women is an arms-length from government advisory agency. The members are appointed by government to advise, advocate and work for equality and to support women's full and active participation in social, legal, cultural, economic, and political spheres of life. The Advisory Council has followed up on recommendations in this policy guide with an Equality Report Card, including a section that assesses government's actions on access to justice. The 2011 Equality Report Card gave government a C overall, but gave only a D grade for "improved access to family law legal aid lawyer." The D grade represents no change from the 2009 status quo. The 2011 Equality Report Card also calls for the implementation of recommendations from the Justice Options for Women project (see below) and for establishment of a domestic violence court. The Advisory Council points out the urgent need for "more diverse, out-of-court options for people" to be developed, promoted and made more accessible.

COMMUNITY LEGAL INFORMATION ASSOCIATION

Community Legal Information Association is a charitable organization established to provide free legal information and education to Islanders. Access to justice has always been part of CLIA's mandate. CLIA operates with funding assistance from the Department of Justice Canada and the PEI Law Foundation, and in-kind support from the Government of PEI. Since CLIA's inception in 1985, family law has been a high priority for CLIA staff with more than half of inquiry calls and lawyer referrals being in the area of family law. Since 1999, CLIA has been involved in the development and implementation of a number of projects and programs designed to promote access to family justice:

- Parenting From Two Homes Program
- Access to Justice Task Force in 2001--2002 (also member of the Steering Committee)

- Do-it-Yourself Kit for Uncontested Divorces in PEI
- Development and distribution of child support guidelines information
- Participation in the Social Justice for Legal Aid for Family Law project
- Single parent workshops
- Distribution of Family Law Information Boxes
- Survey of lay people involved in the civil courts (for the Task Force on Access to Justice)
- Civil Justice and the Public project (Forum on Civil Justice)
- Family Law Information Sessions
- Feasibility Study on a Self-Help Centre for Unrepresented Litigants
- Court-based Information Centre for Self-Represented Litigants proposal
- Who Wins Who Loses? pilot courses in the Supreme Court
- Custody and Access Self-Help Application Kit (in development)

Many referrals, publications, presentations, displays and workshops provided by CLIA have to do with family law and access to family justice. This is the area of greatest demand for services. Currently, CLIA has organized and presented two pilot courses about going to family court. With the new working title of, “The Best Interests of the Children in Custody and Access” these will be offered every six weeks in 2012. Each short course is two sessions long. The sessions are delivered by volunteer lawyers and are provided free for people facing custody and access issues. In these courses, participants learn what to expect if they have to go to court to resolve their dispute, how the best interests of the child can be met, and ways to resolve their dispute outside of court.

In 2010, CLIA developed a proposal designed to provide practical assistance to represented and self-represented litigants alike. The proposed activities included:

- Developing content, planning and implementing group education & information sessions
- Setting up a part-time, staffed Self-Help Centre
- Holding an initial consultation with every self-representing litigant in family law
- Providing interactive court forms for custody and access
- Promoting opportunities to resolve issues out-of-court at all stages of the process

The proposal was not considered for funding because it was thought to be too expensive by the Law Foundation of Ontario, who managed the Pan-Canadian Access to Justice Fund.

CANADIAN BAR ASSOCIATION

The CBA has been an outspoken champion of access to justice. The Canadian Forum on Civil Justice was established in response to recommendations in the 1996 [Report of the Task Force on Systems of Civil Justice](#)¹⁴. It is designed to be, "... a non-profit, independent organization dedicated to bringing together the public, the courts, the legal profession and government in order to promote a civil justice system that is accessible, effective, fair and efficient."

Documents on the Forum website (www.cfcj-fcjc.org) emphasize involving the public by communicating information clearly so that the public can understand and participate in civil justice reform. Through the Forum, the CBA wants "to ensure that the citizen is at the centre of our justice system."¹⁵

The Forum seeks to improve the civil justice system in a variety of ways including the following:

- collecting information about the civil justice system
- carrying out in-depth research on the civil justice system
- promoting the sharing of information about the use of best practices
- functioning as a clearinghouse and library of information for the benefit of all Canadians
- taking a leadership role in providing information about civil justice reform initiatives and sharing this information.

