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Where Are We Now? Accessing the Current Ontario Family Justice System

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Abstract

Is the current family justice system more accessible than ever before? This paper considers the significant changes that have been made to the Ontario family justice system in recent years, including those made as a result of the COVID-19 pandemic, to determine if the “fundamental overhaul” and “bold innovation” called upon by the national Action Committee has occurred, bringing Ontario closer to a more accessible family justice system.

Several prominent legal scholars have identified access to family justice in Canada as a crisis and have made strongly worded recommendations on how the family justice system could be more accessible. As a result, small but significant reform was implemented. In response to the COVID-19 pandemic, Ontario's family justice system made additional changes, including technological advancements to improve access to justice. Were these the “fundamental” and “bold” changes needed to end the access to justice crisis in Ontario family law?

Looking at key reports and articles on access to family justice reform, as well as changes made in recent years, including changes made as a result of the COVID-19 pandemic, this paper argues that the current Ontario family justice system is more accessible, but more work needs to be done to ensure we do not continue to leave the most vulnerable behind.

Key Words: access to justice, family law, COVID-19, reform.

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List of Abbreviations

ADR	Alternative Dispute Resolution
CAC	Case Assessment Coordinator
CBA	Canadian Bar Association
CLEO	Community Legal Education Ontario
EJSRP	Early Justice Services Research Project
FLIC	Family Law Information Centre
LCO	Law Commission of Ontario
MIP	Mandatory Information Program
ODR	Online Dispute Resolution
SRL	Self-Represented Litigant
UFC	Unified Family Court

INTRODUCTION

Access to family law justice has been identified as a crisis in the Canadian legal system for decades.¹ Over the years, prominent family law scholars have published numerous reports and articles outlining recommendations to make the justice system more accessible, responsive and user-focused.² Among the reports was the 2013 final report of the national Action Committee on Access to Justice in Civil and Family Matters (“Action Committee”), which provided realistic and achievable goals for improving access to justice³ and a call to action for “bold innovation” and a “fundamental overhaul” of the

¹ Trevor C.W. Farrow, “What is Access to Justice?” (2014) 51:3 OsgoodeHall LJ 957 at 963, 965, 972; See also, Michael Trebilcock, Anthony Duggan & Lorne Sossin, *Middle Income Access to Justice* (Toronto: University of Toronto Press, 2012) [Trebilcock, Duggan & Sossin] at 271; Beverley McLachlin, “As Courts Reopen, Let’s Focus On Creating Equitable Access To Justice For All”, *Globe and Mail* (10 July 2020), online: < <https://www.theglobeandmail.com/opinion/article-as-courts-reopen-lets-focus-on-creating-equitable-access-to-justice/>>.

² See especially Action Committee on Access to Justice in Civil and Family Matters, “Access to Civil & Family Justice: A Roadmap for Change” (October 2013), online (pdf): *Canadian Forum on Civil Justice* <www.cfcj-fcjc.org/sites/default/files/docs/2013/AC_Report_English_Final.pdf> [Action Committee, A Roadmap for Change]; Ontario, “Putting Justice Within Reach: The Foundation for User-Focused Justice in Ontario” (29 November 2017), online (pdf): <www.ontario.ca/page/putting-justice-within-reach-plan-user-focused-justice-ontario> [Ontario, Putting Justice Within Reach]; The Canadian Bar Association, “Reaching Equal Justice Report, An Invitation To Envision and Act” (November 2013), online (pdf): <lawsocietyontario.azureedge.net/media/lso/media/legacy/pdf/c/cba_equal_justice.pdf> [CBA, Reaching Equal Justice Report]; Law Commission of Ontario, “Increasing Access to Family Justice Through Comprehensive Entry Points and Inclusivity, Final Report” (February 2013), online (pdf): <www.lco-cdo.org/wp-content/uploads/2013/06/family-law-reform-final-report.pdf> [Law Commission of Ontario]; The Action Group on Access to Justice, “Public Perceptions of Access to Justice in Ontario” (25 October 2016) online (pdf): *The Access to Justice Research Network* <theactiongroup.ca/wp-content/uploads/2015/08/Abacus_TAG_Release_Oct14.pdf> [The Action Group on Access to Justice]; Dr. Barbara Landau et al., “Creating a Family Law Process that Works: Final Report and Recommendations from the Home Court Advantage Summit” (Paper delivered at Home Court Advantage Summit, 22-23 November 2009) [unpublished] [Landau]; Dr. Julie Macfarlane, “The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants” (May 2013), online (pdf): *Representing Yourself Canada* <representingyourselfcanada.com/wp-content/uploads/2016/09/srlreportfinal.pdf> [Macfarlane, The National Self-Represented Litigants Project]; Peter Salem & Michael Saini, “A Survey of Beliefs and Priorities about Access to Justice of Family Law: The Search for a Multidisciplinary Perspective” (2017) 55:1 Fam Ct Rev 120 [Salem & Saini]; Jane Bailey, Jacquelyn Burkell & Graham Reynolds, “Access to Justice for All: Towards an Expansive Vision of Justice and Technology” (2013) 31:2 Windsor YB Access Just 181 [Bailey, Burkell & Reynolds]; Michael Saini, Rachel Birnbaum & Nicholas Bala, “Access to Justice in Ontario's Family Courts: The Parents' Perspective” (2016) 37 Windsor Rev Legal Soc issues 1 [Saini, Birnbaum & Bala]; Thomas A. Cromwell, “Access to Justice: Towards a Collaborative and Strategic Approach” (2012) 63 UNBLJ 38 [Cromwell].

³ Acton Committee, A Roadmap for Change, *supra* note 2.

Canadian justice system.⁴ Following the release of the Action Committee's final report, significant reforms to the Ontario family justice system began. However, it was not enough as the crisis continued, with those seeking access to the family justice system still finding it inaccessible, expensive and difficult to navigate.⁵

The COVID-19 pandemic then brought further attention to the continued inaccessibility of the Ontario family justice system. On March 11, 2020, the World Health Organization officially declared COVID-19 as a global pandemic.⁶ Four days later, on March 15, 2020, Chief Justice Morawetz announced the suspension of all regular court operations across Ontario effective March 17, 2020.⁷ During a period of abrupt social distancing measures, mandatory working from home and school closures, those in Ontario's family justice system were forced to confront the reality that the current system was not fit for life in the digital age.⁸ Due to pandemic-related restrictions, the Ontario family justice system was forced to make significant and necessary changes, particularly technological advancements, in order to remain accessible. This paper will examine whether the recent changes to Ontario's family justice system, including those implemented in response to the COVID-19 pandemic, have made the system more accessible than ever before.

⁴ Action Committee on Access to Justice in Civil and Family Matters, "Meaningful Change for Family Justice: Beyond Wise Words, Final Report of the Family Justice Working Group" (April 2013) online (pdf): *Canadian Forum on Civil Justice* <www.cfcj-fcjc.org/sites/default/files/docs/2013/Report%20of%20the%20Family%20Law%20WG%20Meaningful%20Change%20April%202013.pdf> [Action Committee, Beyond Wise Words] at 8.

⁵ See eg. Law Commission of Ontario, *supra* note 2 at foreword, 26, 73; Saini, Birnbaum & Bala, *supra* note 2; Landau, *supra* note 2 at 7; Macfarlane, The National Self-Represented Litigants Project, *supra* note 2 at 40-41.

⁶ Dr. Tedros Adhanom Ghebreyesus, "WHO Director-General's opening remarks at the media briefing on COVID-19 - 11 March 2020" (11 March 2020), online: World Health Organization <www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020>.

⁷ Chief Justice Geoffrey B. Morawetz, "Notice to the Profession, the Public and the Media Regarding Civil and Family Proceedings" (15 March 2020), online: Ontario Superior Court of Justice <www.ontariocourts.ca/scj/notices-and-orders-covid-19/notices-no-longer-in-effect/covid-19-suspension-fam/> [Morawetz, Notice to the Profession].

⁸ Benjamin P Cooper, "Preliminary Thoughts on Access to Justice in the Age of COVID-19" (2020) 56:2 *Gonz L Rev* 227 at 234.

This paper proceeds as follows. Part I sets out the definition of access to justice and describes what an accessible family justice system looks like. Part II considers how the Ontario government has contributed to the access to justice crisis and provides specific examples as to why Ontario’s family justice system remains inaccessible. Part III discusses the key recommendations for reform that have been made to make the Ontario family justice system more accessible, including the public’s access to legal information, access to alternative dispute resolution services, and access to the courts. Lastly, Part IV provides a discussion on where the current Ontario family justice system is, and determines whether the recent transformation of the system has been the “fundamental” and “bold” change needed to end the access to justice crisis in Ontario.

I. WHAT IS AN ACCESSIBLE FAMILY JUSTICE SYSTEM?

Access to justice has been a topic of debate in Canada since the 1970s.⁹ Scholars have proposed several theories for access to justice, starting with the idea that it simply refers to gaining access to the formal court system, including judges and lawyers.¹⁰ Over the last few decades, there has been an expanded vision of access to justice beyond the courtroom, to include a system that provides the public with information, resources and services to help them avoid manage and resolve family law disputes.¹¹ Trevor Farrow recently labeled this as “meaningful access to justice,”¹² which takes into account not only how accessible the court system is, but also how accessible the path is for addressing and resolving the public’s legal disputes.¹³ Most importantly, the access to justice debate

⁹ Cromwell, *supra* note 2 at 39.

