

6-2010

# Cost-Benefit Analysis of Family Service Delivery: Disease, Prevention, and Treatment

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Cost-Benefit Analysis of Family Service Delivery:  
Disease, Prevention, and Treatment

Noel Semple

Law Commission of Ontario

Family Law Process Project

Final Paper

June 23, 2010

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## I. INTRODUCTION, OUTLINE AND METHODOLOGY

Family relationships are both a source of profound satisfaction, and a source of profound challenges for Ontarians. All family relationships end eventually, and it is not always death which does them part. At least 40% of intimate relationships between adults are eventually terminated by the choice of one or both parties.<sup>1</sup> Some intimate relationships dissolve painlessly. Many others, however, create serious challenges when they end, both for the individuals involved and for Ontario as a whole. From the province's point of view, these family challenges can be analogized to a public health problem. The malady in question is not generally fatal, but it is certainly widespread.<sup>2</sup>

This paper considers first the problem, then the prevention, and finally the treatment. In so doing, it deploys cost-benefit and economic lenses as analytical tools. This paper has been prepared for the family law procedure project currently being conducted by the Law Commission of Ontario (LCO). The LCO's work will also draw together research on interdisciplinarity in the legal profession and the results of a broad public consultation with Ontarians. This paper will refer to the findings from these consultations, and seek to relate them to the existing scholarly literature. This paper also includes tentative reform recommendations where they seem to be justified by the research.<sup>3</sup>

Part I of this paper defines the phrase "family challenges" and introduces cost-benefit analysis, with a focus on its potential and its limitations within this field of inquiry. Part II identifies three sources of family challenges: (i) the economic vulnerability of Canadian families, (ii) sacrifices in earning potential during family life, and (iii) conflict arising upon relationship breakdown. Part III turns to mechanisms by which the province might *prevent* family challenges, either by preventing relationship breakdown

or by preventing the challenges which arise upon breakdown. In Part IV, the paper turns to government *responses* to family challenges. Section IV.A is about increasing the legal information and services, and identifying the costs and benefits of alternative dispute resolution and litigation. Section IV.B analyzes the potential of administrative, state-driven responses to family challenges. Part V offers a brief conclusion.

### **I. A. Subject Matter: the Families and the Challenges Under Examination Here**

Sociologists, psychologists, and public policy experts have all proposed definitions of the word “family.”<sup>4</sup> “Family law,” as the subject is taught in Canadian law schools and classified in case digests, may include issues such as child protection and assisted reproduction law. This paper, however, focuses on families which involve intimate or “conjugal” relationships between adults. This includes same-sex and non-marital relationships and relationships which do not produce children. The focus of this paper is the *challenges* faced by these families and their individual members after the adult cohabitation ceases. However the roots of these post-cohabitation challenges must be traced to the experience of the family members during cohabitation.

This paper encompasses neither families which never involved an intimate relationship between adults, nor families in which the intimate inter-adult relationship never dissolved. The rationale for this limitation of scope is that there is a distinct set of challenges posed by the dissolution of intimate relationships between adults. These challenges are those discussed in sections II.B and II.C – sacrifices in earning potential and interpersonal conflict arising on relationship breakdown. Other families -- the family involved in a child protection proceeding, the family seeking access to artificial reproduction technologies, the single parent seeking to support an adopted child -- face

a distinct set of challenges. Because the time and space available do not permit a thorough treatment of this second set of challenges, they must be left for another paper.

### **I. B. Unit of Analysis: Individual or Family?**

This paper will consider the welfare and interests of Ontarians who were members of families, while seeking to simultaneously keep in view the interests of families as units. Our family law and our dispute resolution system currently focus on the individual rights and obligations of family members. To some extent, this is an inevitable consequence of our law's aspiration to protect the interests of (i) people who no longer wish to cohabit, and (ii) individuals whose intimate relationships have been terminated by the other party. The *Canadian Charter of Rights and Freedoms* has arguably helped entrench the individualism of Canadian family law.<sup>5</sup>

However, it is also possible to think creatively about protecting the interests of family units, even when those families appear to be disintegrating. At least if children are present, dispute resolution can be conceived not as the end of a family but rather as a reconfiguration of a family.<sup>6</sup> The law aspires to preserve a child's relationships with both parents in most cases.<sup>7</sup> Therefore, parents often do not or can not entirely disentangle their lives for as long as their child or children remain below the age of majority. This may require family law process to consider the emotional health of the parents, and the need to support a modified, post-cohabitation "family."<sup>8</sup> Doing so can make the adults into better parents, which supports the law's overriding goal in parenting litigation of upholding the best interests of the child.<sup>9</sup>

There is some precedent in the literature for a focus on families as units. There is also an ongoing popular and scholarly debate about whether or *marriage* is itself "in

decline.”<sup>10</sup> The focus of interest in this debate is not so much the well-being of the individuals within families as it is the well-being of the families as units. The case for triage or differentiated case management is largely based on the idea that different *families* (as opposed to different *individuals*) are best served by different services and dispute-resolution approaches.<sup>11</sup> The costs and benefits of focusing on family units versus individuals awaits a fuller exploration, but the literature does provide a basis to explore this intriguing possibility. The interests of broader communities and of Ontario as a whole may be correlated with a progressive and therapeutic response to family units in crisis. This paper will, whenever possible, seek to incorporate both the individual and the family as units of analysis.

### **I. C. The role of choice in the formation of family**

Different scholarly perspectives have come to different conclusions about the role of choice within the formation of the family. To some extent, intimate conjugal relationships may be understood as voluntary, contractual arrangements established by consenting adults for mutual benefit. The mutual benefit is psychological but also financial, insofar as cohabiting and sharing expenses can raise the material standard of living for both parties.

Alternatively, these relationships may be sites of coercion and power.<sup>12</sup> Meg Luxton, for example, suggests that

women’s primary responsibility for domestic labour, and particularly childcare and other caregiving responsibilities, is central to women’s economic dependency on men ... the nuclear family form results in women doing vast amounts of socially necessary labour for free and in ways that are not recognized or validated socially.<sup>13</sup>

Choice is also a central issue in the debate about distinctions between cohabitation and marriage. Some scholars argue that the law should not make distinctions between couples who have cohabited for extended periods and couples who married.<sup>14</sup> Others reply that the choice to marry or not marry is a significant one, from which private family law consequences may legitimately follow.<sup>15</sup> Another line of critical inquiry focuses on the concept of “conjugal,” and queries whether the law should distinguish between those whose cohabitation is “conjugal” and those whose cohabitation is not.<sup>16</sup>

Marriage itself and its historical development have been widely explored in the sociological literature. Ernest Burgess argued in 1945 that, near the beginning of the 20<sup>th</sup> century, a transformation had occurred in the United States from “institutional marriage” to “companionate marriage.”<sup>17</sup> Whereas the former type of marriage was a “building block of society” and regulated by social norms, the latter was fundamentally defined by the affective bonds between the parties and by their choice of each other. John Amato and his colleagues have suggested that this trend continued into the post-war period:

As men and women gained greater freedom to engage in multiple sexual relationships before marriage, marry whomever they pleased, negotiate their own marital roles, and leave unsatisfactory unions, people came to focus increasingly on whether potential spouses would be good companions, emotionally supportive mates, and satisfying sexual partners.<sup>18</sup>

This development appears to have elevated the importance of individual choice in the formation intimate relationships. Andrew Cherlin argued in 2004 that a second transformation had subsequently occurred, towards “individualized marriage, in which the emphasis on personal choice and self-development expanded.”<sup>19</sup> Amato et al



suggested in their 2007 book that “we may be witnessing a shift toward a new view of marriage that values the institutional basis of marriage but also recognizes the importance of companionate and individualistic elements – a form of marriage in which individual happiness and obligations to the larger society are in balance.”<sup>20</sup>

In a diverse and multicultural jurisdiction like Ontario, it is likely that the nature of intimate relationships, and the extent to which they are the products of choice or coercion, are highly dependent on the values and cultural background which the parties bring into them. Kerry Daly’s comments about “parenting culture” might be equally applicable to the influence of culture on decisions about family relationships generally:

Culture consists of an ever changing constellation of meanings and practices, that provides a means for examining the flow of family experience within context ... In our everyday lived experience, culture is usually hidden from view, because it is so familiar and so deeply embedded in our habits and routines. For parents, this often means that the everyday decisions of parenting are shaped by non-specific, background undercurrents that guide what seems right, natural or appropriate. Culture is paradoxical insofar as it is pervasive in everything we do but so often it is indecipherable. It is a case of the fish not being able to see the water in which it swims.<sup>21</sup>

To the extent that intimate relationships are the product of choices, to what extent are they *economic* choices? It is generally thought that decision-making in intimate relationships and between family models is driven by emotional or cultural factors, rather than economic ones. However, studies of the decision whether to marry have identified relevant economic incentives and disincentives to marriage.<sup>22</sup> Pre-marital and cohabitation contracts are entered into by at least some Canadians, and those who do so are clearly aware of the economic consequences of intimate relationships and their potential breakdown.<sup>23</sup>

## I. D. Evaluative Tool: Cost-Benefit Analysis

This paper will seek to apply *cost-benefit* analytical tools to family challenges and our responses to them. Cost-benefit analysis (CBA) has been defined as the

Attempt[t] to place a dollar valuation on the outcomes of a program or intervention and to answer the question: How much is society willing to pay for the output of this program or what are the benefits to society of having this output? The dollar valuation of this output or the benefits are then compared with the costs of producing it. If the benefits exceed the costs, the program is considered to be an efficient use of society's resources.<sup>24</sup>

CBA originally sought to identify "Pareto improvements," which is to say changes in policy which would make at least one person better off without making anyone worse off.<sup>25</sup> Following the work of Nicholas Kaldor and John Hicks, CBA came to accept that a change can be described as "efficient" even if someone is made worse off, provided that everyone would be better off if the "winners" from the change were to compensate the "losers."<sup>26</sup> CBA has been widely applied to the study of environmental and other regulation<sup>27</sup> and to proposals for new government expenditure, for example in health care.<sup>28</sup> However, it has also been criticized for inattentiveness to distributional questions and for its attempt to put a dollar value on human life or other things which should arguably be considered "priceless."<sup>29</sup>

Formal cost-benefit analysis generally requires (i) a quantification of benefits and costs and (ii) an arithmetic comparison of them. Often many of the numbers in the equation are speculative, insofar as they refer to an uncertain future or contra-factual situations.<sup>30</sup> Even if they are real and have already been incurred, determining the true costs and benefits of public sector initiatives is very challenging. Regarding costs, the theoretical efforts of Canada's Parliamentary Budget Office and its counterparts are helpful.<sup>31</sup> With regard to social benefits, the work of the Commission on the

Measurement of Economic Performance and Social Progress led by economist Joseph Stiglitz is also useful.<sup>32</sup>