The Forum has recently moved from the University of Alberta to Osgoode Hall Law School and the York Centre for Public Policy & Law in Toronto. It is presently operating on a Community-University Research Alliance grant awarded to the Forum by the Social Sciences and Humanities Research Council to study the cost of the civil justice system.

On its website, the Canadian Forum for Civil Justice has posted an inventory of civil justice reform initiatives compiled from across Canada.¹⁶

¹⁴ Report of the Canadian Bar Association, Task Force on Systems of Civil Justice, August 1996

¹⁵ Canadian Forum on Civil Justice, About the Forum www.cfcj-fcjc.org

Interestingly, the National Council of the CBA has also considered CBA members' responsibility to provide legal assistance to individuals who cannot afford to pay for their services. At the 2003 mid-winter meeting in Banff, National Council passed a resolution calling on each member of the legal profession to contribute 50 hours or three per cent of billings per year in pro bono legal services.

Pro bono work is voluntary legal work for a charitable organization or for an individual who is unable to pay. The resolution also called on the CBA to take action to assist lawyers by removing barriers to pro bono service by:

- “developing model policies for law societies and their insurers, to permit E&O insurance coverage for pro bono work by lawyers who are otherwise exempt from insurance coverage (for example public sector lawyers, corporate counsel, non-practicing and retired lawyers); and
- encouraging each law society and its respective insurer to implement the necessary insurance coverage to permit insurance exempt lawyers to act on a pro bono basis.”¹⁷

The CBA has also taken an activist role in advocating for legal aid. The CBA has urged that federal civil legal aid funds be “carved out” of the global transfer, now called the Canada Social Transfer, and put into a separate Access to Justice Transfer, requiring provinces and territories to spend the money on improving access to justice. The CBA has also called for the naming of a federal Minister with designated responsibility for civil legal aid.

The CBA has a five-point platform on legal aid reform:

- 1) Legal aid should be recognized as an essential public service, like health care.
- 2) Public funding should be confirmed as necessary to ensure access to justice for low-income people.
- 3) Public funding for legal aid must be increased.
- 4) National standards for criminal and civil legal aid coverage and eligibility criteria are required.
- 5) The federal government should revitalize its commitment to legal aid.

¹⁶ Cfcj-fcjc.org/inventory/

¹⁷ www.cba.org/newsletters

In 2002, British Columbia eliminated poverty legal aid services (for such things as income security matters and housing issues), and imposed severe restrictions on access to legal aid for family law matters. In 2005, faced with no practical response to its lobbying and a belief that access to justice is continuing to deteriorate in Canada, the CBA decided to go to court. In June 2005, it filed suit in the British Columbia Supreme Court, naming the provincial government of BC, the BC Legal Services Society and the federal government of Canada for, “failing to provide access to justice in compliance with the Constitution and Canada’s obligations under international law, including the International Covenant on Economic, Social and Cultural Rights.” The Supreme Court of British Columbia denied the CBA standing to pursue this case.

In June 2010, the CBA published a research paper that presents new research findings, profiles innovations in legal aid service delivery in Canada and elsewhere and suggests future directions to improve legal aid and access to justice generally.¹⁸

The paper, “Moving Forward on Legal Aid: Research Needs and Innovative Approaches” written for the CBA by Dr. Melina Buckley notes that in the jurisdictions that have undertaken studies to find out more about poor people who have legal problems related to civil law matters, the studies all come to remarkably similar conclusions. A majority of low-income people experience one or more serious legal problems that make their day-to-day lives difficult. The legal problems are accompanied by related challenges: economic vulnerability, mental illness, physical illness, safety and security issues, discrimination, and language barriers. As a result, states Dr. Buckley, “Unresolved legal issues can have a cascading negative effect in people’s lives, causing significant economic, social, and health consequences, particularly additional stress. Physical and mental illnesses have been directly attributed to unresolved legal problems among low-income people.” This echoes the statement made by Norman Ross in his PEI paper on Family Law Services in 1999.¹⁹ “Lack of access to justice results in some hidden and difficult to quantify costs.”