¹⁰ See, e.g. Salem & Saini, *supra* note 2 at 121; Bailey, Burkell & Reynolds, *supra* note 2 at 182.

¹¹ See Action Committee, *Beyond Wise Words*, *supra* note 4 at 1-2, 10; Cromwell, *supra* note 2 at 38-39; Landau, *supra* note 2 at 8; Salem & Saini, *supra* note 2 at 121, 123; Orna Rabinovih-Einy & Ethan Katsh, “Access to Digital Justice: Fair and Efficient Processes for the Modern Age” (2017) 18 *Cardozo J. Conflict Resol* 637 [Rabinovih-Einy & Katsh] at 637-638; Action Committee on Access to Justice in Civil and Family Matters, “Responding Early, Responding Well: Access to Justice through the Early Resolution Services Sector” (12 February 2013), online (pdf): *Canadian Forum on Civil Justice* <www.cfcj-fcjc.org/sites/default/files/docs/2013/Report%20of%20the%20Prevention%2C%20Triage%20and%20Referral%20WG%20.pdf> [Action Committee, *Responding Early Responding Well*] at 3.

¹² Trevor Farrow & Lesley Jacobs, *The Justice Crisis: The Cost and Value of Accessing Law* (UBC Press 2020) [Farrow & Jacobs] at 7.

¹³ Farrow & Jacobs, *supra* note 12 at 7.

has highlighted the realization that, in order to systematically change the system in a way that makes it more accessible, the change must consider the system's users rather than the system's providers.¹⁴ This realization allows for changes to be made that better meet the needs of the public for whom the justice system was designed for in the first place.¹⁵

Given the expanded vision of access to justice, an accessible family justice system is one that assists the public with all aspects of their family dispute, from the initial stages of deciding whether to separate to the final stages of settlement or court order. It also provides the public with accurate and reliable legal knowledge so that they can make informed decisions throughout their dispute. That legal knowledge can come in different forms, such as free, online legal information, assistance from court staff, or legal advice from family law practitioners. An accessible family justice system also services the unique needs of each and every family by providing them with different ways in which their family dispute can be addressed and resolved. The needs of Ontarians are not only legal, but can also include financial, emotional and social, which makes family law particularly distinctive from other areas of the law. An accessible family justice system also considers the multidisciplinary nature of family law, as other areas of law, such as landlord and tenant and tax law, which are frequently integrated in family disputes. Lastly, an accessible family justice system makes navigating the court system simple and straightforward. This includes the entire court system, from the court forms required to initiate a court action, to the stages in each family law case and the court rules. The accessible justice system just described does not resemble the current Ontario family justice system.

¹⁴ Action Committee on Access to Justice in Civil and Family Matters, "Report of the Access to Legal Services Working Group" (May 2012), online (pdf): *Canadian Forum on Civil Justice* <www.cfcj-fcjc.org/sites/default/files/docs/2013/Report%20of%20the%20Access%20to%20Legal%20Services%20Working%20Group.pdf> [Action Committee, Legal Services Report] at 3; Landau, *supra* note 2 at 8.

¹⁵ Action Committee on Access to Justice in Civil and Family Matters, "Report of the Court Processes Simplification Working Group of the Action Committee on Access to Justice in Civil and Family Matters" (May 2012), online (pdf): *Canadian Forum on Civil Justice* <<https://www.cfcj-fcjc.org/sites/default/files/docs/2012/Report%20of%20the%20Court%20Processes%20Simplification%20Working%20Group.pdf>> [Action, Committee, Court Processes Simplification Report] at 21.

II. ONTARIO'S FAMILY JUSTICE SYSTEM CRISIS

Ontario's family justice system has been in a state of crisis for more than a decade.¹⁶ Some have attributed the crisis to the Ontario government simply not providing the public with the services needed to effectively resolve their legal disputes.¹⁷ The legal system's escalating cost, significant delays, inconsistencies, complexity and inability to address issues of domestic violence are just a few of the factors contributing to the growing dissatisfaction among users of Ontario's family justice system.¹⁸ This section considers how the Ontario government has contributed to the access to justice crisis and provides specific examples as to why Ontario's family justice system remains inaccessible.

One of the most significant barriers to accessing family justice is the cost of legal services.¹⁹ Low-income individuals are not the only ones unable to afford proper legal services. There is now a greater awareness that middle class individuals are unable to obtain legal services because they cannot afford a lawyer and also do not qualify for legal aid.²⁰ Contributing to the cost of the family court system is the number of court appearances Ontarians must attend prior to their matter going to trial.²¹ Parties must attend a case conference, settlement conference and trial management conference before trial. They may also have to attend motions if temporary orders are required, as well as first appearances or "speak to dates" to schedule their matter. Where parties are close to settlement, they may also be required to attend a second settlement conference or trial management conference. By adding another settlement opportunity with the judge's

¹⁶ See e.g. Saini, Birnbaum & Bala, *supra* note 2 at 17-20; Law Commission of Ontario, *supra* note 2 at 5.

¹⁷ Cromwell, *supra* note 2 at 40.

¹⁸ Landau, *supra* note 2 at 8.

¹⁹ Saini, Birnbaum & Bala, *supra* note 2 at 18; Ab Currie, "Let's Pick Up Where we Left Off 25 Years Ago to Expand on Access to Civil Justice in Canada" (Toronto: November 2020) online (pdf): *Canadian Forum on Civil Justice* <[cfcj-fcjc.org/wp-content/uploads/Lets-Pick-Up-Where-We-Left-Off-25-Years-Ago-To-Expand-Access-To-Civil-Justice-in-Canada-Ab-Currie.pdf](https://www.fccj-fcjc.org/wp-content/uploads/Lets-Pick-Up-Where-We-Left-Off-25-Years-Ago-To-Expand-Access-To-Civil-Justice-in-Canada-Ab-Currie.pdf)> at 5.

²⁰ See Trebilcock, Duggan & Sossin, *supra* note 1; See also Action Committee, Legal Services Report, *supra* note 14 at 3.

²¹ Saini, Birnbaum & Bala, *supra* note 2 at 17.

assistance, the court system is further delayed and costs are increased due to additional preparation and court appearances. As a result of these further court appearances, the time it takes to complete a family court case is increasing. In addition to these factors, the hourly rates of lawyers have continued to rise over the years, which has led to an increase in the cost of family law cases.²²

The high cost of legal services occurs not only in the court system, but also when using alternative dispute resolution (“ADR”) services like mediation, arbitration or collaborative family law. For example, while arbitration can lead to a final result faster than a trial due to the current delays in the court system, the arbitration process is still very similar to a formal trial, which typically includes questioning of the parties at a local court reporters office, hiring financial experts, as well as the cost of the arbitrator. The use of collaborative family law includes hiring lawyers for each party, a financial expert, as well as a child-psychologist if parenting issues are in dispute, all of whom have their own hourly rates. As a result, when using an ADR service, more professionals are usually required, resulting in higher legal fees for the parties.

The number of forms that must be completed prior to commencing a court action is another factor contributing to the inaccessibility of the Ontario family court system. Currently, there are seven forms that need to be filed in the Ontario Superior Court of Justice if new claims are being made for parenting, property and support.²³ If a settlement agreement or final court order needs to be amended and the parties do not agree on the amendments, there are different forms that need to be completed.²⁴ The different forms have contributed to the confusion of the court system as, for example,

²² Action Committee, *A Roadmap for Change*, *supra* note 2, at 4.

²³ Continuing Record, Form 8: Application, Form 13: Financial Statement (Support Claims) or Form 13.1: Financial Statement (Property and Support Claims), Form 13A: Certificate of Financial Disclosure, Form 35.1 Affidavit (Decision-Making Responsibility, Parenting Time, Contact), Support Deduction Order, Support Deduction Order Information Form.

²⁴ Form 15: Motion to Change, Form 15A: Change Information Form. If parenting terms need to be amended, need to also file Form 35.1 Affidavit (Decision-Making Responsibility, Parenting Time, Contact). If child and/or spousal support terms need to be amended, a party also needs to file Form 13: Financial Statement (Support Claims), Form 13A: Certificate of Financial Disclosure, Support Deduction Order and Support Deduction Order Information Form.

even some family law practitioners have difficulty in understanding whether they need to commence an application or motion to change when a client is looking to change a separation agreement. As a result, the family justice system continues to be too complicated and difficult to understand for the public.²⁵

Based on the expensive and time-consuming nature of family litigation, there has been an increase in the amount of people who choose to represent themselves in court, also known as a “self-represented litigant” (“SRL”). In Canada, approximately 50% of people attempt to resolve their legal dispute on their own based on the continued inaccessibility of the justice system.²⁶ The issue with SRL’s is that they have difficulty navigating the family court system, often need more court resources, and hold unrealistic expectations of what they may accomplish due to their lack of legal knowledge.²⁷ A recent study found that 91% of Ontario family law practitioners felt that costs increased for their client’s when the other spouse was self-represented.²⁸ In response to the rise in SRL’s, there have been recommendations to expand and modernize the way in which legal services are provided, such as the introduction of unbundled legal services, or the controversial recommendation of permitting paralegals to assist families with certain family law matters.²⁹

In light of increasing costs, complexity and delays within the family court system, a greater need has emerged for more affordable alternatives to courtroom litigation to assist the public in resolving family law disputes. However, aside from the costs associated with participating in an ADR service, another issue is that alternatives to court usually involve individuals who are settlement oriented and have some positive relationship with

²⁵ Action Committee, *A Roadmap for Change*, *supra* note 2 at 8.

