The Canadian Bar Association British Columbia

DISCUSSION PAPER

Prepared by: The Westminster CBA Subcommittee on the Unified Family Court Proposal

Prepared: January, 2003

We, the undersigned members of the Subcommittee, are anxious to insure and secure our involvement with and participation in the inquiry currently being undertaken by the BC Justice Review Task Force with respect to the possible implementation of a Unified Family Court in this Province. We have all read the Background and Discussion Paper #1 and, on behalf of our constituents, have assembled a collection of preliminary concerns, described herein, for your consideration. We would welcome any opportunity for discourse regarding these matters, and look forward to any reply the Task Force may have.

We are all practitioners of family law with a keen, direct, and professional interest in these issues. We believe that the cumulative insight of our group will assist the Task Force, and Government, in assessing this reform idea. And while we wish to remain optimistic and positive in our approach to this matter, our difficulty, at the present time is that we lack the necessary detail and information to put forward a comprehensive and considered response. Our first request, therefore, is for more information.

Our other initial concerns can be summarized as follows:

1. We wonder if implementation will erode access to justice. Based on our early and incomplete information about the experience in other Provinces, we are concerned. Furthermore, we believe that recent changes to the family law process at the Supreme Court level have dramatically improved the delivery of justice to the public. Early Judicial Case Conferences with ample court time to discuss issues in depth, having Judges and Masters seized from the start, being able to book interim Chambers hearings by phone at convenient times during the day, and having early trial dates (New Westminster is booking about 2 to 3 months ahead) have all had a significant effect in reducing the number of Court appearances and eliminating wait time in Chambers. This has often facilitated the early resolution of pressing issues. The current family law process is working on the whole better now than ever before at the Supreme Court level. We think it's good for the public, and good for counsel.

On the whole, we are less sure about the efficacy of access to justice offered at Provincial Court. The current Provincials Court system seems substantially slower and less certain. In cases where counsel are involved, Provincial Court can prove more expensive due to unproductive "fix date appearances", lost waiting time in Court, and frequently interrupted trials that can stretch on interminably. Surrey Provincial Court currently cannot guarantee trial time in non pressing family cases until the beginning of 2004. Our colleagues regularly express hesitation about commencing proceedings in Provincial Court for these and other reasons. We accordingly believe that if the current Supreme Court family law process is replaced by a UFC system which is modeled on the Provincial Court, most clients and lawyers will lose.

2. While we appreciate the considerable acumen and experience of the Task Force, we are concerned that none of the current members actually practice family law, on a regular basis. Our membership is accordingly anxious to know: why are there no family law practitioners on the Task Force?

3. We are concerned about the economies of the matter. While we appreciate that savings to the Province may not, ultimately, be the chief objective of the proposal, ***it seems*** that the economic advantages of a UFC are being touted as a reason for it. The suggestion is made that these savings will provide additional funding necessary to improve access to justice. For instance, the Discussion Paper anticipates savings "of approximately $2,000,000" and then goes on to describe how "...[those] savings on judge's salaries and benefits would be used to improve and expand the array of family justice services that provide people who are separating with options for resolving their disputes".

We take no issue with the nobility of this objective, but need more information concerning the following:

a. in the past, this membership, and all taxpayers, have encountered difficulty reconciling professed government initiative and policy with "real-life" results. Several years ago, for instance, the government promised that it's new tax on legal services would go to fund Legal Aid. It did not. Accordingly, we wonder, what assurances of accountability, and monitoring can be offered to inspire confidence in this representation? We would appreciate some form of assurance of consistent monitoring of the fiscal policy;

b. it seems to us that the savings, (in "downloading" the Judge's salaries to the Federal government) are extremely modest at 2 million. In our limited insight, and by contrast, we

anticipate the overall costs of effecting a massive overhaul of the Provincially administered family court system will be staggering. Extensive training of the specialized Judges is recommended. This is particularly appropriate since many Provincial Court Judges will have little recollection of asset division issues, while Supreme Court Judges will have limited expertise in the area of child protection. If a specialized bench is a goal of the UFC, training will be important and we expect, pricey. We suspect, therefore, that any illusory "savings" as initially forecast, must be considered against the backdrop of cost increases for training, implementation, "paperwork", rules, committee work, frictional staff inefficiencies, and other fundamental and costly changes to the infrastructure. We wonder if these costs have been forecasted, and if so, why those expenses

i. have not been referred to in the discussion paper;

ii. would not quickly exhaust the modest savings which, purportedly, "...would be used to improve and expand the array of family justice services".

c. will there be any "practitioner input or consultation" into the "array of family justice services" that might be offered with any savings?;

4. One of our constituents with particular insight into the topic has mentioned that in most other UFC jurisdictions, the operation of the court and ancillary services is subject to direction or control by an oversight committee. This has served the invaluable purpose of avoiding "over-bureaucratization" and has kept the UFC focus on proper access to justice issues.

5. We have some concerns regarding the availability, breadth, and quality of legal advice to be offered if mediators, counter staff, duty counsel, and family justice counselors are encouraged to counsel the public. Our membership has a collective recollection of reviewing agreements which were drafted by well-intentioned but not legally capable family justice counselors: these agreements did not always serve the parties well. We are concerned about this proposal, particularly whilst legal aid funding continues to decline.

6. With respect to the comments about video conferencing and other technological advantages, we support these incentives. We believe, however, that these methods can and should be tested now, independently of any UFC initiative. We understand that while video conferencing has been available to practitioners in urban areas of this Province for some time, it is not a resource which has been utilized in day to day practice.