¹⁸ Moving Forward on Legal Aid: Research Needs and Innovative Approaches by Melina Buckley, Canadian Bar Association June 2010 www.cba.org/advocacy/PDF

¹⁹ Report on Family Law Services: A Review and Recommended Plan for Delivery of Family Law Services, Prepared for the Government of Prince Edward Island Legal Services Division, by Norman A. Ross, February 1999

In her paper, Dr. Buckley has also outlined some of the innovative approaches to expanding access to justice that have been developed. These include:

MECHANISMS FOR PROVIDING LEGAL INFORMATION AND ADVICE

Legal information is increasingly available through many different multi-lingual media including:

- Web sites
- Touch-screen services available at kiosks in shopping malls and public
- Telephone messages (for example, dial-a-law programs which offer recorded scripts on legal topics)
- Videos
- Video conferencing
- Lawyer referral services run by the law societies give the name of a lawyer who will provide a free consultation.

In PEI, CLIA publishes written pamphlets, available on the Web site at www.cliapei.ca . They can be emailed or mailed in hard copy to clients or downloaded in PDF format. CLIA is now producing short videos that are available on the web site and used in presentations. CLIA runs a lawyer referral service funded by the Law Society that provides a 45 minute consultation with a private practice lawyer for \$25. CLIA publications are available in English and French and CLIA is proposing to work with the PEI Association for Newcomers to Canada to make them available in other languages.

PARALEGALS

Legal information outreach workers, family resource facilitators, and counsellors do not replace lawyers but can assist clients by taking time to discuss information with them and helping them to access other services.

In PEI the Legal Profession Act governs the practice of law. If the role of paralegals was to be expanded, there would need to be changes to the Act.

OUTREACH PROGRAMS

Outreach programs, usually connected to a hub office, bring legal aid services to communities that are too far from the legal aid office and to people who may not otherwise visit the office. A 2002 analysis of poverty law services in Canada concluded that, to be successful, outreach services must be linked to community networks that offer ancillary services and have local credibility.

There are legal aid offices in Charlottetown and Summerside. There are no outreach programs. Recently one of the family legal aid positions in Summerside has been staffed by a bilingual (French/English) lawyer paid for by the Law Foundation.

POINT OF ENTRY SERVICES

British Columbia has established the Supreme Court Self-Help Information Centre, located in the Vancouver Law Courts, and the Nanaimo Justice Access Centre. Ontario has Family Law Information Centres at family courts throughout the province. These centres are stocked with information materials and have staff available to answer questions during designated hours. Duty Counsel lawyers provide advice to legal aid eligible visitors.

There are no Self-Help Information Centres or Family Law Information Centres in PEI. CLIA has been trying, unsuccessfully, to obtain funding to establish a centre at each of the Supreme Court locations.

THE EXPANDED ROLE OF DUTY COUNSEL

Duty counsel keep the courts running by providing unrepresented litigants with immediate help. They offer legal advice at a critical moment in the legal process. Mostly known through criminal legal aid programs, duty counsel can play a valuable role in family legal aid.

PEI does not have duty counsel dealing with family law.

LEGAL AID OFFICES

In some jurisdictions, staffed legal aid offices have been part of legal aid service delivery since the beginning. Other jurisdictions have chosen to give legal aid certificates to clients who can then ask a private practice lawyer to take on the work at the legal aid rate. Some jurisdictions offer a combination of both systems.

We have a mixed system in PEI. This is supported by the Province with funding from the Canadian Social Transfer. It is also supported by the Law Foundation of Prince Edward Island which entered into a seven-year financial contribution agreement with the province in 2008. This additional funding has led to the addition of a family legal aid staff lawyer in the Summerside office.

COMMUNITY-BASED LEGAL CLINICS

The community clinic model is multi-disciplinary, and includes a mandate for community education, community development, and law reform. The Manitoba Public Interest Law Centre, a division of Legal Aid Manitoba, focuses on strategic litigation on behalf of disadvantaged groups. Calgary Legal Guidance enjoys grassroots and legal community support, is free of government interference, and operates with staff (lawyers and social workers) and volunteers, including law students. Legal Aid Ontario funds specialty legal aid clinics for, for example, people with disabilities, the elderly, injured workers, African-Canadians and others.

PEI does not presently have any community based legal clinics.