²⁶ Rachel Birnbaum, Nicholas Bala & Lorne Bertrand, "The Rise of Self-Representation in Canada's Family Courts: The Complex Picture Revealed in Surveys of Judges, Lawyers and Litigants " (2012) 91:1 Can B Rev 67 at 71; See also *Ibid* at 4.

²⁷ Government of Canada, Department of Justice, “JustFacts, Self-Represented Litigants in Family Law” (June 2016), online: <<https://www.justice.gc.ca/eng/rp-pr/fl-lf/divorce/jf-pf/srl-pnr.html>>.

²⁸ Justice Annemarie E. Bonkalo, “Family Legal Services Review” (31 December 2016), online: *Ministry of the Attorney General* <https://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/family_legal_services_review/>.

²⁹ *Ibid*.

the other spouse.³⁰ As a result, there are numerous cases, such as those involving family violence or parental alienation, where the current ADR services available simply cannot assist families the way that judicial intervention can. There is therefore a clear gap in Ontario's family justice system, as those with ample financial means have better access to the system than those with limited or no economic means.³¹

III. HOW TO MAKE THE ONTARIO FAMILY JUSTICE SYSTEM MORE ACCESSIBLE

For Ontario to have an accessible family justice system, reform to the system must address and remove, or at the very least minimize, the numerous factors that contribute to the frustration among its users. Reports and articles on access to family justice reform made over the past decade identify three main suggestions for change: (1) the public's access to reliable, accurate, and easy-to-understand legal information; (2) the public's access to alternative dispute resolution services; and (3) simplifying the public's access to the family court system. This section will go over each of these three suggestions in detail, discussing previous reform proposals and identifying changes made to the Ontario family justice system in response.

A. THE PUBLIC'S ACCESS TO LEGAL INFORMATION

When people have access to reliable, accurate, and easy-to-understand legal information, the family justice system is more accessible. In 2013, the Law Commission of Ontario ("LCO") appropriately stated,

“[f]or the law to be effective for those who are subject to it, access to knowledge about the law and capacity to negotiate the law, with or without assistance, is as

³⁰ Noel Semple & Nicholas Bala, “Reforming the Family Justice System: An Evidence-Based Approach” (2 October 2013) online (pdf): <papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID2366934_code686285.pdf?abstractid=2366934&mirid=1> [Semple & Bala] at 8.

³¹ Salem & Saini, *supra* note 2 at 121.

important as “the law” itself. A “good” statute has limited value if it is difficult to understand and accessing the rights it provides formidable.”³²

Knowing and exercising one’s rights empowers the public by allowing them to better understand what rights to pursue, what rights to avoid, and to feel more in control over the process and outcomes.³³ Additionally, having accurate and reliable legal information can allow the public to undertake a risk assessment of their claims and weigh what is most important to them against the potential financial repercussions of pursuing a claim that might not be successful.

Access to reliable and accurate legal information early in a dispute can also increase the use of ADR services. The LCO refers to this as “front end loading the system,”³⁴ as it allows people to identify the nature of their legal problem early on and then choose the best method for them to resolve their dispute, such as dealing with it themselves, filing a court action, or engaging in an ADR service like mediation.³⁵ By having more information about the family law system at the beginning of a dispute, people can begin to realize that going to court is only one of the options available. If more people participate in ADR services, the court system can be used only for urgent matters, high-conflict situations, or precedent-setting cases.³⁶

Access to easy-to-understand legal information is especially important for those who cannot afford a lawyer.³⁷ SRL’s rely on freely available legal information to educate themselves about their legal rights and processes. If the legal information is difficult to

³² Law Commission of Ontario, *supra* note 2 at 5-6.

³³ Action Committee, Legal Services Report, *supra* note 14 at 5.

³⁴ Law Commission of Ontario, *supra* note 2 at 28.

³⁵ See e.g. Nicholas Bala, “Reforming Family Dispute Resolution in Ontario: Systemic Change and Culture Shifts” in Trebilcock, Duggan & Sossin, *supra* note 1 [Bala] at 279; Justice George Czutrin, “Some Reflections on Family Dispute Resolution in Ontario” in Trebilcock, Duggan & Sossin, *supra* note 1 [Czutrin] at 326; Cromwell, *supra* note 2 at 45; Action Committee, Beyond Wise Words, *supra* note 4 at 7 and 41; Law Commission of Ontario, *supra* note 2 at 1, 64, 71; Action Committee, Responding Early Responding Well, *supra* note 11 at 3; Landau, *supra* note 2 at 9.

³⁶ Law Commission of Ontario, *supra* note 2 at 28.

³⁷ Bala, *supra* note 35 at 291.

understand, SRL's may remain unfamiliar about the law and the procedures of the legal system, which may contribute to delays within the family system. Making legal information simple to comprehend and freely available to the public can help reduce delays, minimize costs and promote access to justice.

Following the rise in SLR's, scholars began to recognize that the manner in which legal information was distributed to the public was contributing to the access to justice crisis.³⁸ Many felt that the information available was too complicated to understand because it was geared towards the legal profession rather than the general public.³⁹ Others also felt that there was too much legal information available, particularly as a result of the internet, making it difficult to navigate and overwhelming for many to know what information was reliable.⁴⁰ Due to these challenges, people with family law issues were more likely to seek legal advice from friends and family members.⁴¹ According to the Action Group on Access to Justice, 32% of Ontarians sought legal advice from family members and friends in 2016, compared to 26% who sought advice from online legal resources.⁴² As a result, the general public may be given incorrect legal information, which can lead to unmanageable expectations, increased costs and delays in resolution.

1. Suggestions for Reform to Make Legal Information More Accessible to the Public

In response to these challenges, one common suggestion for reform among key scholars was for a single portal of legal information to be made available to the public.⁴³ This would enable a centralized access point for reliable legal information to be provided to

³⁸ See e.g. Czutrin, *supra* note 35 at 320-321; Cromwell, *supra* note 2 at 39; Action Committee, *Beyond Wise Words*, *supra* note 4 at 41-44; Saini, Birnbaum & Bala, *supra* note 2 at 19-20; Law Commission of Ontario, *supra* note 2 at 18-19; Action Committee, *Legal Services Report*, *supra* note 14 at 8.

³⁹ Action Committee, *Beyond Wise Words*, *supra* note 4 at 10; Macfarlane, *The National Self-Represented Litigants Project*, *supra* note 2 at 64-65; Saini, Birnbaum & Bala, *supra* note 2 at 19-20; Law Commission of Ontario, *supra* note 2 at 19.

⁴⁰ Action Committee, *A Roadmap for Change*, *supra* note 2 at 13; Law Commission of Ontario, *supra* note 2 at 18, 59.

⁴¹ Law Commission of Ontario, *supra* note 2 at 18.

⁴² The Action Group on Access to Justice, *supra* note 2 at 3.

⁴³ Action Committee, *Legal Services Report*, *supra* note 14 at 6; Law Commission of Ontario, *supra* note 2 at 19; Macfarlane, *The National Self-Represented Litigants Project*, *supra* note 2 at 116.

those with legal issues. Many have advocated for coordination and collaboration among key stakeholders, such as government, law foundations, law societies and legal aid plans in order to be successful in providing timely and accurate information through a central entry point.⁴⁴ The LCO also recognized that an alliance among these stakeholders could help address the diversity of all Ontarians because they have the experience and knowledge to contribute to the development of unified legal information.⁴⁵ Furthermore, by broadening the scope of legal information available to the public, families will be able to connect with the legal and non-legal services that are best suited to their specific needs.⁴⁶

2. Recent Advances in Providing Better Legal Information to the Public

In reply to the reform suggestions, Ontario made two distinct changes in terms of providing legal information to assist individuals in resolving family law disputes. First, the provincial courthouses responded through the availability of the Mandatory Information Program (“MIP”)⁴⁷ and the Family Law Information Centre (“FLIC”)⁴⁸ in each courthouse across Ontario. The MIP is a mandatory class for all parties who are involved in a family court case where they learn about the potential effects of separation and divorce on children, alternatives to going to court, the litigation process, as well as other local services available to families.⁴⁹ However, the MIP can only be attended by those who are a part of a family litigation file and therefore not available to those seeking legal advice and information at the outset of their dispute. On the other hand, the FLIC

⁴⁴ Action Committee, Legal Services Report, *supra* note 14 at 5-6; Action Committee, Court Processes Simplification Report, *supra* note 15 at 11; Law Commission of Ontario, *supra* note 2 at 60; Action Committee, A Roadmap for Change, *supra* note 2 at 13.