Assuming that costs and benefits can be quantified, cost-benefit analysis may be used to identify investments of public funds which will “pay for themselves” or produce benefits which exceed their costs in the long run. For example, a recent report from the Ontario Association of Food Banks argued that poverty costs \$10.4 billion to \$13.1 billion per year for the federal and provincial governments, or \$2,299 to \$2,895 per year per Ontarian household.<sup>33</sup> This report divides the social cost of poverty into three components. The "remedial costs" include governmental health care, crime-response, and social assistance expenditures which would not exist in the absence of poverty. The "intergenerational costs" are created by the inherited impediments and needs of children of poor families. "Opportunity costs" are the provincial revenues which are lost because of citizens being less economically productive than they would be in the absence of poverty.<sup>34</sup>

Cost-benefit analysis is compatible with a variety of different choices about what's important to us as a society. In the words of Cass Sunstein, CBA

should not be seen as embodying a reductionist account of the good, and much less as a suggestion that everything is simply a “commodity” for human use. It is best taken as pragmatic instrument, agnostic on the deep issues and designed to assist people in making complex judgments where multiple goods are involved.<sup>35</sup>

CBA requires, and is not an alternative to, a conversation about our values as a society. This conversation is necessary in order to place dollar figures on the various outcomes of public policy options. As an analytical technique, CBA is compatible with a variety of alternative schemes for valuing these outcomes, such as the Genuine Progress Index

(GPI). The GPI is an index of human progress which was designed as an alternative to more purely financial measures such as Gross Domestic Product or Gross National Product.<sup>36</sup> Formulations of the GPI often include items such as “cost of family breakdown” and “value of non-paid household labour” which are directly relevant to any application of CBA to family policy issues.<sup>37</sup>

#### *I.D.1. Applying CBA Methodology to Family Challenges: Limitations*

The methodological difficulty of quantifying speculative costs is particularly biting in the field of study under examination here. For example, a true cost-benefit analysis of the parent education program in Toronto's Superior Court might have to determine how much further litigation would currently be occurring had the program never been put into place. The long-term impact of different procedures and interventions upon children is also little understood, largely due to the ethical challenges of scientifically controlled research on children.<sup>38</sup>

Assessing costs of family dispute resolution for the participants also requires looking outside of family law itself. An example of this approach is *Walking on Eggshells: Abused Women's Experiences of Ontario's Welfare System*, a report prepared by a multidisciplinary team in 2004.<sup>39</sup> This report identified a nexus between family law disputes, social assistance, and domestic violence. Ontario Works (the provincial social assistance system) is a means-tested program. In order to be entitled, an applicant must show that he or she remains below a certain income level despite having made “reasonable efforts to obtain compensation or realize” all “financial resource[s] or income that the person may be entitled to or eligible for.”<sup>40</sup> An applicant who is entitled to child support from a co-parent must therefore make efforts to obtain it.

If the applicant has experienced domestic violence at the hands of this co-parent, then the obligation to pursue him or her for child support may create vulnerability to further violence. The Ontario Works Policy Directives respond to this danger by providing that “individuals at risk of domestic violence are not expected to pursue support and may be granted a waiver.”<sup>41</sup> However, the *Walking on Eggshells* authors reported that many individuals who would have benefitted from this waiver were unaware of it. Within their interview sample, only 2 out of 34 claimants who might have qualified for the waiver were even aware of its existence.<sup>42</sup> One interviewee reported:

I was told absolutely, that I had to go for child support even though I told them that it was a dangerous situation, they still said I had to do it if I wanted to receive benefits from them. And then they turned right around and said they were going to take it.<sup>43</sup>

While this specific account cannot be corroborated, it is probably representative of the experience of at least some domestic violence victims. The pressure to pursue child support faced by social assistance recipients is an example of a “cost” imposed by our family service delivery system and borne by an already vulnerable group. However, it is very difficult to imagine how this cost might be quantified.

As discussed below, there is a substantial literature evaluating experiments and pilot projects in the family dispute resolution sphere. The value of these projects is most often measured in terms of the settlement rate – how many of the litigants withdrew from litigation after engaging in the initiative under study. Settlement rates are a helpful indicator proxy for the benefits of a family process reform initiative, but a settlement might be exploitative or not durable. For this reason follow-up interviews and questionnaires with participants, asking for example how many would recommend a particular intervention, are a useful complement to settlement rates.<sup>44</sup>

These studies provide a basis for comparing the costs of specific types of ADR to the process costs of litigation, but they do not generally consider broader costs and benefits (including non-financial ones) to adults, to children, and to communities. Identifying these costs and benefits would be necessary in order to perform a formal CBA. The evaluation of Australia's 2006 reforms conducted by Rae Kaspiew and her colleagues is extremely comprehensive and exceeds 400 pages in length, but even this thorough document is not able to perform a formal and quantified cost-benefit analysis.<sup>45</sup>

More broadly, it is not clear that one can ever quantify the value of intangibles such as preserving access to justice,<sup>46</sup> cultivating forgiveness between the parties,<sup>47</sup> or other costs and benefits offered by litigation and alternative responses to family challenges. Nonetheless the literature has recognized that such items have a value which can be weighed against other values. For example, the conclusion of McIntosh et al regarding Australia's "Children's Cases Program" pilot project was that "a loss in apparent judicial impartiality amounted to a clear gain for many parents, who were more often reached, moved, and inspired by a judge who entered their struggle."<sup>48</sup>

### *1.D.2. Applying CBA to Family Challenges: Potential*

Cost-benefit analysis in its formal and technical version has not often been applied to family law policy questions.<sup>49</sup> However, there are a few interesting examples of less structured applications of similar, economically-oriented analytical tools to family challenges. A 2009 submission to Ontario's Attorney General argued for the funding of "Case Assessment Coordinators" and expanded mediation services in Ontario courts.<sup>50</sup> This argument was supported by an Appendix identifying the various cost components

of implementing this proposal at one court. The Appendix also identified the cost of the proposal per case diverted from court.<sup>51</sup>

Even when the quantification required by formal CBA is impossible, costs and benefits are identified in a less technical way in family law policy debates. “Informal” CBA might simply mean focusing on costs and benefits of alternative responses to family challenges and using this thought process to generate reform ideas. An example is found in the debate about whether the law should encourage more “equal” divisions of parenting time after a relationship ends. It is a generally acknowledged *benefit* to children to have parenting arrangements which preserve meaningful relationships with both of their parents.<sup>52</sup> However, inter-parental conflict is a generally acknowledged *cost* or detriment to children, especially if the children are aware of or observe that conflict.<sup>53</sup> The effort to preserve relationships with both parents by ordering joint custody may often increase the level of conflict. Substantial debate continues about how to balance the benefit against the cost. Scholars question whether reforms to strengthen children’s relationships with both parents post-separation (benefit) would increase conflict (cost) to the extent that there is a net detriment for the children.<sup>54</sup>

## **II. FAMILY CHALLENGES**

The challenges which Ontarians experience after family separation often have roots within the economic life of the intact family. Ontario’s families are highly vulnerable to the economic challenges of relationship breakdown, due to low levels of savings and high household expenses relative to household income. Individuals who have curtailed labour force participation in order to assume domestic responsibilities within a family face unique challenges if that family dissolves. Whatever economic

arrangements prevail within the intact family, some degree of *conflict* often accompanies the end of a relationship, and this is another major source of family challenges.

A recent case report tells the story of an Ontario couple who experienced many typical family challenges.<sup>55</sup> The story of their relationship and its dissolution is told below. Subsequent sections of this paper will make reference to this story, in order to illustrate the nature and impact of family challenges.

*Ronald Peters and Beatrice Smith met in 1974, when both were employed by the federal government. Beatrice was 18 years old at the time; Ron was 27 and had two children from a previous relationship. Three years later, Ron and Beatrice moved in together and began living as a couple. For the next 11 years, they lived together in various Canadian towns to which Ron was posted by the Canadian government. In 1988, they got married. Ron soon received a promotion, becoming manager of workplace a small Ontario town.*

*Beatrice was still working in another office of the same federal ministry at the time. She fell afoul of the criminal law after taking financial advantage of her employer. She was convicted and incarcerated for theft, fraud, and forgery. Although this development had an impact on both parties, their relationship survived the blow. In 1995 Ron and Beatrice moved south, to a larger city. They opened a small print and copy shop.*

*When they arrived in their new city, Beatrice was 40 years old and Ron was close to 50. They had lived together for 18 years. Although Beatrice's criminal charge was still hanging over them unresolved, they established themselves in a new city and were probably optimistic about becoming entrepreneurs. They also had another reason for joy – Beatrice was pregnant with their first daughter, Sarah. Sarah was born on Canada Day 1995. Her sister followed almost exactly three years to the day later -- June 30, 1998.*

*Ron and Beatrice devised a schedule to allow them to care for their infant daughters and their infant business at the same time. Ron, who left the federal workforce after moving, cared for the babies from Monday to Friday while Beatrice staffed the business. On the weekend, they would switch roles; with Beatrice at home and Ron dealing with the business. Despite these diligent efforts, the store was never very successful. In 2006, a judge found that it was losing over \$10,000 per year, and it subsequently became bankrupt.*



*In June 2005, Beatrice suddenly moved out of the parties' home. She apparently did so without any warning or prior announcement. However, she must have had her reasons for ending a 30 year relationship.*

*Despite -- or perhaps because of -- their many decades together and their two young children, the parties were unable to part company amicably. It may be that they had never been very happy; a judge later found an "undercurrent in the evidence of some domestic violence between the parties and a power imbalance in the relationship of the parties."<sup>56</sup> When Beatrice left the matrimonial home in June of 2005, she took the children with her to a location which she did not disclose to Ron. Ron did not find out where they were living until the following January. He had no formal access to his daughters until one year after the separation. At that time, weekly supervised access visits of one hour in duration began.*

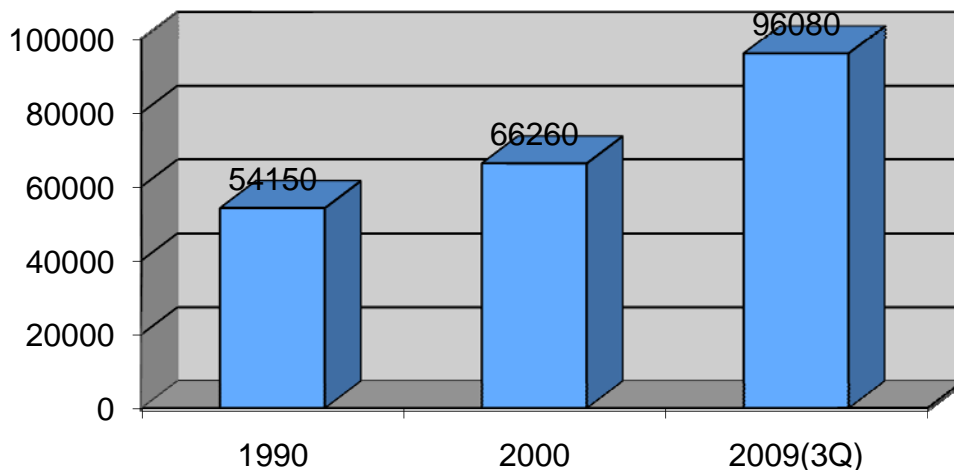
*Infuriated, Ron responded by creating a series of internet sites and conducting a public campaign against what he alleged were Beatrice's efforts to alienate the children from him. He wrote a letter denouncing Beatrice to the principal of the girls' school, and also created and distributed "press releases" about her and about the parties' dispute. The Office of the Children's Lawyer became involved in the case in 2006, and a social worker from that agency prepared a report which was used at trial. A social worker from the local Children's Aid Society was also active in the case. A six-day trial occurred in late summer 2009, at which neither party had the benefit of a lawyer. Beatrice did not even formally testify, although she did present her case to the court and had witnesses speak for her. The central issues in the trial were the parental alienation allegation, child custody, child support, and division of family property.*