LAW SCHOOL LEGAL AID PROGRAMS

Law school clinic programs have been an important component of legal aid services to low-income people over the last decades. In the 2006-07 fiscal year, almost 1000 Ontario law students – 25% of the enrolment in the six Ontario law faculties – participated in the Student Legal Aid Service Societies program. A significant number of students are doing work that is currently not integrated with other legal aid services.

PEI does not have a law school. The nearest law schools are Moncton which offers a common law program in French, Dalhousie in Halifax, and the University of New Brunswick in Fredericton. CLIA has participated in the Pro Bono Students Canada program through the UNB Law School.

A HOLISTIC APPROACH TO LEGAL AID SERVICE DELIVERY

A few jurisdictions have gone beyond small legal aid innovations and have taken a bigger step “out of the box” towards comprehensive and integrated legal aid service delivery. There are two main approaches with the potential to affect access to family justice:

- 1) multi-disciplinary practices bringing together legal, social, and health services, and
- 2) increased coordination among agencies serving the low-income community

UNIFIED FAMILY COURT

In September 2009, the Government of Canada introduced legislation to amend the Judges Act to permit the expansion of Unified Family Courts (UFCs) in Canada. The proposed reforms would authorize the salaries for 27 additional judges to be appointed to these specialized courts.

Family law matters are usually handled by two levels of court. Here in PEI, criminal matters are typically heard in Provincial Court and family matters are heard in the Supreme Court.

A Unified Family Court (UFC) would unite jurisdiction over all family law matters at the Supreme Court level. UFCs are designed to reduce the time, conflict and cost of litigation that can be particularly harmful to children and individuals in situations that are, or are likely to become, violent, by providing:

- A single court with jurisdiction to hear all issues raised in each family matter
- Easy access to a full range of family justice services
- Specialized judges who are experts in family law
- A user-friendly environment with simplified procedures

UFCs currently exist in seven jurisdictions in Canada. Four of these, Newfoundland and Labrador, Nova Scotia, New Brunswick, and Ontario, have submitted proposals to the federal government seeking judges to expand their UFCs.

The PEI Justice Options for Women project has been calling for increased cooperation amongst agencies dealing with family legal issues and for the establishment of a domestic violence court for years. The difference between a unified family court and a domestic violence court is that a domestic violence

court would deal only with domestic violence cases, and would provide wrap-around services to both offender and victim.

DOMESTIC VIOLENCE COURT

Ontario's Domestic Violence Court²⁰ (DVC) program is the most extensive program in Canada. It prosecutes domestic assault cases and provides early intervention in abusive domestic situations, providing better support to victims and increasing offender accountability.

In a DVC program like that in Ontario, teams of specialized personnel, including police, Crown attorneys, Victim/Witness Assistance Program (VWAP) staff, probation services, Partner Assault Response (PAR) program staff and community agencies, work together to ensure priority is given to the safety and needs of domestic assault victims and their children.

In 2003, a Justice Options Report made the following recommendations to the PEI government; that the Province:

- expedite the process of creating the Family Law Section.
- develop alternative dispute resolution models, in collaboration with community, and support the use of approaches such as mediation and collaborative law for disputes not involving violence against women.
- work with the Canadian Bar Association, and the PEI Law Society to find ways to increase the numbers of lawyers willing to do family law legal aid work, including Victim Assistance orders.
- increase funding for family law legal aid, including alternative dispute resolution options.
- increase the number of family court counsellors in sites across the province.

“Moving Forward on Legal Aid”²¹ also presents two mechanisms for enhancing access to legal services that are related to but separate from legal aid reform: access to justice communities and pro bono work.

²⁰ www.attorneygeneral.ius.gov.on.ca/english/about/vw/dvc.asp

²¹ Moving Forward on Legal Aid: Research Needs and Innovative Approaches by Melina Buckley, Canadian Bar Association June 2010 www.cba.org/advocacy/PDF

ACCESS TO JUSTICE COMMUNITIES

- “create a single point of entry to legal assistance for low-income clients
- integrate all institutional and individual providers and partners
- allocate resources among providers to ensure that representation can occur in all forums for all low-income persons, and
- provide access to a range of services for all eligible clients no matter where they live, what language they speak, or the ethnic or cultural group to which they belong.”