⁴⁵ Law Commission of Ontario, *supra* note 5 at 60.

⁴⁶ Salem & Saini, *supra* note 2 at 133.

⁴⁷ See *Family Law Rules*, O.Reg 114/99 [*Family Law Rules*], r 8.1; See also Farrow & Jacobs, *supra* note 12 at 192.

⁴⁸ Ontario, “Family Justice Services” (last modified 12 August 2021), online: <www.ontario.ca/page/family-justice-services#section-2> [Ontario, Family Justice Services].

⁴⁹ *Ibid.*

can be attended by any member of the public where they can obtain the same information available at the MIP program.⁵⁰

Second, in response to the recommendation for a single entry portal for accessing legal information, Community Legal Education Ontario (“CLEO”) has expanded and modernized the Steps to Justice website.⁵¹ This was done in collaboration with a wide range of key stakeholders⁵² and provides the public with legal information on common legal problems, guided pathways for different areas of law including family law, and assists with the drafting of court forms.⁵³ It also offers the public information that is easily accessible, accurate and simple to understand for those seeking assistance in understanding their family law problem.

B. THE PUBLIC’S ACCESS TO ALTERNATIVE DISPUTE RESOLUTION SERVICES

Not every family law dispute requires court intervention. In Ontario, there are a variety of ADR services available to assist families in resolving their family law matter without going to court. Examples of these are negotiation with or without a lawyer, mediation, private arbitration and collaborative law. The availability of ADR services to the public promotes access to justice by providing families with alternatives to managing and resolving their dispute without the need to enter a courtroom.

Rather than going to court, ADR services give families more control over the process and outcome of their dispute and can be tailored to the individual needs of both parties. For example, ADR services can allow for more breaks throughout the day than in court and can be scheduled around the availability of the parties. It also allows parties to select a neutral intermediary with expertise in the specific family issues in dispute, as opposed to

⁵⁰ Ontario, Family Justice Services, *supra* note 48.

⁵¹ CLEO Connect, “About CLEO Connect” (last visited 21 August 2021), online: <<https://cleoconnect.ca/what-we-do/>>.

⁵² This includes the Ministry of the Attorney General, Legal Aid Ontario, community legal clinics, the Law Society of Ontario, the Superior Court of Justice, the Ontario Court of Justice, The Action Group on Access to Justice.

⁵³ “Steps to Justice” (last visited 21 August 2021), online: <<https://stepstojustice.ca/>>.

having no choice in the judge if they go to court. Another important aspect of using an ADR service is the ability to come up with a solution that best meets the needs of everyone involved, especially the children. Individuals who use an ADR service can be more creative and have greater input in the final settlement rather than receiving a final order from a judge after a lengthy trial. The Action Committee believes that ADR services can help make the family justice system more affordable, fair, and efficient.⁵⁴ This can be accomplished by refocusing the families' attention on their needs and interests rather than the rigid rules and positions commonly found in the courtroom.⁵⁵

1. Suggestions for Improvements to Alternative Dispute Resolution Services

Raising public awareness of the various ADR services available can make the family justice system more accessible. It was found that the majority of the public is unaware of ADR services available that can assist them with their family law dispute. According to Dr. Julie Macfarlane's National Self-Represented Litigants Project, "[a] significant number of SRL's say that they were never offered mediation, and/or do not know what it is."⁵⁶ Dr. Macfarlane recognized that "[t]his is a clear gap that needs to be urgently addressed."⁵⁷

One way to address this concern is through the suggestion of triaging families at the outset of their family dispute with the assistance of Case Assessment Coordinators ("CAC").⁵⁸ This approach is similar to the LCO's recommendation of "front end loading the system," in which triaging can assist the public by providing information early in their dispute about the different pathways available to best suit their needs, including an ADR service. Triaging can also assist in determining how a case should be handled, particularly ones which may involve power imbalances or family violence.

⁵⁴ Action Committee, Court Processes Simplification Report, *supra* note 15 at 13.

⁵⁵ Rabinovih-Einy & Katsh, *supra* note 11 at 641.

⁵⁶ Macfarlane, The National Self-Represented Litigants Project, *supra* note 2 at 12.

⁵⁷ *Ibid.*

⁵⁸ Landau, *supra* note 2 at 7, Bala, *supra* note 35 at 279; Czutrin, *supra* note 35 at 326; Cromwell, *supra* note 2 at 45; Action Committee, Beyond Wise Words, *supra* note 4 at 7, 41; Law Commission of Ontario, *supra* note 2 at 64, 71.

Aside from receiving legal information online, people can also obtain legal information from lawyers. However, many lawyers continue to be focused on bringing matters to court rather than making use of an ADR service. The Action Committee recognized that the traditional role of the “zealous advocate” is too limited for the varying demands of family law practice.⁵⁹ As a result, many scholars have suggested culture change as one of the ways to enhance access to justice, proposing that family professionals should move away from a court-centered perspective to a more collaborative approach.⁶⁰ The Action Committee declared “[t]he motto might be: court if necessary, but not necessarily court.”⁶¹ Dr. Macfarlane recently labelled this change in perspective as the “new lawyer,”⁶² which considers an alternative model of lawyering practice but uses the same expertise and understanding of traditional legal practice.⁶³ The “new lawyer” is evolved in a way that advances the best possible result for the client through settlement, using amicable dialogue, encouragement, and relationship management.⁶⁴

Another way to improve access to family justice through the use of ADR services is to incorporate technology. This can likely reduce costs to the public while potentially serving a larger number of people. It has been suggested by many that ADR services be expanded to include Online Dispute Resolution (“ODR”) to achieve this goal.⁶⁵ ODR refers to a variety of ADR services that use technology to communicate and resolve a dispute virtually without the requirement of the parties being physically present

⁵⁹ Action Committee, *Beyond Wise Words*, *supra* note 4 at 30.

⁶⁰ See e.g. Bala, *supra* note 35 at 274, 279, 313-314; Action Committee, *Beyond Wise Words*, *supra* note 4 at 3, 24- 25; See also, *Hryniak v. Mauldin*, 2014 SCC 7 at paras 2, 28, 32.

⁶¹ Action Committee, *A Roadmap for Change*, *supra* note 2 at 11.

⁶² Julie Macfarlane, “The Evolution of the New Lawyer: How Lawyers are Reshaping the Practice of Law” (2008) 1 J Disp Resol 61.

⁶³ *Ibid* at 63-64.

⁶⁴ *Ibid*.

⁶⁵ Ontario, *Putting Justice Within Reach*, *supra* note 2 at 14; CBA, *Reaching Equal Justice*, *supra* note 2 at 422-23; Action Committee, *A Roadmap for Change*, *supra* note 2 at 16; The Canadian Bar Association, “No Turning Back: CBA Task Force Report on Justice Issues Arising from COVID-19” (February 2021), online (pdf): <www.cba.org/CBAMediaLibrary/cba_na/PDFs/Publications%20And%20Resources/2021/CBATaskForce.pdf> [CBA, No Turning Back] at 8.

together.⁶⁶ In 2013, the Action Committee recognized the importance of ODR in the court system, acknowledging that it may open up a number of opportunities for easily accessible and low-cost dispute resolution.⁶⁷ They recommended that ODR services should also be used where suitable and practicable.⁶⁸ The Ontario government also discussed the use of ODR in its 2016 report, recommending that this type of technology would ensure that the justice system is designed in a way that is relevant to Ontarians for years to come.⁶⁹ In 2019, the Law Society of Ontario Technology Taskforce recommended the use of ODR platforms as it can provide the public with an array of legal services including predicted outcomes of their legal matter to assist in facilitating mediation.⁷⁰ When technology such as ODR platforms are properly used, it can substantially improve access to justice by reducing barriers of cost, time and delay in the process.⁷¹

2. Recent Modifications to Ontario's Alternative Dispute Resolution Services

In response to the call for more people to take advantage of ADR services, the federal government enacted legislation requiring legal professionals to advise their clients about ADR services available to them. As of March 1, 2021, amendments to the federal *Divorce Act*,⁷² provincial *Family Law Act*⁷³ and *Children's Law Reform Act*⁷⁴ came into effect where family legal advisers are now required to advise their clients about the

⁶⁶ Government of Canada, Department of Justice, "Dispute Resolution Reference Guide: Online Dispute Resolution" (August 2012), online : <www.justice.gc.ca/eng/rp-pr/csj-sjc/dprs-sprd/res/drrg-mrrc/10.html#i>.

⁶⁷ Action Committee, Legal Services Report, *supra* note 14 at 14-15.

⁶⁸ Action Committee, A Roadmap for Change, *supra* note 2 at 6.

⁶⁹ Ontario, Putting Justice Within Reach, *supra* note 2 at 14.