## **II. A. Economic Vulnerability of Canadian Families**

The Peters are somewhat indicative of this economic vulnerability of Canadian families, although they were perhaps better off than most. Ron Peters was fortunate, to have a secure pension from the Government of Canada paying \$48,306 per year.<sup>57</sup> Beatrice's income was not disclosed by the case report. However, the parties worked for ten years to build a business which appears to have consistently lost money and eventually gone bankrupt. At the time of the judgment, Ron owed over \$50,000 to the Canada Revenue Agency and Beatrice owed \$26,000 to a credit counselling agency. After 30 years of hard work, their collective net worth was less than \$300,000.<sup>58</sup>

The end of an intimate cohabitational relationship is a time of financial stress for its members. At the very least, cohabitation's economies of scale are suddenly lost and transitional costs of establishing new domiciles must be absorbed. Subsequent sections of this document will describe in detail the financial costs of relationship breakdown and family litigation. The ability of individuals to meet these challenges depends substantially on their economic position before the break-up occurred, and there is evidence that large numbers of Canadian families are already "on the edge" financially and ill-equipped to deal with relationship breakdown. There is also evidence that the poorest Ontarians (those earning less than \$20,000 per year) are 33% more likely than other Ontarians to experience family relationship problems.<sup>59</sup>

Canadians have become steadily more indebted and less likely to have savings, and this trend has persisted through economic recessions, recoveries, and booms. This trend has reduced the ability of Canadians to draw upon reserves of cash and property in order to cushion the financial blow of relationship breakdown.<sup>60</sup> The following chart, adapted from a recent Vanier Institute report authored by Roger Sauvé, illustrates the steadily increase over time in average debt per household.<sup>61</sup>



**Figure 1: Average Canadian Household Debt in Constant 2007 Dollars**

One indicator of the capacity of Canadian households to “carry” this increasing debt is the ratio of household debt to income. This measure reached a new record of 145% in December of 2009.<sup>62</sup>

Turning from net wealth to household income, we find that many Canadian families are “just getting by.” A key driver of increasing debt loads is the decreasing ability or willingness of the average household to save. The average annual savings of Canadian households decreased from \$7,700 in 1990 to \$2,800 in 2000, although it recovered by 14% between 2000 and 2010.<sup>63</sup> In the third quarter of 2009, the average Canadian household earned \$66,200 and spent \$63,000.<sup>64</sup> The Canadian Payroll Association, reporting on a survey conducted in September of 2009, found that “59% of Canadian employees report they would have trouble making ends meet if their paycheque was delayed by even one week.”<sup>65</sup> Given these financial realities, it is easy to see how the sudden and dramatic costs of relationship breakdown – such as legal

fees and finding new housing – can be disastrous for Ontario’s families and their members.

## **II. B. Sacrifices in Earning Potential Undertaken in Intact Families**

As noted above, intriguing scholarly debates surround the role of economic and other *choices* in family formation. Economic choices remain highly significant within the life of an intact family. If an individual chooses (or is coerced into) making *sacrifices in earning potential* while cohabiting in an intact family, those sacrifices give rise to financial difficulties after the relationship dissolves. Family responsibilities often lead Ontarians to make such sacrifices, and this is therefore a post-relationship challenge which has roots within the economic life of the intact family. This section will discuss the nature of individual earning-potential sacrifices, the persistent gender pattern in this phenomenon, and the post-relationship impact of earning-potential sacrifices.

### ***II. B. 1. How Family Life can Lead to Sacrifices in Individual Earning Potential***

Sacrifices in earning potential typically take the form of an individual’s (i) choices to reduce participation in educational or training programs which would increase an individual’s earning potential; (ii) choices to voluntarily depart from the workforce, temporarily or permanently; or (iii) choices about where, how, and how much to work while within the workforce which diminish long-term earning potential. An example of this third type of sacrifice is Beatrice Peters’ relocation between various Ontario towns as required by Ronald Peters’ career.<sup>66</sup> Even though she worked in the same industry as her partner, such moves probably diminished her earning power.

Simply cohabiting in an intimate relationship may lead to such sacrifices being made. In Beatrice Peters’ case, for example, they occurred long before she had

children. In addition to income, a household requires a certain amount of domestic labour in order to function. It may be efficient for one party to curtail education or employment in order to discharge these functions, leaving the other to concentrate on income-generation.<sup>67</sup> Even in the absence of efficiency gains, this arrangement may be adopted due to social pressures or gender role expectations.<sup>68</sup>

However it is the presence of young children which makes sacrifices in individual earning potential most likely.<sup>69</sup> While the time required for domestic labour other than parenting may have declined with technological advances,<sup>70</sup> parenting remains very time consuming and is, perhaps, becoming more so.<sup>71</sup> Becoming a parent therefore provides a much stronger incentive to curtail employment or education than does simply cohabiting or marrying. Many parents must pay for child care in order to continue working or attending school, and a substantial number are not capable of earning wages much in excess of what child care costs. For these parents, sacrificing earning potential in favour of parenting is, in the short term, actually a way to save money. For other parents, emotional and/or social pressures push towards earning-power sacrifices.

The judgment of Justice L'Heureux-Dubé in the landmark 1992 Supreme Court Case of *Moge v. Moge* clearly identified the connection between parenting and individual earning-potential sacrifices:

The most significant economic consequence of marriage or marriage breakdown... usually arises from the birth of children. This generally requires that the wife cut back on her paid labour force participation in order to care for the children, an arrangement which jeopardizes her ability to ensure her own income security and independent economic well-being.<sup>72</sup>

Some parents leave the workforce entirely, either permanently or (more commonly) for temporarily during the infancy of their children. Others remain employed but work fewer hours, choose flexible employment, or work night shifts so as to balance family schedules.<sup>73</sup> The percentage of Canadians working weekends, evenings, nights, or rotating shifts increased from 23% to 29% between 1992 and 2009.<sup>74</sup> The Peters' arrangement – Ron home with the kids Monday to Friday, Beatrice at home on the weekend, each parent minding the shop when not parenting – is one example of this phenomenon. Employment decisions made in order to facilitate parenting can easily curtail individual or household earning potential in the short or long term. The Peters' decision to leave guaranteed paycheques in the civil service and open a risky business which ultimately failed may have been motivated by the birth of their first daughter.

### *II. B. 2. Quantifying Parenting*

What Justice L'Heureux-Dubé demonstrated in *Moge* remains true today: women are substantially more likely than men to make sacrifices in their earning potential due to family responsibilities. For this among other reasons, they are more likely to experience financial challenges after relationship breakdown. However, the available data does suggest a demographic trend to a more balanced distribution of wage-generating and domestic tasks within Canadian households since *Moge* was decided.

A substantial body of literature exists about the gender allocation of parenting responsibilities in Canadian households.<sup>75</sup> Perhaps the most obvious measure of parenting contributions is quantity of time which adults spend with their minor children. However scholars have identified other relevant contributions to parenting. Joseph Pleck suggested that paternal involvement can be measured in terms of (i) the nature

and quality of interaction with children and (ii) taking responsibility for decision-making, in addition to (iii) absolute number of hours spent in parenting.<sup>76</sup> Duxbury and Higgins suggest that a parent who is *responsible* for children and makes decisions on their behalf experiences more stress than a parent who simply spends time with them.<sup>77</sup> This might mean that parents in the former group are more likely to make individual earning-power sacrifices in order to cope.

### *II. B. 3. Persistence of Gender Patterns*

However parenting is defined, researchers have found that women today usually do more of it than men do. Duxbury and Higgins (2001) asked Canadian parents who had the “primary responsibility for child care” in their families. 63% of women replied that they did so, and 50% of men replied that their female partners did so. Roughly 39% stated that responsibility was shared.<sup>78</sup> With regard to responsibility for child care, Duxbury and Higgins found little change between 1991 and 2001. Another interesting indication comes from the National Longitudinal Survey on Children and Youth. In conducting this survey, Statistics Canada telephoned Canadian households and asked to speak to the “person who is the most knowledgeable” about the child. In 92% of the cases it was the mother of the child who came on the line.<sup>79</sup>

The gender pattern may be most pronounced with regard to the youngest children.<sup>80</sup> Kerry Daly reported that, in 1998, “employed mothers in dual earner families with a child under 5 years of age spent an average of 91 minutes per day in personal childcare activities (feeding, washing and dressing children) compared to 47 minutes among fathers.”<sup>81</sup> Citing a 2001 book about American women, Thomas Oldham recently noted that “only 34% of married women with children younger than age six work full

time."<sup>82</sup> Canadian law allows either mothers or fathers to take “parental leave” from paid employment immediately after the birth of a child. Because this program does not replace the entire income of the parent, it constitutes a sacrifice in individual earning power undertaken in order to discharge family responsibilities. Gillian Ranson observes that mothers remain much more likely than fathers to take parental leave, and this is another example of the persistent gender role pattern.<sup>83</sup> In fact, fathers are *less* likely to have employment interruptions of any kind than childless men are.<sup>84</sup>

Beaujot and Ravanera analyzed time-use data from the 2005 General Social Survey conducted by Statistics Canada, in order to determine how men and women are dividing paid and unpaid work within families anchored by adult heterosexual relationships.<sup>85</sup> Their results neatly summarize the persistence of a traditional gender pattern in Canadian families:

the *complementary-traditional* (he does more paid work, she does more unpaid work) is the predominant model with 32.9%, followed by *woman’s double burden* (she is doing same amount of, or more, paid work, and more unpaid work) with 26.8%. ... the *role-sharing* model, in which they do the same amount of unpaid work, comprises 26.5%.<sup>86</sup>

These gender patterns are reflected in another finding from the same study: Canadian women tend to have jobs with more flexibility but lower pay than those of men.<sup>87</sup> This is logically consistent with women’s efforts to balance paid employment with domestic labour.

Most recently, Ranson’s 2010 book *Against the Grain* provided a helpful literature review on these issues.<sup>88</sup> The focus of Ranson’s volume is couples who have adopted equally-shared or female-breadwinner family models. While arguing that this group constitutes a “vanguard,” she acknowledges that they are not representative of the



majority. Ranson's conclusion is that "the bottom line, in Canada as in many other industrialized countries, is that the responsibilities of parenthood continue to be 'gendered and privatized,' with mothers continuing to face greater demands than fathers."<sup>89</sup>

#### *II. B. 4. Evidence of Change and Gender Role Convergence within the Family*

Despite the persistence of traditional gender roles, there is also evidence of historical and ongoing change. These changes may reduce the prevalence of individual earning-potential sacrifices, or distribute them more equitably among family members. This could ease the post-relationship financial disruption which these sacrifices cause.