7. The committee believes that, regardless of whatever happens with the UFC, provision of duty counsel is an integral step for insuring the smooth operation of the justice system. The increasing number of unrepresented litigants slows the resolution of cases, and creates difficulties for lawyers, court staff, Judges, and the system generally. In that regard, we feel that we are not in possession of sufficient information, regarding the volume of family law cases in the Province, and our district, to properly respond to the proposal as a whole. What allowance is made for duty counsel?

8. We note that before UFCs were implemented in other Provinces, there was significant research and consultation undertaking so that those changes could be discussed and then implemented with all information at hand and with minimal disruption. We do not have that information now, and so we are concerned about the volume of disruption that may likely ensue. We first learned about the UFC idea, for instance, in November of 2002, with a requirement that our position be formulated by mid January. We feel that we have not been given adequate time, data, or statistical material to properly formulate a carefully considered position.

9. Mention is made in the materials of improved access to documents, materials and information by way of the Internet. We support this general initiative, but note that recently, the Chief Justice distributed a practice direction which resulted in the removal of the family law decisions from the Supreme Court data base. Some of our members are deeply disappointed by this move and feel that this has had a very unfortunate result (for them) in terms of access to information. If the task force is ready to acknowledge the valuable service that can be provided through Internet information sharing, we would welcome the opportunity to put forth a proposal regarding Internet accessibility for members of the Bar, as well as the public, in a comprehensive way which would complement the task force objectives and the needs and concerns of practitioners.

10. We have some real concerns as well about paragraph 5.5 on page 9, and the prospect that the number of unrepresented persons will increase. It is our belief that a system that is preserved and presented to the public as being “simplified” may cause more unrepresented litigants to use the system. This may have the unfortunate effect of increasing the amount of court time devoted to such matters, and reducing efficiencies. We are concerned that the objective in this regard may be somewhat confused.

11. We have some real concerns as well about the prospect of having limited or no discoveries, trimmed procedural safeguards, a “stream-lined process”, and a simplified, or further set of rules. Some of our concerns include the following:

a. we cannot imagine one comprehensive set of "simplified rules" that would be adequate for all the different types of cases that would be heard by a Unified Family Court. The rules respecting discovery, document production, and other procedural safeguards which would "work" for a child apprehension case would be completely inadequate in a multi-million dollar asset division case;

b. we suspect that at least two sets of procedural rules would be required to accommodate various issues that arise in cases which involve property, and those which do not;

c. we cannot accept, as members of the Bar, any notion of being required to obtain a court order to access the right to examine an opposing party for discovery. We are concerned about the liability that would accrue to us as members of the Bar if our ability to ascertain facts in any given case was restricted in this fundamentally offensive way. We wonder if such rules would be within the dominion of the Legislative Assembly and whether there may be jurisdictional/constitutional challenge to any such change. We are concerned that the impetus to simplify the rules will result in our catering to the lowest common denominator (ie. the simplest of cases).

12. The comments in the report about costs are somewhat hard for us to follow. If the implementation involves obviating filing fees and trial fees, we suspect the losses from that alone will exceed 2 million dollars in the first quarter. We are also concerned that removing filing fees might promote the bringing of frivolous claims which would further impact on our already overburdened system.

13. Although the committee supports the concept of specialized judges, we are concerned with respect to those already experienced family law trial judges at the Supreme Court level, and the risk of "pigeon holing"those resourceful jurists into a "family-only" environment. This may be counter productive. We suspect that a number of Judges may oppose these initiatives and we hope their voice will be heard as well. We wonder, as well, what will become of the Masters.

14. We are concerned that, based on paragraphs 5.2 and 5.5, many needy areas of the Province will initially not be subject to the UFC program. We understand this "phasing in" to be intended to model the Ontario program. In this Province, however, we have many regions currently poorly served by the Justice system, and recently ravaged by the closure of Provincial Court facilities. In the north, for instance, and according to paragraph 5.2, the "nearest" UFC facility would be Prince George (a venue which is approximately half-way to the northern Provincial boundary). To assess

what impact this program would have on northern communities, we wonder: would residents of Fort St. John, be faced with three systems: UFC in Prince George, *and* Supreme or Provincial Court facilities in their locale? We are unable to appreciate how a staged implementation could realistically, fairly, and practically improve access to justice evenly, within the Province.

CONCLUSION

Our overwhelming concern is with respect to whether, in hasty adoption of an imperfect program, this implementation will restrict the public access to justice. Recent changes to the system have dramatically improved the delivery of justice services. These would include the Family Law Project in New Westminster, and the adoption of Rule 60 E. We do not want to see these advantages subsumed by a replacement system. "Tossing the baby out with the bath" is the adage that comes to mind.

We hope to be informed. We also want our input to be helpful and progressive. And while we believe the UFC is an idea worthy of complete consideration, we wish to emphasise that we need more facts and more time before we can properly respond to it or present a unified response from the Bar. We are concerned that the proposal has the potential to represent an extremely dangerous proposition for non-urban stakeholders. Our preliminary research into the experience in other jurisdictions (research which has only just commenced) indicates that a cautious and considered approach is merited. The report of Carla Courtenay Esq, concerning her findings on the experience in Ontario, Nova Scotia, Newfoundland and Labrador, and Manitoba, persuades us that our concerns are well-founded.

In the result, we welcome the opportunity to offer our input and welcome your response. .

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