⁷⁰ Will Morrison, "Technology Task Force, Update Report" (November 2019), online (pdf): *Law Society of Ontario* <lawsocietyontario.azureedge.net/media/lso/media/about/convocation/2019/technologytaskforce-report-en.pdf> [Morrison] at 13.

⁷¹ Michael J Wolf, "Collaborative Technology Improves Access to Justice" (2012) 15:3 NYU J Legis & Pub Pol'y 759 [Wolf] at 776.

⁷² *Divorce Act*, RSC 1985, c 3 (2nd Supp) [*Divorce Act*].

⁷³ *Family Law Act*, R.S.O. 1990, c. F.3 [*Family Law Act*].

⁷⁴ *Children's Law Reform Act*, RSO 1990, c C.12 [*Children's Law Reform Act*].

variety of ADR services available, referred to in the legislation as “family dispute resolution processes.” Family legal advisers are also required to encourage clients to attempt to resolve their matters outside of court, unless it would clearly not be appropriate to do so.⁷⁵

To assist those who cannot afford to use ADR services, the Ontario Ministry of the Attorney General has provided free family mediation services at all of Ontario’s courthouses.⁷⁶ However, this service is only available for parties who have already filed a court action, and only for those who have a court appearance that day.⁷⁷ Off-site family mediation services are also available for a fee based on the income of the parties and the number of children.⁷⁸

Additionally, effective May 14, 2021, the Superior Court of Justice developed a Binding Judicial Dispute Resolution pilot project in the Simcoe, Muskoka and Cornwall Superior Court of Justice, Family Court Branch as well as the Superior Courts in the Northwest and Northeast regions.⁷⁹ This project was designed to offer family law litigants with an easier approach to reaching a final resolution, as well as assist in addressing significant backlogs in family cases caused by COVID-19.⁸⁰ While this project requires parties to commence a court action and file other necessary court documentation in support of their position,⁸¹ it can broaden the type of ADR services available to those with less complex family law cases but have difficulty reaching a final resolution on their own.

⁷⁵ *Children’s Law Reform Act*, *supra* note 74 at s 33.2(2); *Divorce Act*, *supra* note 72 at s 7.7(2); *Family Law Act*, *supra* note 73 at s 47.3(2); See also, *Moving Ontario Family Law Forward Act, 2020*, S.O. 2020, c. 25.

⁷⁶ Ontario, Family Justice Services, *supra* note 48.

⁷⁷ *Ibid*; Ontario Court of Justice, “COVID-19: Scheduling of Family Matters in the Ontario Court of Justice (last modified 21 April 2021), online: <www.ontariocourts.ca/ocj/covid-19/archives/covid-19-scheduling-of-family-matters-in-the-ontario-court-of-justice-april-8-2021-revised-april-21-2021/>.

⁷⁸ Ontario, Family Justice Services, *supra* note 48.

⁷⁹ Chief Justice Geoffrey Morawetz, “Practice Advisory Concerning the Superior Court of Justice’s Binding Judicial Dispute Resolution Pilot Projects” (10 May 2021), online: *Ontario Superior Court of Justice* <www.ontariocourts.ca/scj/practice/binding-judicial-dispute-resolution-pilot/> [Morawetz, Binding Judicial Dispute Resolution Pilot Projects].

⁸⁰ *Ibid*.

⁸¹ *Ibid*.

C. SIMPLIFYING THE PUBLIC’S ACCESS TO THE FAMILY COURT SYSTEM

Simplifying the family court system can also improve access to justice. Access to legal services and the court is a critical component of access to justice.⁸² To have an effective court system, it must function in a fair, resourceful and balanced manner to meet the needs of the public.⁸³ Nonetheless, the current family court system is becoming more complicated and more unbalanced in relation to the needs of the public and the disputes before it.⁸⁴ In its final report, the Action Committee stated that

“[e]veryday legal problems need everyday solutions that are timely, fair and cost-effective. Procedures must be simple and proportional for the entire system to be sustainable. To improve the system, we need a new way of thinking that concentrates on simplicity, coherence, proportionality and sustainability at every stage of the process.”⁸⁵

In response, family law scholars have advocated for the expansion of the Family Court of the Superior Court of Justice, also known as the Unified Family Court (“UFC”), across all of Ontario, as well as the use of technological innovations to create a modern court system that meets the needs of Ontarians today.

1. Recommendations for Reform to the Family Court System

i. Unified Family Court

Many scholars agree that the UFC will assist with the access to justice crisis.⁸⁶ For Ontarians, family law includes both federal and provincial legislation; thus, in the absence of the UFC, jurisdiction over family cases in Ontario is split between the

⁸² Action Committee, Court Processes Simplification Report, *supra* note 15 at 2.

⁸³ *Ibid* at 1.

⁸⁴ Action Committee, A Roadmap for Change, *supra* note 2 at 8.

⁸⁵ *Ibid*.

⁸⁶ See Bala, *supra* note 35 at 301; Czutrin, *supra* note 35 at 319 to 320; Action Committee, Beyond Wise Words, *supra* note 4 at 7, 8, 46-48; Landeau, *supra* note 2 at 17; Law Commission of Ontario, *supra* note 2 at 29; David M. Steinberg, "Developing a Unified Family Court in Ontario" (1999) 37:4 Family & Conciliation Courts Rev 454; Barbara A. Babb & Judith D. Moran, *Caring for Families in Court: An Essential Approach to Family Justice* (Abingdon, Oxon; New York, NY: Routledge, 2019) at 6.

Superior Court of Justice and the Ontario Court of Justice.⁸⁷ The UFC is a court which hears all family law disputes in one forum, regardless of what federal or provincial claims are being sought.⁸⁸ With the increase in complex and high-conflict family matters before the court, expanding the public's ability to access the court through the UFC can help to simplify the family court system and make it easier for families to navigate. This can also assist in reducing the amount of additional conflict between the parties and provide healthier long-term resolutions for families and their children.⁸⁹

Case management is a unique feature of the UFC that makes the court system more accessible. This is where the same judge presides over all stages of a court matter, including conferences and motions, meaning which means "[o]ne judge for one family."⁹⁰ Case management can provide judges with an influential tool to assist in improving access to justice by facilitating more settlement and providing the public with more accountability and consistency within the family court system.⁹¹ This is due to the fact that judges in the UFC are specialized in family law prior to being appointed to the bench and therefore have specific experience and knowledge in helping families navigate the court system.⁹² Additionally, high conflict and high risk family cases use a disproportional amount of justice system resources.⁹³ A specialized judge can identify these cases early on and provide a greater degree of supervision and accountability to better promote safety and settlement.⁹⁴ The UFC can help reduce the amount of time it

⁸⁷ Ontario Superior Court of Justice, "Family Proceedings" (last visited 23 August 2021) online: <www.ontariocourts.ca/scj/family/> [Ontario Superior Court of Justice, Family Proceedings].

⁸⁸ Department of Justice Canada, "The Unified Family Court Summative Evaluation Final Report" (March 2009), online (pdf): *Evaluation Division, Office of Strategic Planning and Performance Management* <www.justice.gc.ca/eng/rp-pr/cp-pm/eval/rep-rap/09/ufc-tuf/ufc.pdf> [Department of Justice Canada] at 1.

⁸⁹ *Ibid.*

⁹⁰ Bala, *supra* note 35 at 298; See also Landau, *supra* note 2 at 5, 15; *Family Law Rules*, *supra* note 47 at r 39(9).

⁹¹ Action Committee, Court Processes Simplification Report, *supra* note 15 at 8.

⁹² Action Committee, A Roadmap for Change, *supra* note 2 at 19.

⁹³ Bala, *supra* note 35 at 299.

⁹⁴ Department of Justice Canada, *supra* note 88 at 36.

takes to resolve a family matter, and as a result, reduce costs for families across Ontario.⁹⁵

ii. Use of Technology

Technology can improve access to family justice because it is more efficient, cost effective and user-friendly.⁹⁶ While the advancements of technology continue to change modern life, many have observed that these technological developments are by-passing the justice system.⁹⁷ As a result, scholars have recommended four ways that technology could be used to improve access to the family court system.

Virtual court appearances are the most prominent recommendation for improving access to family law justice through the use of technology.⁹⁸ Virtual appearances save the cost and inconvenience of travelling to court as people can access the court system from the comfort of their own home. This is especially important for disabled litigants, those living in remote areas, and the poor.⁹⁹ It can also increase the safety of family litigants, including those who have been subject to domestic violence.¹⁰⁰

Many scholars have also recommended simple and interactive court forms to improve access to justice.¹⁰¹ This includes forms that use plain language, a question and answer

⁹⁵ Action Committee, Court Processes Simplification Report, *supra* note 15 at 8.

⁹⁶ *Ibid* at 5; Darin Thompson, "Creating New Pathways to Justice Using Simple Artificial Intelligence and Online Dispute Resolution" (2015) 2:1 IJODR 4 at 8.

⁹⁷ See e.g. Action Committee, Legal Services Report, *supra* note 14 at 3; Action Committee, Court Processes Simplification Report, *supra* note 15 at 5; Action Committee, A Roadmap for Change, *supra* note 2 at 16; Action Committee, Beyond Wise Words, *supra* note 4 at 55; Ontario, Putting Justice Within Reach, *supra* note 2.