The most dramatic social change has been the increase in female labour force participation over the past half-century. Between 1960 and 2000, the proportion of Canadian women in the labour force rose from 32% to 71%.<sup>90</sup> Canadian women still earn less than men on average -- \$24,400 versus \$39,300 per year in 2003.<sup>91</sup> However, the gender wage gap shrank steadily between 1967 and 2003.<sup>92</sup> Over the course of this period, women's participation in registered retirement savings plans (RRSPs) and employer-sponsored pension plans also steadily increased, coming very close to gender parity on some measures.<sup>93</sup> Kerry Daly observes that the "dual earner family" (both parents in the work force) is now the "dominant family form in Canada" and accounts for 7 out of 10 two parent families.<sup>94</sup> Ranson adds that "the majority of young Canadian families in all regions, as well as in all economic, ethnic and language groups, have both parents either in the paid labour force or in education or training programs."<sup>95</sup>

Looking forward, Beaujot and Ravanera note that the growth of the service sector and the knowledge economy may benefit female workers more than male workers. This

is because women are more likely than men are to work in service industries, and also more likely to pursue post-secondary education.<sup>96</sup> Increased female labour force participation has certainly not “solved” the problem of post-relationship economic disruption caused by individual earning potential sacrifices. However, it has reduced markedly the number of women who have no capacity to earn income after a divorce or separation.

Significant, although less dramatic shifts have also taken place in the work and parenting behaviour of Canadian men. There has been some decline in male labour force participation since 1971, roughly the same period during which women’s labour force participation was dramatically rising.<sup>97</sup> Referring to American data, Ellen Galinsky and her colleagues observe that “men are taking more overall responsibility for the care of their children in 2008 than in 1992, according to themselves and their wives/partners.”<sup>98</sup> Daly confirms that in Canada too, “the dominant trend in the contributions that women and men make to parenting and domestic work is one of convergence with women doing less and men doing more.”<sup>99</sup> The Peters’ parenting arrangement in Sault Ste. Marie is representative of this trend, with Ron acting as the primary stay-at-home parent.<sup>100</sup> Gillian Ranson argued that the non-traditional Canadian households which she studied (like the Peters) are at the vanguard of “change evident on a global scale,” and that “all this change, however slow and slight, is in the direction of more egalitarian relationships in the home.”<sup>101</sup>

### *II. B. 5. Post-Relationship Effects of Sacrifices*

Earning potential sacrifices are and will continue to be a consequence of family life for many if not most Canadians. As noted above, this is most powerfully true for

parents. The more non-paid family responsibility or labour an individual assumes, the more likely it is that he or she will curtail education or labour force participation. When and if those relationships end, what are the continuing effects of the earning-potential sacrifices which individual family members make?

The judgment of Justice L'Heureux-Dubé in *Moge* gives a foundational account of the connection between earning-potential sacrifices within relationships and economic problems afterwards:

Once the marriage dissolves, the kinds of non-monetary contributions made by the wife may result in significant market disabilities. The sacrifices she has made at home catch up with her and the balance shifts in favour of the husband who has remained in the work force and focused his attention outside the home. In effect, she is left with a diminished earning capacity and may have conferred upon her husband an embellished one.

...

The financial consequences of the end of a marriage extend beyond the simple loss of future earning power or losses directly related to the care of children. They will often encompass loss of seniority, missed promotions and lack of access to fringe benefits such as pension plans, life, disability, dental and health insurance.<sup>102</sup>

A substantial economic literature seeks to quantify the “wage depreciation effect” – the long-term impact on an individual’s earnings of temporary absences from the workforce. As noted above, leaving the workforce is the most dramatic (although not the only) type of sacrifice in earning potential which an individual can make due to family responsibilities. In her 2005 article, Kathleen Spivey reviewed and added to this literature.<sup>103</sup> Her study confirmed that “total non-employment time has a statistically significant depreciation effect on wages” and that a wage depreciation effect persisted from early-career interruptions even many years later.<sup>104</sup> With regard to gender differences, Spivey found that “wage losses associated with non-employment were less

severe for women than for men, although more past interruptions seemed to matter for women than men."<sup>105</sup> Robert Leckey notes the continuing economic disadvantage faced by women leaving intimate relationships, which is at least partially attributable to the wage depreciation effect:

recently divorced or separated mothers remain financially worse off than recently divorced or separated fathers ... 44 percent of recently divorced or separated mothers have an annual personal income of less than \$30,000, contrasted with 19 percent of recently divorced or separated fathers.<sup>106</sup>

The spouse who did *not* make such sacrifices during the relationship has usually benefitted somewhat from the domestic focus of the spouse who did so.<sup>107</sup> For example, Ron Peters' ascent through the ranks of Parks Canada to become manager of Pukaskwa National Park might have been impossible had Beatrice not been willing to move with him between various postings.<sup>108</sup>

The legal remedy of spousal support is, among other things, designed to compensate the spouse who made earning-power sacrifices using the income of the spouse who did not.<sup>109</sup> However, spousal support is by no means a complete solution to this problem. It is ordered and/or paid in only a small minority of divorces and separations, and in the Peters' case spousal support was not claimed. Carol Rogerson estimated in 2002 that spousal support was paid in only 10-25% of divorce cases,<sup>110</sup> although it is possible that the development of the *Spousal Support Advisory Guidelines* since that date have increased its prevalence. The *Guidelines* themselves propose a payor income "floor" of \$20,000. If neither spouse earns more than that amount, it is very unlikely that spousal support will be paid.<sup>111</sup>

## II. C. Conflict arising from relationship break-down

Family challenges are created not only by the economic life of the intact family, but also by what happens when the intimate relationship at the heart of the family dissolves. Most relationship break-downs are characterized by some degree of *conflict* between the adult parties. The Peters' case had an unusually high degree of conflict, but family justice system workers will recognize as familiar many of the manifestations of hostility from that case. If the family includes children who are old enough to be aware of the break-down, then they are likely to be affected by it in some way. This section will briefly review the literature on post-relationship conflict, and the costs which it imposes upon adults, children, and society.

Although post-relationship conflict may occur without any legal manifestation, conflict arising from relationship break-down frequently results in legal disputes. A 2009 telephone survey conducted for the Ontario Civil Legal Needs (OCLN) Project asked low- and middle-class Ontarians which civil legal problems they had experienced in the previous three years.<sup>112</sup> "Family relationship problems" were reported by 12% of the respondents, and by 30% of all those who reported having *any* type of civil legal problem. Family relationship problems were, by a substantial margin, the type of civil legal problem most often experienced by low- and middle-class Ontarians. The prevalence of family problems was greater than the *combined* prevalence of the second- and third- most common civil problems.<sup>113</sup>

When family conflict does manifest itself in a legal form, it very often continues as such for extended periods of time. The OCLN telephone survey found that, among the respondents who had experienced a family relationship problem at any time in the previous three years, 44% reported that the problem was still unresolved at the time of

the survey.<sup>114</sup> Three-quarters of those in this group stated that they had been trying to resolve the family relationship problem for a year or more.<sup>115</sup> The Peters filed applications and counter-applications in January and February of 2006, and the judgment in their case was not released until November of 2009 – almost three years later.

There is an extensive literature about the effects of divorce and/or dysfunctional family conflict on adults and children. A key conceptual issue in this literature is distinguishing the effects of *conflict* from the effects of the end of the relationship.<sup>116</sup> The scholarship at one point debated the impact of divorce itself on children, asking whether divorce is “bad” or “good” for children. The general consensus until perhaps the 1980s was that divorce was, at best, a necessary evil. While this line of inquiry continues in some quarters,<sup>117</sup> it now appears that *conflict* (especially violence) is the greater cause of mental health damage to children and adults, as opposed to relationship break-down itself. The end of the relationship may in fact have *positive* effects if it ends or alleviates conflict by putting some distance between the parties.

While children have substantial resilience to the effects of family break-down,<sup>118</sup> there is also little doubt among child development experts that exposure to serious inter-parental conflict can leave long-term scars.<sup>119</sup> For example, the judge who decided the Peters’ case identified a serious risk that the children might be

placed in the middle of much hostility between their parents who would be forced by the nature of the custodial arrangement to have more contact with each other than they have at the present time ... the children are far more comfortable when their parents have less contact with each other.<sup>120</sup>

It is at least plausible that family conflict can reduce the ability of children to be productive and contributing members of society in the long run, although this is very difficult to quantify. If so, this is a significant social and economic cost. Post-relationship conflict is inevitable, but the extent and pathology of family conflict is influenced by the response to it.<sup>121</sup> In evaluating potential responses to family challenges, reducing conflict –especially inter-parental conflict to which children are exposed – must be one of the goals.

### **III. PREVENTATIVE RESPONSES TO FAMILY CHALLENGES**

Part II of this paper identified three key family challenges: (i) the economic vulnerability of Canadian families, (ii) sacrifices in earning potential undertaken in intact families, and (iii) conflict arising on relationship break-down. Andrew Schepard has proposed that family conflict be identified and treated as a public health epidemic, due to its disease-like impacts upon society.<sup>122</sup> This means that both prevention and treatment are important. This Part will focus on the ways in which the government might *prevent* family challenges or reduce their severity before they occur.

#### **III. A. Prevention of Relationship Break-Down**

One way to reduce the impact of family challenges would be to reduce the number of intimate relationships which are voluntarily dissolved. This was, indeed, a central social goal for many decades in Canada. Books were written, and professionals trained, with the goal of preventing divorce.<sup>123</sup> Section 9 of the *Divorce Act* also reflects the policy objective of “saving” marriages. It provides that family lawyers must “draw to the attention” of their clients to the statutory objective of “reconciliation of spouses,” and provide information about “marriage counselling or guidance facilities known to him or

her that might be able to assist the spouses to achieve a reconciliation.”<sup>124</sup> Some American scholars argue that preserving or “protecting” marriages should be an explicit goal of family law.<sup>125</sup> For example, “covenant marriage,” a form of union which is designed to be more difficult to dissolve than normal marriage, is available to couples in some American states.<sup>126</sup> The focus of this scholarship has generally been on saving *marriages*, as opposed to intimate cohabitations generally. In fact, many of those who wish to “save marriage” from divorce also perceive non-marital cohabitation as a “threat” to marriage which society should resist.

While the law can make the legal state of marriage more difficult to exit, it is difficult to see how it can preserve family affection or harmony. Nor can people be forced to cohabit. **Preserving the legal form of a marriage which lacks affection, harmony, or cohabitation has no apparent purpose. For these reasons, it seems more promising to assume that large numbers of intimate relationships will continue to dissolve before death does them part, and to examine ways to prevent or mitigate the challenges which arise when they do so.**

### **III. B. Prevention of Challenges Arising Upon Break-down**

This section will consider what society can do for members of intact families so as to reduce the severity of the challenges they will face when and if those relationships dissolve. Richard Susskind seems to be correct in suggesting that people “prefer to have a fence at the top of a cliff rather than an ambulance at the bottom.”<sup>127</sup> It is worthwhile to consider how family challenges might be prevented.