Some Canadian legal aid programs have experimented with elements of this approach, but no jurisdiction has set up a permanent collaborative structure similar to the American Access to Justice Commissions. A recent review of legal aid in New Brunswick did propose approaching the other Atlantic Provinces to explore the benefits of a joint delivery model for legal aid services, which could perhaps lead to an Atlantic Access to Justice Commission.²²

PRO BONO WORK

Lawyers have always taken on a few clients at greatly reduced rates or for free. Cutbacks to financial support for legal aid programs have probably increased pro bono activity and encouraged a move toward greater organization and integration of pro bono efforts within legal aid programs and the court system. However, in PEI, pro bono work is unreported and we don't know how much is done. In some places it is mandatory for lawyers to report on their pro bono activities. Is more pro bono work desirable? There has been a concern voiced that pro bono work is being substituted for adequate government-funding of legal aid services. Unlike legal aid which is a matter of right, lawyers take on pro bono cases as a matter of charity and professionalism and there is no entitlement to receive it. According to “If There Were Legal Aid in New Brunswick” by Hughes and MacKinnon, “In Canada, lawyers continue to offer pro bono services although the tensions at the juncture between legal aid and pro bono services still need to be resolved. It has been suggested that the bar use a formal commitment to pro bono work as a quid pro quo for governments to reinvest in legal aid systems.”²³

²² If there were legal aid in New Brunswick...A Review of Legal Aid Services in New Brunswick, by Dr. J Hughes and E. L. MacKinnon, Province of NB, 2001

²³ *ibid*

EMERGING OPTIONS

Other possibilities for increasing access to family justice include:

PREPAID LEGAL SERVICES PLANS (LEGAL EXPENSE INSURANCE)

The Canadian Auto Workers Legal Services Plan²⁴ was first negotiated at Ford, GM and Chrysler in 1984. From its beginning as the first negotiated prepaid legal service in Canada, the Plan has continued to be a significant and growing benefit program. It provides a wide range of legal services for workers, retirees and their dependents. The Plan has now been negotiated at 38 bargaining units covering 110,000 participants and since 1985, has dealt with over 758,000 legal cases.

Plan services are delivered through a network of 9 offices, with 25 staff lawyers, 70 paralegals, intake clerks, legal secretaries as well as 1,077 co-operating lawyers.

CONTINGENCY LEGAL AID FUNDS

Successful legal aid litigants must reimburse a portion of their settlement depending on their income level.

CONTINGENCY FEES

Lawyers are paid depending on the success of their efforts.

TAX DEDUCTIONS AND SUMMARY ADVICE SERVICES

Public legal information and education associations provide free legal information; lawyer referral services provide low cost summary advice services.

UNBUNDLING OF LEGAL SERVICES

This is an approach that has been frequently talked about and has had limited use in PEI and elsewhere. It is an approach where a lawyer may do one specific piece of a case, rather than taking on the case as a whole. The Legal Profession Act in PEI does not present a barrier to unbundling.

²⁴ www.caw.ca

There may be insurance issues for lawyers and it must be made clear to the client that the lawyer does not have responsibility for the case and is only doing one specific piece of legal work. This approach assists self-represented litigants in the preparation and presentation of their case. It cuts down on legal costs to the extent that the client only pays for discrete services.

CONCLUSION

Access to Family Justice is crucial in a civil society. As social norms and family definitions change, the justice system must also change to reflect society. Equity is a cherished concept for both the Advisory Council on the Status of Women and Community Legal Information Association. Both work to end discrimination and to ensure that disadvantaged and vulnerable Canadians have the same access to services as those who are privileged.

We must never forget why we promote access to justice and work for reforms to the civil justice system. At CLIA, we can quote many clients who are lost, confused, impoverished, cynical, angry and frustrated after chasing a round of calls, referrals, services and court hearings that never seem to end in concrete solutions to their problems. There have to be alternative and new ways of accessing justice that enable us to meet the needs of more Islanders.

In conclusion, this paper is not a comprehensive piece of research into access to justice issues in Canada. It is a brief and suggestive overview of some of the strategies developed to deal with some of the issues. It is designed to stimulate your imaginations and to inform your discussions at the Think Tank on Access to Family Justice. I am grateful to the PEI Advisory Council on the Status of Women and Community Legal Information Association for the opportunity to write this paper.

Thank you,

Ann Sherman