⁹⁸ Ontario, Putting Justice Within Reach, *supra* note 2 at 11; Action Committee, Court Processes Simplification Report, *supra* note 15 at 7 - 8; Action Committee, A Roadmap for Change, *supra* note 2 at 17; Wolf, *supra* note 71 at 785; Bailey, Burkell & Reynolds, *supra* note 2 at 201.

⁹⁹ Bailey, Burkell & Reynolds, *supra* note 2 at 200- 201; CBA, No Turning Back, *supra* note 65 at 9.

¹⁰⁰ Bailey, Burkell & Reynolds, *supra* note 2 at 200; See also Wolf, *supra* note 71 at 785.

¹⁰¹ See, e.g. Macfarlane, The National Self-Represented Litigants Project, *supra* note 2 at 9; Law Commission of Ontario, *supra* note 2 at 22; Landau, *supra* note 2 at 15; Action Committee, Court Processes Simplification Report, *supra* note 15 at 5; Action Committee, Beyond Wise Words, *supra* note 4 at 49-50.

approach, or tick the box.¹⁰² Many family litigants rely on court forms for guidance and advice on what information and documentation they must provide when filing a family law claim. However, many of the family law forms are difficult to understand and complete, resulting in barriers to those who do not have the assistance from a lawyer.¹⁰³ Simplified, interactive court forms can save money and time for both the court and litigants by assisting the public in properly completing the applicable court forms, resulting in fewer rejections from the court staff.¹⁰⁴ This can help empower family litigants and give them confidence when navigating the family court system.

Electronic filing of court documents is another recommendation to improve access to justice.¹⁰⁵ Electronic filing minimizes or eliminates in-person attendances and provides some of the same accessibility benefits as virtual hearings.¹⁰⁶ It no longer requires a person to take time away from their work and family to attend court in person for things that could be dealt with online.¹⁰⁷

Another recommended measure to improve access to justice is real time court orders.¹⁰⁸ Prior to the COVID-19 pandemic, there was no mechanism in place that allowed judges to create and sign court orders on the spot, unless the order was anticipated and prepared in advance by counsel. Hodson recognized the benefits from real time court orders,

¹⁰² Action Committee, Court Processes Simplification Report, *supra* note 15 at 6; Action Committee, Beyond Wise Words, *supra* note 14 at 49; Macfarlane, The National Self-Represented Litigants Project, *supra* note 2 at 9.

¹⁰³ Macfarlane, The National Self-Represented Litigants Project, *supra* note 2 at 9.

¹⁰⁴ *Ibid*; Bailey, Burkell; & Reynolds, *supra* note 2 at 195; Action Committee, Court Processes Simplification Report, *supra* note 15 at 5.

¹⁰⁵ See, e.g., Action Committee, A Roadmap for Change, *supra* note 2 at 16; Ontario, Putting Justice Within Reach, *supra* note 2 at 3; CBA, No Turning Back, *supra* note 65 at 9.

¹⁰⁶ Action Committee, Court Processes Simplification Report, *supra* note 15 at 6-7.

¹⁰⁷ Ontario, Putting Justice Within Reach, *supra* note 2 at 3.

¹⁰⁸ Action Committee, A Roadmap for Change, *supra* note 2 at 16-17; Action Committee on Access to Justice in Civil and Family Matters, “Colloquium Report” (June 2014), online (pdf): *Canadian Forum on Civil Justice* <www.cfcj-fcjc.org/sites/default/files//docs/2014/ac_colloquium_web_FINAL.pdf> at 9.

including significantly reducing the time the court spends on approving draft orders,¹⁰⁹ as well as the ability to standardize the wording of court orders to ensure consistency.¹¹⁰

2. Improvements Made to Simplify the Family Court System in Ontario

Prior to the COVID-19 pandemic, the use of technology in the family justice system was slow and sparse. The placement of Wi-Fi in each of the courthouses across Ontario did not begin until the fall of 2017, and was not expected to be completed until 2019.¹¹¹ Almost all court appearances, as well as the issuing and filing of court documentation, took place in person, and paper disclosure was still widely used. In 2018, Ontario introduced online filing of joint divorce applications.¹¹² That same year, the Ministry of the Attorney General also partnered with CLEO to develop online interactive Guided Pathways to Family Court Forms which allowed users to generate family court forms simply by answering a series of online question and upon completion, the software organizes the answers given and enters it onto the appropriate form.¹¹³ This program has since been further expanded to include conference briefs, completing net family property statements, and making or responding to a motion, just to name a few.¹¹⁴

Following Chief Justice Morawetz's announcement in March 2020 that most in-person court operations in Ontario would be suspended, the family court system underwent significant technological change.¹¹⁵ To ensure that social distancing restrictions were adhered to, most family court appearances were heard virtually, including motions,

¹⁰⁹ David Hodson, “The Role, Benefits, and Concerns of Digital Technology in the Family Justice System” (2019) 57:3 Fam C Rev 425 at 426.

¹¹⁰ *Ibid* at 427.

¹¹¹ Ontario, Putting Justice Within Reach, *supra* note 2 at 12.

¹¹² Ontario Bar Association, “Update: The Online Filing Service for Joint Divorce Applications is Available as of November 19, 2018” (19 November 2018), online: <www.oba.org/Sections/Family-Law/Resources/Resources/Update-The-Online-Filing-Service-for-Joint-Divor>.

¹¹³ *Ibid*; Action Committee, Beyond Wise Words, *supra* note 4 at 49-50.

¹¹⁴ Steps to Justice, “About Family Law Guided Pathways” (last visited 23 August 2021), online: <stepstojustice.ca/guided-pathways/family-law/?gclid=cjwkcajwnpoebha0eiwa609refwz8bjml-cmgbm3orjzxc6w-b_24dr4pfdkitf9k3cjle28-3q7bocpeaqavd_bwe>.

¹¹⁵ Morawetz, Notice to the Profession, *supra* note 7.

conferences, and trials.¹¹⁶ Court documents could also be commissioned and signed electronically,¹¹⁷ as well as filed through specific courthouse e-mail addresses rather than in person.¹¹⁸

As a result of the suspension of in-person court operations, significant delays were caused due to the inability to access physical family files. A family law matter could not be handled properly if the files were not accessible. Consequently, many litigants were forced to scan and email copies of their court documents to the courthouse in order for judges to access files remotely. An online document exchange system therefore became necessary. On July 29, 2020, the Ministry of the Attorney General announced the use of Thomson Reuters CaseLines (“CaseLines”) in the Ontario Superior Court of Justice,¹¹⁹ which allows for litigants and the court to upload and access their specific family law file online. On August 10, 2020, the CaseLines pilot project began in Toronto, including family matters other than child protection cases or cases that were subject to a sealing order.¹²⁰ As of April 19, 2021, the use of CaseLines was expanded to Central East and Central South judicial regions, with a continued province-wide rollout to be expanded throughout Spring and early Summer 2021.¹²¹

¹¹⁶ Morawetz, Notice to the Profession, *supra* note 7.

¹¹⁷ *Administering Oath or Declaration Remotely*, O. Reg. 431/20; See also, Law Society of Ontario, “Remote Commissioning” (last visited 23 August 2021) online: <lso.ca/lawyers/practice-supports-and-resources/topics/the-lawyer-client-relationship/commissioner-for-taking-affidavits-and-notary-publ/1%E2%80%99attestation-a-distance>.

¹¹⁸ Morawetz, Notice to the Profession, *supra* note 7; Tania Sourdin, Bin Li & Donna Marie McNamara, “Court Innovations and Access to Justice In Times Of Crisis” (2020) 9 HPT 447 [Sourdin, Li & McNamara] at 449.

¹¹⁹ Memorandum from Chief Justice Geoffrey B. Morawetz to Bar and Legal Associations re: CaseLines (29 July 2020), online: <www.ontariocourts.ca/scj/notices-and-orders-covid-19-supplementary-memo-august-6-2020/>.

¹²⁰ Chief Justice Geoffrey B. Morawetz, “Supplementary Notice to the Profession and Litigants in Civil and Family Matters Regarding the Caselines Pilot, E-Filing, and Fee Payment” (last modified 17 June 2021) online: *Ontario Superior Court of Justice* <www.ontariocourts.ca/scj/notices-and-orders-covid-19-supplementary-notice-september-2-2020/>.

¹²¹ Law Society of Ontario, “Frequently Asked Questions: CaseLines” (last modified 6 July 2021) online: <lso.ca/lawyers/practice-supports-and-resources/practice-area/civil-litigation/caselines-frequently-asked-questions#3-what-is-the-estimated-timeline-for-rolling-out-caselines—7>.