A key question which has emerged from the LCO’s public consultations pertains to the idea of “early intervention” in family disputes.<sup>128</sup> How early is early enough? The



answer might be that early intervention must begin during cohabitations, in anticipation of the fact that many cohabitations will eventually be ended voluntarily. One interesting finding from the Ontario Civil Legal Needs Project telephone survey suggests some scope for prevention of challenges. 14% of the respondents said that in the future they would be likely to experience family relationship problems.<sup>129</sup> If it is true that many Ontarians *anticipate* future family challenges, they may be receptive to initiatives to prevent or mitigate those challenges. **The government should ensure that its public information initiatives about family law are made available and accessible to Ontarians who are still cohabiting in intact relationships, not only to those who have decided to cease cohabiting.**

### *III. B. 1. Education*

The severity of the conflict which arises upon relationship break-down is to some extent dependent on the manner in which the parties communicate and address that conflict. Education as prophylaxis for dysfunctional family conflict could conceivably start before the conflict arises, if it were delivered in high school or as a pre-requisite to marriage.<sup>130</sup> The Ontario secondary school curriculum already includes a course entitled “Healthy Active Living Education.” In this course, students are “given opportunities to refine their decision- making, conflict-resolution, and interpersonal skills, with a view to enhancing their mental health and their relationships with others.”<sup>131</sup> **The government should consider teaching strategies for communication and conflict-resolution in intimate relationships in the context of the “Healthy Active Living Education” in Grade 12, or in another course.** Doing so might enhance Ontarians’ ability to deal with post-relationship conflict in a manner which mitigates rather than

exacerbates it. It could conceivably even increase the chance that intimate relationships remain harmonious and healthy.

### *III. B. 2. Marriage and Cohabitation Contracts*

Individuals entering a marriage or cohabitation are permitted to establish by contract what their financial obligations to each other will be when and if their relationship dissolves.<sup>132</sup> Doing so can substantially reduce the potential for subsequent conflict and disagreement, and can create clear expectations for the parties. Justice Québec publicizes information about cohabitation contracts on a website, which includes an explicit recommendation that

People who chose to live in a de facto union should specify how they intend to live as a couple and how they intend to manage their family relationship to avoid disputes and disagreements... because a written document provides more lasting proof than a verbal agreement, it is in your interest to sign a written cohabitation contract with your de facto spouse.<sup>133</sup>

By contrast, the family law section of the Ontario Ministry of the Attorney General does not appear to mention cohabitation or marriage contracts.<sup>134</sup> **The Government should consider expanding the information which it provides about pre-marital and cohabitation contracts. Potentially, the Ministry's web site could include an explicit recommendation to create such a contract, or a web-based tool to help parties draft contracts.**

However, it is very difficult for individuals to negotiate about entitlements and obligations which they never expect to become real, insofar as people generally do not enter intimate relationships while contemplating their dissolution. If the entitlements and obligations *do* become real, this often does not occur for many years after the contract was initially negotiated. For these among other reasons, very few Ontarians enter

marriage or cohabitation contracts. It is not clear that amendments to the Ministry web site would substantially change this reality.

### *III. B. 3. Discouraging Earning-Potential Sacrifices: Public Investments in Child Care*

As established above, sacrifices in earning potential undertaken for family reasons can lead to economic challenges after relationship break-down. Some such sacrifices are an inevitable and healthy response on the part of Ontarians to their family responsibilities. However, Ontario might want to discourage the most dramatic form of earning potential sacrifice – extended or permanent departures from the labour force. To put the point in positive terms, the state may wish to encourage continuing employment and/or educational activities by parents.

As noted above, parenting is the family responsibility which is most likely to lead Ontarians to make earning-potential sacrifices. Therefore, increasing the supply and affordability of non-parent child care is one way to reduce the need for those sacrifices and thereby reduce the post-separation disruption which they cause. This is particularly true for mothers. Willem Adema observes that “the development of formal childcare allows female employment to expand further, both in terms of the number of female workers and the hours they engage in paid employment.”<sup>135</sup> As female labour force participation rates have increased, there has been a commensurate increase in the proportion of non-parental child care.<sup>136</sup>

However, by comparison to other wealthy countries Canada has made very limited public investments in child care. The OECD found in 2006 that Canada’s investment in early childhood services was equal to only 0.3% of GDP.<sup>137</sup> This was the

lowest figure among 14 OECD countries studied in the report.<sup>138</sup> This report also noted that only approximately 24% of Canadian children between the ages of 0 and 6 have access to regulated day care.<sup>139</sup>

Despite repeated electoral promises, there is still no national non-parental child care program. Indeed the most recent substantive federal initiative was the creation of the Canada Child Tax Benefit, which takes the form of a monthly cash payment to families with minor children.<sup>140</sup> While this initiative may facilitate the purchase of private child care, it does not increase the supply of non-parental child care and provides no incentive to parental labour force participation. It was not intended to be, and does not serve as, a deterrent to sacrifices in earning potential.

Quebec is the exception to generally low overall public investment in child care. In this province public provision of day care is established and widespread. According to OECD statistics published in 2005, 40% of all of Canada's childcare capacity is in Quebec despite the fact that only 22% of Canadian children live there.<sup>141</sup> In 2001, Ontario's provincial government spent \$232 on childcare for every child aged 0-12. This compares to \$980 per child in Quebec, and a national average of \$386 per child. However, the provincial government's recent initiative to provide free full-day kindergarten is a step in the right direction, insofar as this will facilitate labour-force participation by the parents of four- and five-year olds.<sup>142</sup> **State provision of child care reduces the likelihood of parental earning-power sacrifices, which in turn reduces economic challenges in the wake of relationship break-down. In weighing the costs and benefits of family policies, this fact should be considered.**

### *III. B. 4. Discouraging Earning-Potential Sacrifices: Tax Reform*

Feminist scholars have pointed out that some elements of Canada's tax system disincentivize income-generating labour by individuals who cohabit with others who earn more than they do. For example, Canadians are now permitted to contribute \$5,000 per year into tax-free savings accounts (TFSAs) which offer significant tax savings. A married individual is permitted to contribute \$5,000 per year into his or her own account, plus an additional \$5,000 per year into his or her spouse's account. The higher-earning spouse can do so regardless of whether the other spouse is earning income. The family can therefore receive the entire \$10,000 per year tax shelter benefit despite the fact that only one individual is earning income to make contributions. An alternative would be to allow individuals to contribute only to their own TFSAs. If this were the case, the TFSA would operate as an incentive to both spouses to earn income. Only by doing so would the family be able to obtain the full \$10,000 per year tax benefit.<sup>143</sup>

**Governments should consider restructuring benefits such as TFSA so that they incentivize income-generation by both spouses, and disincentivize earning-power sacrifices.**

Kathleen Lahey argues that the tax system is one contributor to "unrelenting pressure on women to substitute unpaid work for paid work at the margins."<sup>144</sup> One source of this pressure which she identifies is "joint tax instruments," defined as "tax provision[s] that adjus[t] tax liability either upward or downward on the basis of having a spouse or common-law partner."<sup>145</sup> For example, the dependent spouse credit reduces tax liability when a taxpayer's spouse is being supported by the taxpayer.<sup>146</sup> Lahey argues that that joint tax instruments are disincentives to women's labour force participation because their benefit is reduced or lost if the spouse with lower earning

potential joins the labour force. Whether this spouse is male or female, the salient point is that joint tax instruments may encourage sacrifices in earning potential, and thereby exacerbate economic problems post-separation. **Joint tax instruments have complex costs and benefits, but it should be recognized by law-makers that their disincentive to labour force participation is among their drawbacks.**

Lisa Philipps has also observed that tax law can act as an incentive or disincentive to intra-household transfers of wealth to the lower-earning spouse.<sup>147</sup> For example, Canadians are now allowed to “split” pension income with their spouses so as to obtain tax benefits.<sup>148</sup> However, the split may be purely “notional” – legal title to the pension income need not be transferred to the lower-earning spouse. If income splitting were to be dependent on actual legal transfers, then the economically weaker spouse would thereby be empowered during the relationship. This could reduce the economic challenges experienced by that spouse after relationship break-down, especially for those who cohabited in a non-marital relationship and are therefore not entitled to statutory property division.<sup>149</sup> While requiring legal transfers of property would increase the intrusiveness of the tax system, **the legislature should consider whether this reform might bring about a more equitable distribution of property within intact relationships, and thereby reduce post-separation economic challenges.**

### *III. B. 5. State Compensation of Caregiving*

An alternative to discouraging earning-potential sacrifices is to compensate the individuals who make those sacrifices in order to perform caregiving tasks. Doing so may lead to them having more savings and economic independence with which to weather the shock of relationship dissolution. Some feminist scholars have argued that

the state should compensate caregivers directly.<sup>150</sup> The Law Commission of Canada's *Beyond Conjugality* report proposed consideration of refundable tax credits for caregivers, or direct grants to them.<sup>151</sup> The *Income Tax Act* currently allocates tax credits both to parents of minor children and to caregivers for the elderly and disabled.<sup>152</sup> However other feminists, including Kathleen Lahey, respond that compensating caregiving would simply reinforce traditional gender expectations and push caregivers out of the workforce.<sup>153</sup>

However, state compensation of caregiving has limited potential as a tool to promote economic independence after relationship breakdown. It is not clear that tax credits or even direct payments provided to a member of an intact relationship will be preserved for the benefit of that family member, as opposed to becoming part of the general "family finances." It might be possible to somehow segregate these funds for the personal benefit of the caregiver should the relationship eventually dissolve, e.g. by adding them to the Canada Pension Plan account of the caregiver. However doing so would mean that the financial benefit would not be available to the caregiver and his or her family at the time when the caregiving was actually happening.

#### **IV. POST-BREAKDOWN RESPONSE TO CHALLENGES**

##### **IV. A. Responding to Challenges After Relationship Breakdown**

Even if preventative initiatives are pursued, relationship breakdown will continue to confront Ontarians with legal and financial challenges. This section will address techniques for responding to these challenges after they arise. It will begin with the least adversarial methods, and work towards traditional civil litigation. Section D, below, will consider the costs and benefits of administrative responses to family challenges.

With regard to all potential responses to relationship breakdown, a key fact is that, as the Law Commission's Consultation Paper noted, family problems come in "clusters."<sup>154</sup> For example, while parenting disputes are fundamentally different from financial disputes, they present themselves within the same families, and family courts must respond to them together. More broadly, family law problems "cluster" with other types of legal problems. The Ontario Civil Legal Needs Project Report identified family relationship issues as among the types of legal problems which are most likely to be experienced in tandem with other legal problems.<sup>155</sup>

#### *IV. A. 1. Supplying Legal Information to the Public*

Legal information can be defined to include both substantive information about family law, and information about legal procedures and dispute resolution options. Legal information is distinct from legal *services* which are personalized and provided directly by professionals.<sup>156</sup> The provision of legal information is very inexpensive, by comparison to other government responses to post-relationship challenges. Information, once created, can be reproduced for very little cost for an unlimited number of users. Moreover, unlike legal services, ADR, or litigation, consuming legal information has little or no cost for the individuals who access it (assuming that the government provides for free.) From a cost-benefit analysis point of view, state initiatives to create legal information are worth undertaking even if they have only modest benefits for Ontarians experiencing family challenges. In other words, because the cost is small, only a small benefit need be demonstrated for legal information. Very real benefits do seem to be offered by family legal information initiatives, and the government has responded with what is already a fairly comprehensive campaign. However, this section will propose a



few initiatives which might make a broader range of legal information accessible to a broader range of Ontarians.

Ontario made substantial investments in providing legal information about family challenges this area. Family Law Information Centres (FLIC) are found in all of our family courts.<sup>157</sup> These contain brochures and other documents. Some but not all FLICs are staffed by employees who provide general information about the system. Law Help Ontario, at the 361 University Ave. court in Toronto, offers information to self-represented litigants using an innovative combination of lawyers and written information.<sup>158</sup> The province has also provided funding for internet-based family information initiatives. Statutes and case law are increasingly available for free online.<sup>159</sup> The Ministry of the Attorney General has recently expanded its “Family Law Resources” page, which now includes a comprehensive “frequently asked questions” section and pictures of sample courtroom layouts.<sup>160</sup> The Ontario Civil Legal Needs Project asked Ontarians about their familiarity and experiences with five public information services.<sup>161</sup> They found that “although only 1 to 8 per cent of those surveyed had heard of any of the websites, their satisfaction levels were very high (81 per cent and higher).”<sup>162</sup> This suggests that the quality and utility of these public information sources is very good, but **the government needs to put more effort into publicizing them, so that more Ontarians may benefit.**

More narrowly-focused online initiatives include the Family Law Education for Women (FLEW) site.<sup>163</sup> The central message of the FLEW site is that all Ontarians, regardless of ethnic background or family situation, have the right to the protection of our family law statutes.<sup>164</sup> The FLEW website appears to provide information which

helpful and accurate for both women and men. It is unclear why it is branded as being “for women,” given that our statutes and case law apply equally to men and women and given that men and women both need information about family law. **Given that this web-site is funded by the provincial government, the government should ask that it be rebranded to emphasize its utility to *all* Ontarians.**

The internet appears to be the most logical medium for delivering family law information to Ontarians. The Ontario Civil Legal Needs Project found that, even among low- and middle-class Ontarians, 84% have access to the internet.<sup>165</sup> However, most of the internet-based legal information initiatives identified above are predominantly text-based. (FLEW is an exception, providing audio streams of information and sign-language videos.) Given that many Ontarians have limited English literacy, **the province should consider providing family law information on websites in video format.**

Parent Information Sessions are group classes in which information about separation and family law are presented through oral presentations and videos. These are mandatory in Toronto’s Superior Court of Justice<sup>166</sup> and are available on a voluntary basis in certain other family courts. Parenting information sessions are soon to be launched in the Brampton family court.<sup>167</sup> Based on the author’s observations,<sup>168</sup> there is a fairly limited degree of interactivity in these sessions. Participants are allowed to ask some questions but queries about the specific facts of a case are discouraged and the primary mode is one-way provision of information from the leaders to the participants. For this reason, these programs are more appropriately classified as “legal information” rather than “legal services.”

The literature is somewhat ambivalent about the benefits of Parent Information Sessions, which are usually evaluated (if at all) in terms of whether or not they reduce litigation. Ellis and Anderson (2003) reviewed the literature and conducted their own study of Family Information Sessions being held in Ontario at that time for divorcing parents. Their conclusion was that these programs reduce use of court resources by inducing settlement.<sup>169</sup> However, not all research on these programs has replicated the results about reduced use of court resources. Versaevel studied a voluntary parent education program in Washoe County, Nevada.<sup>170</sup> She reviewed the court files of litigants who had and who had not participated in the classes, and concluded that "no clear correlation could be found that supported the idea that parent education classes could help resolve matters faster."<sup>171</sup> Shelley Kierstead compared a sample of litigants who had attended a program with a control group which had not.<sup>172</sup> She found that, although there were significant differences between the two groups with regard to certain elements of litigiousness, "considered as one combined variable, there was statistically significant difference in litigiousness between the sample group and the control group."<sup>173</sup> **A more comprehensive evaluation of Parenting Information Sessions is necessary before their publicly-funded expansion can be recommended.**

A great deal of legal information which would be useful to Ontarians at the time of relationship breakdown remains inaccessible to them or expensive enough to be beyond the reach of most self-represented middle class litigants. For example, the Law Society of Upper Canada (LSUC) conducts Continuing Legal Education seminars, for which lawyers write research papers without compensation. LSUC has an online

archive of all of these papers, and a database of video-recordings from the seminars. However, these are not publicly available for free,<sup>174</sup> despite the fact that LSUC does not generally compensate the lawyers who deliver the seminars and write the CLE papers. For example, LSUC held a four hour “Six Minute Family Lawyer” program in December 2009, which provided a broad overview of key issues in family law. This program is archived online, but costs \$150.00 to access. Most other family law CLE programs cost even more. **In light of LSUC’s statutory duty to “act so as to facilitate access to justice for the people of Ontario” and “protect the public interest,”<sup>175</sup> the province should ask LSUC to make family law CLE materials publicly available for free or reduce their prices. If this is not possible, these CLE materials should at least be made available in Ontario’s public libraries.**

The *Spousal Support Advisory Guidelines* (SSAG) have quickly become a central feature of spousal support law in Canada.<sup>176</sup> However, by comparison to the Child Support Guidelines, the SSAG are relatively complex and difficult for many self-represented litigants to use. Determining a spousal support entitlement using the “with child support” formula in the SSAG would require either advanced math skills or access to software such as DivorceMate.<sup>177</sup> Using DivorceMate to calculate a single spousal support entitlement costs at least \$350.<sup>178</sup> **The provincial and federal governments should cooperate in creating free on-line software to calculate Spousal Support Advisory Guidelines ranges.**

Richard Susskind has noted that people who have legal rights or obligations are often unaware of them.<sup>179</sup> This point seems particularly true in the family law context. For example, the matrimonial home remedies provided by Part II of the *Family Law Act*

are probably not front of mind for individuals at the time of relationship breakdown.<sup>180</sup>

However the rights provided therein, such as the equal right of spouses to possess the matrimonial home,<sup>181</sup> are potentially very valuable. Susskind proposes that the state might proactively provide legal information to citizens at the time when they need it, using biographical information about the individual possessed by the state:

once an individual builds up a profile of his or her activities, or joins communities, whether open or closed, of people with shared interests, then distilled, relevant, and tailored briefings will be sent to them. In this way, citizens may be urged to be proactive.<sup>182</sup>

**Marriage and child-birth might be examples of activities which would trigger "tailored briefings." When an Ontarian citizen gets married or becomes a parent, the province could send an information package by email or post. This package would, among other things, identify family law issues which that citizen might eventually encounter.** While privacy concerns would be a possible impediment to such an initiative, the idea is certainly an intriguing option for providing legal information about family challenges to Ontarians.

#### *IV. A. 2. Increasing the supply and affordability of legal services*

No matter how comprehensive and accessible, legal *information* is not a complete substitute for personalized legal *services*.<sup>183</sup> Services can be offered by lawyers, or by other professionals such as paralegals and social workers who have experience working with the family justice system. A central finding of the LCO's public consultations is that there is a broad diversity of different "entry points" to the family justice system, staffed by a wide variety of different professionals who provide services and information.<sup>184</sup>

However, large numbers of Ontarians use the family justice system with little if any personalized assistance. The Ontario Bar Association recently found that that 40% of all civil litigants lack lawyers, and that the rate of self-representation among family litigants is even greater than this average.<sup>185</sup> In 2009, another report stated that approximately 70% of family litigants are unrepresented.<sup>186</sup> While some of these individuals do not wish to be represented, many if not most would like to have legal representation but do not believe that they can afford it.<sup>187</sup> A survey of Kingston family court litigants without lawyers published in 2005 found that 83% stated that they were unable to afford the legal fees.<sup>188</sup>

The actual cost of family legal services varies widely. A survey of lawyers conducted by *Canadian Lawyer* magazine found that the average legal fee for a contested divorce in Ontario is \$12,602. The average fee for a civil case culminating in a two-day trial was \$45,477.<sup>189</sup> However, it also appears that many Ontarians obtain more affordable legal services, probably because their matters are not “contested” and do not culminate in trials. A 2009 telephone survey conducted for the Ontario Civil Legal Needs Project identified low- and middle-class Ontarians who had sought legal assistance for a non-criminal matter in the previous three years.<sup>190</sup> Among those who had obtained legal services, 28% said that the services were free, and an additional 19% said that they paid less than \$1,000.<sup>191</sup> Legal Aid Ontario reported that, in 2008-2009, the cost of the average family client funded by that agency was \$1826.00.<sup>192</sup>

Nevertheless, the OCLN survey also found that many individuals experiencing family challenges have particular difficulty accessing legal services. 81% of those who had experienced this type of challenge in the previous three years had sought legal

services, but 30% of those who did so “had difficulty” in obtaining it.<sup>193</sup> Among low-and middle-class Ontarians who had a civil justice problem but did not seek legal assistance, the perceived cost of lawyers was by far the most common reason for not doing so.<sup>194</sup> Lowering the cost of legal services would make them more accessible to Ontarians experiencing post-separation family challenges. Having access to experienced and competent professional help would certainly reduce the strain which family challenges place on Ontarians in this position. There are a variety of initiatives by which the province might lower the cost of legal services, each of which has a distinct set of costs and benefits.

One obvious option would be to increase the supply of legal aid available for family law disputes. Legal aid allows individuals to obtain the services of a lawyer paid by the government. These services are available for family law matters through the Family Law offices run by Legal Aid Ontario (LAO).<sup>195</sup> In 2008-2009, LAO issued 30,107 certificates for family matters, spending \$50,755,000.00 on these services.<sup>196</sup> However, it is very difficult to obtain comprehensive LAO-funded representation for private family law disputes which do not include child protection or criminal elements.<sup>197</sup> One recent report claimed that "over the past decade there has been a 30% drop in lawyers accepting certificates from family law clients who qualify for legal aid."<sup>198</sup>

One of the most intriguing findings of the OCLN survey was that “One in three respondents ... said they prefer to resolve their legal needs by themselves with legal advice, but not necessarily with the assistance of a legal professional.”<sup>199</sup> **The provincial government might wish to respond by de-emphasizing funding of comprehensive legal representation in favour of providing more limited legal**

**services to a broader group of people.** Examples of these more limited services include LSUC's a telephone Lawyer Referral Service which offers members of the public a free 30 minute consultation with a lawyer.<sup>200</sup> Other forms of free legal services currently available in Ontario family courts include duty counsel and volunteer law student assistance from the Pro Bono Students Canada Family Law Program. Another way to make public dollars go further is to subsidize legal clinics which provide limited family legal services at a reduced and predictable rate. Many Ontarians who are unable to afford family legal services as they are currently structured would be able to pay a smaller and more predictable amount. For example, Atlanta's Family Law Information Centers offer 30 minute consultations which in some cases carry a nominal fee of roughly \$10.<sup>201</sup>

**Publicly-funded personalized legal services can also be provided remotely, and the government should explore this possibility.** The LSUC Lawyer Referral Service mentioned above<sup>202</sup> might be complemented by a website to which Ontarians could submit queries about family disputes. Many questions could be answered by paralegals or workers in low-cost jurisdictions abroad; this would allow a more expansive service to be provided at a lower cost.<sup>203</sup>

If the government wishes to reduce the cost and increase the accessibility of legal services without further public expenditure, then it might **consider lowering the barriers to the private-sector provision of legal services.**<sup>204</sup> At present, the *Solicitors Act* makes it illegal for anyone not "admitted and enrolled as a solicitor" to represent another individual in court.<sup>205</sup> This rule (which has very limited exceptions) has made it very difficult for paralegals or others to provide legal services to Ontarians



experiencing family challenges. Canada's Competition Bureau has argued convincingly that **“law societies should neither prohibit related service providers (such as paralegals...) from performing legal tasks, nor limit their ability to do so, unless there is compelling evidence of demonstrable harm to the public.”**<sup>206</sup> Whether there is sufficient evidence of demonstrable harm in this case is an open question.