Throughout the pandemic, the Ontario *Family Law Rules*¹²² have been amended several times to accommodate the technological advancements within the family justice system. This includes giving the courts discretion over the use of telephone or video technology in a case,¹²³ permitting electronic filing of court documents through the Ontario Justice Services website,¹²⁴ as well as permitting electronic signatures on court documents.¹²⁵

Furthermore, the Attorney General for Ontario, Doug Downey, recently wrote a letter to the Federations of Ontario Law Associations Family Law Committee, asking for input on the proposal to create new standard orders regarding financial disclosure requirements in family law matters.¹²⁶ It is being proposed that once a pleading is issued, standard financial disclosure orders would be made automatically by the clerk of the court in every case in the UFC, excluding child protection cases and applications for simple and joint divorces.¹²⁷

Shortly following the World Health Organization's announcement of the COVID-19 becoming a global pandemic, the Canadian Bar Association ("CBA") created a COVID-19 Task Force to evaluate the urgent and progressing issues of the delivery of legal services caused by the COVID-19 pandemic.¹²⁸ On February 17, 2021, the CBA's COVID-19 Task Force released their final report which identified ways in which the justice system could reposition how legal services could be provided during and after the pandemic to ensure it remains accessible, current and dedicated to focusing on those pursuing justice.¹²⁹ Two important themes emerged from this report. First, there will be

¹²² *Family Law Rules*, *supra* note 47.

¹²³ *Ibid* at r 1(7.2)(i.1), 1(7.3.1).

¹²⁴ *Ibid* at r 1.1; See also, Ontario, Log In, (last visited 23 August 2021) online: <www.justiceservices.jus.gov.on.ca/MyAccount/screens/OneKey/login.xhtml?lang=EN>.

¹²⁵ *Family Law Rules*, *supra* note 47 at r 1.1(1).

¹²⁶ Letter from Attorney General Doug Downey to Federations of Ontario Law Associations (11 May 2021).

¹²⁷ *Ibid*.

¹²⁸ CBA, No Turning Back, *supra* note 65 at 3.

¹²⁹ *Ibid* at 6 - 7.

no going back to the way the justice performed prior to the pandemic. Second, the innovative technologies and processes must be implemented to improve access to justice and not inadvertently prevent it.¹³⁰

After examining recent reforms to the family justice system, particularly those implemented in response to the COVID-19 pandemic, the changes appear to have positively responded to earlier suggestions to make the family justice system more accessible. However, it must be determined whether the changes made in creating the current Ontario family justice system were the fundamental and bold changes required to meet the expanded vision of access to justice identified by many.

IV. THE PRESENT ONTARIO FAMILY JUSTICE SYSTEM

So far, this paper has examined the key recommendations made to make the family justice system more accessible, as well as the changes implemented in response to these recommendations. This section will consider whether the current system has resulted in more meaningful access to justice, as well as what the recent changes to the system mean for access to family law justice initiatives moving forward.

A. VALUABLE LEGAL INFORMATION AVAILABLE TO THE PUBLIC

The new and improved legal information services, such as the MIP, the FLIC, and enhancements to the Steps to Justice website, allow for accurate, relevant and clear legal information to be provided early in a family law dispute.¹³¹ However, whether people are aware of the existence of these services and whether they actually assist those seeking information must be examined.

One disadvantage of the MIP and the FLIC is that they are only available at the local courthouse. As a result, until they enter the courthouse, the public may not be aware these services exist. While information about these programs are available on the Ontario

¹³⁰ CBA, No Turning Back, *supra* note 65 at 8.

¹³¹ Farrow & Jacobs, *supra* note 12 at 195.

government website, it is difficult to find unless the individual knows exactly what to look for.

Another concern is whether the information provided at the MIP and the FLIC is actually useful. Farrow and Jacobs recently reviewed the Evolving Justice Services Research Project (“EJSRP”) which investigated the effect of legal information provided to those in the Ontario and British Columbia justice systems.¹³² The project evaluated the effectiveness of legal information in assisting people with every day legal problems over a three-year period.¹³³ The Ontario MIP’s were part of this study. After review of the results from the study and comments by its participants, Farrow and Jacobs found that individuals with legal issues follow different ways to justice and therefore specific information is needed at various points along the way.¹³⁴ They ultimately concluded that changes to the MIP, such as to the script and delivery of information to include videos and scenario-based role-playing, are required in order for it to adequately help the users of family legal services.¹³⁵

While the improvements to the Steps to Justice website have undoubtedly provided the public with easy-to-understand legal information, the public’s awareness of the availability of these services also remains an issue.¹³⁶ If users of the family justice system do not have access to the available legal information, it is as if the information did not exist at all. It is therefore recommended that these services be promoted more effectively.

One cost-effective way to promote these services can be to inform all family lawyers about the existence of these services so that they can direct both potential and existing clients to it. Those who call into law offices seeking assistance from a lawyer but ultimately find out they cannot afford to retain one can be directed to the Steps to Justice website for guidance. Existing clients can also benefit from these services, which provide

¹³² Farrow & Jacobs, *supra* note 12 at 192.

¹³³ *Ibid.*

¹³⁴ *Ibid* at 193.

¹³⁵ *Ibid* at 202.

¹³⁶ Landau, *supra* note 2 at 7-8.

a solid foundation of common legal concepts and terms. This allows the lawyer and client to spend more time together, focusing on the complex and unique challenges of their case rather than simple terms and information readily available online. This can also save the client money on legal fees by allowing them to ask specific questions about their case and engage in more in-depth discussions with their lawyer. Clients who receive specialized knowledge and support from their lawyer may avoid the feeling of wasting money on legal fees.

The current infrastructure for the public's ability to access reliable, accurate, and easy-to-understand legal information is available as a result of recent changes. However, following the results from the EJSRP, it is evident that more empirical research is needed to determine whether the current informational initiatives actually provide the public with what is needed to observe meaningful access to justice in Ontario.

B. EXISTING ALTERNATIVE DISPUTE RESOLUTION INITIATIVES

The federal and provincial governments are taking positive steps toward making the family justice system more accessible with the use of ADR services. This can be seen through the recent amendments to the *Divorce Act*,¹³⁷ *Family Law Act*¹³⁸ and *Children's Law Reform Act*.¹³⁹ Placing greater responsibility on legal practitioners for informing their clients about the various ADR services available to them improves access to justice.

However, numerous challenges remain unaddressed by the new legislative initiatives, preventing meaningful access to justice from being fully achieved. This includes the inability to reach everyone who wishes to access the family justice system. While the objectives behind mandating lawyers to advise their respective clients about the ADR services is clear, the difficulty is that at least 50% of people continue to choose to represent themselves.¹⁴⁰ As a result, not everyone can afford to seek legal advice from a

¹³⁷ *Divorce Act*, *supra* note 72.

¹³⁸ *Family Law Act*, *supra* note 73.

¹³⁹ *Children's Law Reform Act*, *supra* note 74.

¹⁴⁰ Macfarlane, *The National Self-Represented Litigants Project*, *supra* note 2; Action Committee, *A Roadmap for Change*, *supra* note 2 at 4.

lawyer, and if the public does not seek legal advice, they are less likely to receive information about ADR services that can assist them.

There is also no guidance from the governments regarding what information, and how much information, the lawyer should provide when advising clients about ADR services. Some lawyers may simply ignore this requirement, or provide very little information about the services in order for clients to understand whether it will truly help them. Supplying lawyers with handouts or a link to the government website to provide to their clients can assist in ensuring the public receives consistent information about the ADR services that are available.

Another challenge is the cultural shift that will be required from the family bar to increase its use of ADR services. It is acknowledged that cultural change in the legal profession does not occur overnight. Scholars have proposed that reform begin at the law school level, with the goal of developing negotiation skills early on in a way that promotes collaborative partnership with all parties involved.¹⁴¹ Creating a collaborative foundation for all family lawyers early on in their education can assist in making a more meaningful family justice system. However, if law schools do not require ADR training as part of its curriculum, then the development of the “new lawyer” will be limited to only those who are interested. Until then, family law practitioners will need to take the lead in advancing access to justice initiatives.¹⁴²

Additionally, raising public awareness of the various ADR services available does not change the fact that these services continue to be expensive for the vast majority of people. Although the government has responded by providing free mediation at the courthouse, these services are only available to people who have already filed a court action and are only available on the day of a court date. While it is understandable that the government cannot provide free mediation to everyone, only providing free mediation to those who initiate a court action is illogical and counter-intuitive. It has been

¹⁴¹ Action Committee, A Roadmap for Change, *supra* note 2 at 15; Semple & Bala, *supra* note 30 at 17.

¹⁴² Action Committee, Court Processes Simplification Report, *supra* note 15 at 20.

recognized that middle-income earners require the most assistance,¹⁴³ therefore free mediation should be made available to them without the need to initiate litigation.

The recent rise in virtual ADR services as a result of the COVID-19 pandemic can also assist with the issue of cost. This has allowed for parties to retain mediators or arbitrators from different cities with possibly cheaper rates and not having to pay for travel fees. As a result, virtual ADR has provided an accessible justice system by responding appropriately to the rise in family disputes caused by the COVID-19 pandemic by modernizing the way ADR services are provided to the public. It is likely that the virtual nature of ADR services will remain after the COVID-19 pandemic has ended.