The province subjected paralegals to LSUC regulation in 2007,<sup>207</sup> despite the Competition Bureau's warning that “to the extent that paralegals need to be regulated, the proper avenue for this is not through the law societies, given the obvious conflict of interest that arises from having one competitor regulate another.”<sup>208</sup> In May of 2010 a resolution was briefly brought before the LSUC annual general meeting which would have opened a discussion about authorizing paralegal family law practice.<sup>209</sup> This proposal was met with fierce opposition from Ontario lawyers, and was withdrawn before being considered.<sup>210</sup> The objection of many lawyers to paralegal family law practice was summarized by Mary Reilly, treasurer of the Family Lawyers Association of Ontario:

Our concern is that family law is extremely complicated. You have to have knowledge of a lot of different pieces of legislation. It isn't a case of just giving them a couple of courses, and they're up to speed.<sup>211</sup>

Certain areas of family law are more complicated than others, and Reilly's argument might be more valid for some areas than for others. **One option would be to allow paralegal practice with regard to child support and custody and access, which are not, in most cases, legally complex. Property division, spousal support, and other issues could be reserved for lawyers.** These latter issues are both more

complex and more likely to be relevant by wealthier individuals who are better able to afford lawyers' fees.

Short of licensing paralegal family law practice, there are various other ways in which the province might make it easier to provide family legal services. For example, **LSUC might consider waiving the articling requirement for law school graduates wishing to practice family law. Family lawyers might be exempted from some of the obligations which the Law Society places on lawyers which increase the cost of doing business, such as the new continuing professional development requirement.**<sup>212</sup> It is at least possible that Ontario lawyers are actually *overqualified* for the average family law dispute experienced by lower- and middle-class Ontarians. If so, and if reducing qualification requirements would increase the supply of family legal services and thereby lower their price, the Law Society and the government should consider doing so.<sup>213</sup>

The cost of such initiatives would take the form of lowered standards, which might or might not translate into less satisfactory services being provided to clients. The value of having competent, knowledgeable, and dedicated people working in the system should not be underestimated. Julie Lasonde reported that one of the reasons why the LCO's public consultations succeeded in bringing together individuals with divergent perspectives on highly emotional matters was the trust relationships which those individuals had with their lawyers and other service providers.<sup>214</sup> These lawyers and service providers were able to convene round-table meetings and focus groups. This attests to the profound value of high-quality, personalized service in dealing with family challenges.

As important as high quality services are, it is not clear that law school and the LSUC bar admission course are *necessary* and *sufficient* preparation for providing services of this nature to Ontarians experiencing post-relationship family challenges. One interesting point of reference regarding the value of lawyers' services versus other services is a report authored by Rae Kaspiw and her colleagues evaluating Australia's 2006 Family Law reforms.<sup>215</sup> Individuals who had used the family justice system and had obtained services from lawyers and/or non-lawyers were asked whether they would recommend the services they obtained. Lawyers did not produce higher rates of client satisfaction than most of the alternative service providers.<sup>216</sup> It would be very useful to study the satisfaction rates of Ontario clients of family lawyers and alternative family service providers.<sup>217</sup> Such a study might confirm or deny the proposition that only licensed lawyers are capable of providing useful legal services to Ontarians experiencing family challenges.<sup>218</sup>

Another option is to restructure the way in which legal services are provided. In the traditional model, a lawyer is retained to represent a client until the client's legal problem is resolved. Fees are calculated on an hourly basis. While the client may withdraw from this arrangement at any time, he or she often has little idea at the outset how much it will cost to resolve the problem. In addition to the hourly rate itself, the unpredictability of the final bill is one of the factors which make legal services seem unaffordable to middle class Ontarians. Richard Susskind proposes an alternative to this model, which would involve a lower and more predictable price tag for the consumer:

decomposing legal work that has been, or should be undertaken ... into constituent tasks and allocating these to the least costly sources of

service that we can find, so long as this multi-sourcing and mass customization does not fail to deliver the requisite quality of guidance that the non-lawyer needs.<sup>219</sup>

“Unbundling” of legal services has been identified by the Ontario Civil Legal Needs project as a possible way to increase affordability.<sup>220</sup> This would allow clients to do some things for themselves while obtaining legal assistance for the most challenging portions of litigation (such as oral advocacy.) **The Ontario government should work with the Law Society to encourage the provision of unbundled family law services, provided that doing so would make them more accessible without excessively reducing quality.**

#### *IV. A. 3. Alternative / Appropriate Dispute Resolution (ADR)*

ADR can be defined as any structured dispute-resolution process other than courtroom adjudication. While the “A” in ADR once stood for “alternative,” it is increasingly being used to stand for “appropriate.”<sup>221</sup> This signifies that adjudication is no longer the privileged or primary avenue for the resolution of family law disputes.<sup>222</sup> However, the word “appropriate” also leaves open the possibility that a litigation process may in some cases be *more* appropriate than other alternatives. For example, it has been argued that, at least in cases of power imbalance or domestic abuse, the structured environment of a court-room offers the best opportunity for the rights and interests of vulnerable parties to be protected.<sup>223</sup>

The rise of ADR in family law can be traced to the “divorce revolution” which began in the late 1960s. As a result of legal and social changes, courts were newly confronted with large numbers of family disputes.<sup>224</sup> They responded, in part, by experimenting with a wide variety of programs and interventions, the primary purpose of

which was to encourage settlement.<sup>225</sup> These public sector, court-connected programs and interventions were an early form ADR, although most ADR in Ontario today is conducted in the private sector.

The continuing demand for ADR services is created by the fact that family litigation is very expensive for the parties, their children, and the state. Scholars, policy-makers, and Canadians confronting family challenges therefore look for other ways of resolving family disputes which impose fewer costs.<sup>226</sup> Nor is the case for ADR made exclusively by critics of lawyers -- lawyers themselves are embracing it.<sup>227</sup> For example, the Ontario Bar Association Family Law Section, a group of lawyers, recently joined with two ADR organizations in calling for “non-adversarial options” to become the “primary framework for resolving family matters.”<sup>228</sup>

Today, the most common forms of ADR in the Ontario family law context are collaborative family law, mediation, and arbitration. The latter two may be practiced independently of each other, or may be combined as mediation-arbitration (“Med-Arb”).<sup>229</sup> Beyond these core techniques, some scholars would give ADR a broader definition, for example including solicitor negotiation or custody evaluation under this rubric.<sup>230</sup>

The evaluation literature has sought to weigh the costs and benefits of different types of ADR. Commonly, a specific type of mediation, assessment, or parent education is evaluated in terms of the number of cases which settled during or immediately after the process.<sup>231</sup> While these studies often have very small sample sizes,<sup>232</sup> they do help establish what programs help reduce the costs of litigation. Qualitative techniques such as interviews and surveys have been deployed in some of

these evaluations in order to more comprehensively analyze costs and benefits.<sup>233</sup> Comprehensive qualitative evaluations of family process are more labour-intensive than quantitative reports on settlement rates, and is therefore often conducted by the state itself<sup>234</sup> or with public funding.<sup>235</sup> While such small scale pilot projects are perhaps the most common method by which costs and benefits of alternative mechanisms have been studied, a valuable set of sources go beyond assessing a single program. Experiments and literature about costs and benefits have originated in state- and province-wide initiatives<sup>236</sup> and in partnerships between universities and courts.<sup>237</sup> Inter-jurisdictional comparisons are rare, but very helpful when they do appear.<sup>238</sup>

*Mediation* is perhaps the oldest and most widespread form of ADR used for family challenges. In Ontario, free court-adjunct mediation is available in the 17 court-houses which are part of the Family Court Branch of the Superior Court of Justice (also known as the “unified family court.”)<sup>239</sup> Mediation is also available at many of the other family courts. Full or partial settlement is reached in 79 percent of Ontario family mediations.<sup>240</sup> Mediation is usually less costly and more therapeutic than litigation,<sup>241</sup> and there is some evidence that resolutions reached using this dispute-resolution technique are more durable than those which are the result of adjudication.<sup>242</sup> Jennifer McIntosh and her colleagues compared found that including children in mediation produced more durable agreements.<sup>243</sup> On the other hand, mediation may produce unjust results in the many cases in which power imbalances and/or domestic violence are factors.<sup>244</sup>

From a cost-benefit point of view, the great advantage of mediation is that it can produce durable settlements using a very small resource input. The parties need not

have lawyers to participate in mediation. A successful mediation obviates the need for future judicial intervention, thereby potentially *saving* public resources given that mediators are much less costly to the taxpayer than judges are. These facts make mediation a very compelling option in an environment of resource scarcity like that which prevails in the Ontario family justice system. **The provincial government should ensure that free or affordable mediation is available to all Ontario family litigants** for appropriate cases.

*Child assessment* by mental health professional or social worker in a parenting case can arguably be considered another form of ADR. This categorization is questionable because the *primary* function of assessors is to identify and recommend the parenting arrangement which would be in the best interests of a child or children.<sup>245</sup> This evaluative function is distinct from the dispute-resolution function which is at the core of ADR. However, there is substantial evidence that neutral assessments generally speed the parties to a negotiated resolution.<sup>246</sup> Assessments sometimes produce settlement incidentally,<sup>247</sup> and sometimes they do so because the assessor consciously tries to achieve this result. The provincial government funds child assessments conducted by social workers from the Office of the Children's Lawyer.<sup>248</sup> Although the applicable statute defines these assessments as purely evaluative or forensic in nature, there is compelling evidence that these social workers also encourage the parties to settle by engaging in informal mediation.<sup>249</sup> These informal mediation efforts by the OCL's social workers in custody and access cases should be encouraged in appropriate cases, because early settlement of the case is usually in the best interests of the child. **A new section should be added to the *Children's Law Reform Act* which**

**acknowledges and protects the mediative function of OCL social workers in custody and access cases.<sup>250</sup>**

*Collaborative family law (CFL)* is a relatively new initiative,<sup>251</sup> which is quickly gaining adherents in Ontario.<sup>252</sup> The distinguishing feature of collaborative family law is the “Collaborative Practice Participation Agreement.”<sup>253</sup> This contract prevents the lawyers involved from representing the parties if litigation occurs and which also commits everyone involved to a cooperative and constructive approach to dispute-resolution. CFL seems to consistently produce durable settlements while avoiding litigation. However CFL is not itself without costs. Insofar as it requires the parties to both retain lawyers as well as, often, other professionals, it is beyond the financial reach of most Ontarians. Like mediation, it may lead to vulnerable parties settling for markedly less than they might obtain at trial,<sup>254</sup> insofar as it de-emphasizes legal entitlements in favour of interest-based negotiation.<sup>255</sup> While CFL is certainly a valuable option for Ontarians who can afford it, it is not clear that the provincial government should be involved in its provision.