On the other hand, the requirements to participate in the new Binding Judicial Dispute Resolution pilot project do not result in a more accessible justice system. While the project's intentions are good, the reality is that it cannot assist the vast majority of those in the family court system who are in need of the project due to the unrealistic requirements that must be met in order to be eligible. For example, the requirements include less complex cases that do not involve witnesses other than the parties, where necessary financial disclosure or other information has already been exchanged and where the parties substantially agree on the facts.¹⁴⁴ Furthermore, the government has stated that due to time constraints, cases requiring more than two to three hours of hearing time are not appropriate for the pilot project.¹⁴⁵ Those who are eligible for the project are unlikely to be involved in litigation in the first place.

Additionally, despite the recommendation to expand ADR services to include ODR, nothing has yet been implemented in Ontario family law. While the CBA Task Force has recently stated that any venture into online platforms in family law matters is difficult,¹⁴⁶ it is still critical that ODR be considered as an additional family law ADR service in

¹⁴³ Trebilcock, Duggan & Sossin, *supra* note 1.

¹⁴⁴ Morawetz, Binding Judicial Dispute Resolution Pilot Projects, *supra* note 79.

¹⁴⁵ *Ibid.*

¹⁴⁶ CBA, No Turning Back, *supra* note 65 at 15.

order to help make the family justice system more accessible. The advancement of ODR in family law may become necessary in order for the system to remain accessible to the public due the reliance on technology in all aspects of their lives. It is acknowledged that some family issues may be too complex to be dealt with through ODR, and that some people may lack the technology or ability to fully participate in a digital justice system.¹⁴⁷ It is therefore critical that barriers to an ODR service be identified and addressed before it is implemented within the family justice system.

C. A MODERN FAMILY COURT SYSTEM

The recent changes to the family court system have made it easier to use and more accessible. This includes the expansion of the UFC, which now has 25 locations across Ontario.¹⁴⁸ The UFC and its case management function has fundamentally shifted the judiciary's role from adjudicative to settlement and management oriented. This has the potential to greatly benefit those involved in the court system by reducing delays and increasing savings for family litigants by assisting in narrowing issues and settling cases as quickly as possible.

The most significant change to the family court system is the use of virtual court appearances in all or any part of a family case, at the court's sole discretion.¹⁴⁹ Once the COVID-19 pandemic has passed, virtual court appearances should not be used for the entire court process. Virtual appearances are appropriate for procedural, uncontested, and less complicated matters. This includes first appearances before a clerk, speak-to court dates and trial management conferences where the only issues being decided are the scheduling of future court dates and timelines for production of documentation. Virtual appearances are also appropriate for uncontested trials, short and urgent motions, and case conferences as only procedural or consent orders can be made. Having these matters heard virtually can reduce costs for family litigants because they no longer have to take a full day off from work to attend.

¹⁴⁷ CBA, No Turning Back, *supra* note 65 at 15.

¹⁴⁸ Ontario Superior Court of Justice, Family Proceedings, *supra* note 87.

¹⁴⁹ *Family Law Rules*, *supra* note 47 at r 1(7.2)(i.1), 1(7.3.1).

The option of participating in a settlement conference virtually or in person should still be made available on a case-by-case basis. This is because some cases have progressed more quickly than others. Some cases, for example, are still awaiting significant financial disclosure at the settlement conference stage, while others are ready for trial. Cases that are trial ready at the settlement conference stage may benefit more from being held in-person rather than virtually due to the formality and trial-like atmosphere that can be provided in the courthouse. This may give the parties a better idea of what a trial is like and assist in the resolution of the matter.

The option of participating in a trial virtually or in-person should also be available on a case-by-case basis. Trials are often days in length, contain numerous witnesses, sometimes expert witnesses, and require substantial amount of documentary evidence to be exchanged. Virtual trials can assist with these challenges, by allowing the court to better assess credibility of witnesses more closely at a screen and accommodate schedules of the witnesses.¹⁵⁰ Also, CaseLine's has greatly assisted the court and litigants in managing the heavy document load. However, some people can be uncomfortable with the technology required, including navigating different screens and programs during a trial, and therefore having a virtual trial may put those individuals at a disadvantage.

To ensure consistency across Ontario's family court system, the judiciary should establish unified guidelines for what types of cases should be heard in person versus remotely. Having guidance can help parties understand the circumstances under which the court will or will not allow a matter to proceed remotely when making arguments to the court on the issue. Providing the public with a court system that reliably and consistently manages each family dispute will promote meaningful access to justice.

Despite not being mentioned in any of the prominent reports or scholarship on family law reform, a document exchange system such as CaseLines can also facilitate access to justice by improving the efficiency of the court. This reduces both costs and delays for the systems users, and benefits marginalized members such as those living in rural

¹⁵⁰ CBA, No Turning Back, *supra* note 65 at 9.

communities and SRL's.¹⁵¹ In Ontario family law, numerous documents must be exchanged, including significant financial disclosure such as bank statements, income tax returns, and corporate documentation. CaseLines has resulted in less paper and printing, easier access to files online, and better management of evidence during motions and trials, whether held in-person or virtually. It is unlikely that the court system will return to its previous method of document exchange.

It is also hopeful that the suggestion for a standardized financial disclosure order at the outset of each new family case will become a reality. This can help facilitate consistency in the wording of orders across Ontario, and most importantly, reducing the amount of court time required to bring motions against those who refuse to provide mandated financial disclosure. This can also assist SRL's in understanding their financial disclosure obligations at the outset of their family case and prevent family professionals, such as opposing counsel and judges, from providing legal advice to the SRL unintentionally.

D. CHALLENGES RESULTING FROM THE USE OF TECHNOLOGY

It is unrealistic to expect that increased use of technology in access to justice initiatives will benefit all people affected by the family justice system.¹⁵² Individuals who do not have access to the internet or simply cannot afford it may be unable to participate in family matters remotely, or may be forced to do so in public places where free Wi-Fi is available.¹⁵³ People with low literacy skills, mental disabilities, or visual or literacy impairments may also have difficulty using technologies such as e-filing and interactive court forms.¹⁵⁴ Additionally, due to the substantial amount of confidential information relied on throughout a family matter, the court's recent reliance on the internet and virtual court appearances raises privacy concerns.¹⁵⁵ Issues have also been raised about the

¹⁵¹ Bailey, Burkell & Reynolds, *supra* note 2 at 195, 197-198.

¹⁵² *Ibid* at 182; Morrison, *supra* note 70 at 15.

¹⁵³ Bailey, Burkell & Reynolds, *supra* note 2 at 199.

¹⁵⁴ *Ibid* at 196-197; Sourdin, Li & McNamara, *supra* note 119 at 450; Action Committee, Legal Services Report, *supra* note 14 at 7.

¹⁵⁵ CBA, No Turning Back, *supra* note 65 at 12-14.

virtual nature of the courtroom, such as the potential loss of appreciation for the importance and civility of the justice system, as well as the perceived disadvantages of advocating virtually rather than in person.¹⁵⁶ These are just a few examples of how recent technological advancements in the family justice system have shifted the public's perception of the system in a negative direction, with the public believing that access to justice is now out of reach for the majority of people.¹⁵⁷ As a result, if the use of technology within the family justice system continues to ignore the needs of the vulnerable community, it may exacerbate the access to justice crisis.¹⁵⁸

CONCLUSION

The COVID-19 pandemic has unquestionably heightened the desire for an accessible family justice system. It has also forced the opportunity to revolutionize the Ontario family justice system in a way that can allow for real and substantial change. Ontario has moved closer to having accurate, reliable, and easy-to-understand legal information as a result of justice reforms through programs such as the MIP, the FLIC, and Steps to Justice website. The recent federal and provincial legislative changes have also raised awareness of the importance of providing ADR services to each family going through a separation. Most importantly, the UFC and increased use of technology are simplifying and making the family court system easier to use. However, while recent technological advancements have brought us closer to improving access to justice in Ontario, drawbacks have emerged, and certain vulnerable groups have remained disadvantaged.

The number of access to family justice initiatives continues to grow, and the practical reform suggestions should compel key stakeholders and policymakers to pursue these solutions forcefully. Nonetheless, the recommended courses of action for change needed to make the Ontario family justice system accessible for all remains unfulfilled. The CBA

¹⁵⁶ CBA, No Turning Back, *supra* note 65 at 9- 10; Bailey, Burkell & Reynolds, *supra* note 2 at 203.

¹⁵⁷ CBA, No Turning Back, *supra* note 65 at 6.

¹⁵⁸ Action Committee on Access to Justice in Civil and Family Matters, "Tracking our Progress: Canada's Justice Development Goals in 2019" (2020), online (pdf): *Canada's Justice Development Goals* <www.justicedevelopmentgoals.ca/sites/default/files/canadajdg_report19_en_0.pdf> at 17.

Task Force appropriately stated, “in the end, the secret of getting ahead is getting started.”¹⁵⁹ Ontario has started, but positive change in its family justice system must continue after the COVID-19 pandemic is over to ensure the most vulnerable people are not left behind.

¹⁵⁹ CBA, No Turning Back, *supra* note 65 at 24.

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