*Parenting coordination* generally takes place after a parenting agreement or order is in place between separated parents.<sup>256</sup> A parenting coordinator is generally tasked with mediating and arbitrating smaller disputes about parenting between the parties so as to avoid recourse to litigation, and with ensuring regular and conflict-free access visits.<sup>257</sup> In some jurisdictions “special masters” are appointed by the court and have similar functions.<sup>258</sup> In Ontario, however, parenting coordinators are usually empowered by an agreement between the parties. Like CFL, parenting coordination is



useful for those who can afford it, but it is not a realm in which the provincial government has a direct role to play.

*Arbitration* is the form of ADR which is most similar to litigation. In arbitration, the parties sign an “arbitration agreement” which empowers a third party to resolve their dispute. Arbitration may or may not be preceded by a “mediation phase,” in which the arbitrator seeks to mediate the dispute. If so, it is known as “mediation-arbitration,” or “Med-Arb.” In Ontario the *Arbitration Act* governs arbitrations generally.<sup>259</sup> The *Family Arbitration* regulation, among other things, requires that those who arbitrate family disputes have certain types of training. This regulation also requires all family arbitrations to be conducted in accordance with the law of Ontario or the law of another Canadian jurisdiction.<sup>260</sup> Arbitration (with or without a prior mediation phase) offers the parties finality, the ability to craft an appropriate procedure for each case, and an expert decision-maker.<sup>261</sup> However arbitration’s confidentiality may inhibit the development of the law, insofar as the decisions are not reported and cannot be used as precedents. Private arbitration is not available to most Ontarians due to the paucity and high fees of the specialist lawyers who provide this service.<sup>262</sup>

Nonetheless, arbitration proponents say that it is actually *less costly* to the litigants than courtroom litigation is, despite the fact that private arbitration requires the parties to pay the arbitrator.<sup>263</sup> In a recent lecture, prominent Toronto arbitrator Lorne Wolfson identified two key reasons for this cost advantage.<sup>264</sup> First, arbitrators are experts in family law, and need not be “educated” by the parties’ lawyers. By contrast, some judges are generalists, and if so the parties must pay their lawyers to prepare and present submissions educating the judge about the applicable law. Second, Mr.

Wolfson stated that arbitrators can dedicate large chunks of time to a single case – up to a full day at a time. A judge, on the other hand, can often only allocate 1 hour at a time to a case or settlement conference in a family law dispute.<sup>265</sup> Because one hour is seldom sufficient, the parties must return weeks or months later. Their lawyers must then be paid to learn the case and travel to court again.

If it is true that family arbitration is cheaper for the litigants than going to court, this might point to substantial cost savings which might be achieved through family court reform. **If family judges were all specialists, and if they were allowed to allocate longer continuous stretches of time to each case, then it is possible that the total number of court room hours spent per case could be dramatically reduced.** This could, in turn, create substantial and immediate public savings. **Ontario should explore the possibility that features of the private family law arbitration system might be imitated by the public court system.**

#### *IV. A. 4. Litigation*

Litigation might be considered the “last line of defence” in Ontario’s response to the challenges arising upon intimate relationship breakdown. Today, Ontario’s family and general courts administer a system of statutes and common law rules which has been totally re-written since the 1967 introduction of the *Divorce Act*.<sup>266</sup> All Ontario family litigation is subject to a corpus of key statutes,<sup>267</sup> common law principles, and procedural rules.<sup>268</sup> The *Family Law Rules* apply to all family disputes in all Ontario courts. However, Ontario has a geographically heterogeneous family law procedure, in which remain substantial differences between regions and courts. This section will

briefly discuss some of the distinctive features of family litigation in Ontario, before identifying some of the costs and benefits of litigation as a response to family disputes.

There are three types of court in the system: (i) the Superior Court of Justice, (ii) the Ontario Court of Justice, and (iii) the Family Court branch of the Superior Court of Justice.<sup>269</sup> Courts in this third category are also known as “Unified Family Courts” (UFC).<sup>270</sup> In the 18 jurisdictions which have a UFC, all private family disputes can be addressed therein.<sup>271</sup> In other parts of the province, litigants attend either the Superior Court of Justice (SCJ) or the Ontario Court of Justice (OCJ). In general, parties who are seeking a divorce must go to the SCJ while all others file in the OCJ. In remote communities, family court may be part of a “court party” which travels between communities.<sup>272</sup> **Unified family courts reduce the complexity of the system for litigants, while allowing resources such as mediation and specialist judges to be deployed more efficiently for a larger group of litigants. The province should work with the federal government to extend the UFC system across the province.**

Another important difference between Ontario courts is the nature of the judges. In some locations family matters are heard by *specialist* judges, who either deal exclusively with family law disputes or who have family law among two or three areas of exclusive focus. In others, the judges are *generalists* who hear the whole gamut of legal disputes, including family law matters. In general, smaller communities are less likely to have specialist family law judges, because the quantity of family disputes in these areas is not sufficient to occupy a judge full-time. There is an active debate in the literature about whether the quality of adjudication is correlated to whether or not the judge is a family law specialist.<sup>273</sup> Many family lawyers prefer specialists,<sup>274</sup> but there

does not appear to be quantifiable evidence about whether specialist judges produce tangibly different results for litigants. The “Recapturing and Renewing” report proposed what seems a reasonable compromise position between judicial generalism and judicial specialism in family court: **generalist judges should be appointed to hear family cases for terms of at least six months.**<sup>275</sup>

There are a number of other points of divergence among Ontario family courts. While some jurisdictions (including Toronto) appear to have enough judges to make a system work in an orderly fashion,<sup>276</sup> other jurisdictions (particularly those in the “905” area around Toronto) lack sufficient judicial resources to deal with the demand.<sup>277</sup>

**Judicial resources should be distributed so as to minimize regional disparities in access to family justice.** Parenting information sessions are mandatory in some courts, voluntary in others, and entirely unavailable in many others.<sup>278</sup> There are also reportedly some divergences among the forms used at different courts.<sup>279</sup> Conferences under Rule 17 of the Family Law Rules are scheduled in different ways at different courts. For example, in Brampton a judge will have three conferences scheduled concurrently at 10 a.m., and shuttle between them.<sup>280</sup> In Toronto, one conference is scheduled every hour or every two hours.<sup>281</sup>

These are all examples of regional variations and experiments in family court administration. They are evidence that litigation is not “monolithic” or totally tradition-bound in the family arena. A simple form of cost-benefit analysis would involve comparing the costs and benefits of these alternatives which are currently in place, identifying best practices, and exploring potential to incorporate them elsewhere when appropriate. **While there may in some cases be good reasons for regional**

**variation, family court judges and administrators should be encouraged to identify best practices and spread them throughout the province where appropriate.**

What are the costs and benefits of litigation as a way to resolve family conflict, by comparison to alternatives? While litigation is almost a dirty word among some family conflict professionals, its benefits should not be ignored. Both in Ontario and abroad, the professionals who work in family courts have made substantial efforts to fine-tune civil procedure to respond to the unique characteristics of family cases.<sup>282</sup> Litigation, and facilitating access to the court, may have benefits in terms of access to justice,<sup>283</sup> perception of justice,<sup>284</sup> and respect for the court.<sup>285</sup> Sometimes the adversarial system has produced breakthroughs. The 1992 Supreme Court of Canada judgment in *Moge v. Moge* is generally acknowledged to have constituted a major leap forward in Canadian spousal support law in terms of remedying support arrangements which were unjust to women.<sup>286</sup> *Moge*, and the substantial social benefits which it has produced, would have been impossible if the parties had been pushed into mandatory mediation or another form of ADR. Had they weighed the amount of money at stake in their case (less than \$200 per month) against the cost of litigating through multiple appeals to the highest court in the land, then it is unlikely that our law would have moved forward as it did.<sup>287</sup>

Some scholars say that people feel more satisfied with adversarial modes of dispute resolution as compared to inquisitorial or mediatory ones.<sup>288</sup> Carol Smart and Vanessa May note that, at least in principle, “the courts can ... function as a mechanism through which the parents can express their hurt and grievances, and in this way the

legal process can offer psychological containment of disputes and conflict.”<sup>289</sup>

However, family litigation appears to many of the litigants to be unfair. The OCLN telephone survey found that, among low- and middle-income Ontarians who had resolved a family dispute within the previous three years, 45.7% said the process was “unfair.”<sup>290</sup> This suggests that the status quo, despite its emphasis on due process, is not convincing Ontarians that justice is being done.

One genuine benefit of litigation as a dispute-resolution mechanism is its openness to public scrutiny. Trials are transcribed, decisions are reported, and appeals are available to the litigants. None of the forms of ADR described above possess all of these characteristics. To the extent that we are concerned about decisions being made on inappropriate grounds (e.g. gender bias), the openness of litigation may be preferable to the secrecy of ADR.

Despite these benefits, family litigation imposes very substantial costs on adults, children, and society. The most obvious costs of family litigation for adults are the time and money which it consumes. The average 2009 legal fee for a contested divorce in Ontario was \$12,602.<sup>291</sup> A divorce may be “contested” even if it is settled fairly quickly, and divorces involving courtroom advocacy can cost much more. The average legal fee for all Ontario civil litigation cases culminating in two-day civil trials was \$45,477.<sup>292</sup> While it is not clearly specified in this data source, it appears probable that these fees are *per person*. The average “per family” legal fee for a contested divorce would therefore be 2 x \$12,602, or \$25,204. Retaining other private sector professionals, such as mediators or assessors adds to the cost,<sup>293</sup> unless doing so reduces the need for lawyers.

How affordable are family lawyers' fees for Ontarians? These fees might be paid for by borrowing, by drawing on savings, or from individual income. As noted above,<sup>294</sup> there is a long-term trend to higher levels of indebtedness and lower quantities of savings. Even if an Ontarian is able to borrow or use savings in order to pay, doing so will clearly have obvious long-term repercussions on his or her economic well-being. Savings spent in litigation cannot be used for retirement or education, and loans must eventually be repaid.

To what extent can the average Ontarian pay for family litigation using his or her income, without drawing down savings or borrowing? The most recent data on Ontarians' incomes from Statistics Canada pertains to 2007. That data indicates that the median income for "Economic families, two persons or more" in Ontario was \$67,500.<sup>295</sup> Projecting the 1998-2007 income growth trend forwards produces a projected median income of \$68,845 for 2009.<sup>296</sup> The 2009 "per family" legal fee for a contested divorce (\$25,204) is equal to 36.6% of this income. Given that the average Canadian household saved only \$3,200 in 2009,<sup>297</sup> it is clear that there is little surplus available in the average household budget to pay sudden and dramatic expenses such as legal fees.

It is safe to conclude that the average legal fee for a contested divorce would constitute an enormous financial blow for the average family. Moreover, these costs come at a time when people are likely to be especially ill-equipped to pay them, given the other financial pressures which are likely to arise on relationship breakdown, such as the need to relocate. This is particularly true for a spouse who left or curtailed involvement in workforce during the relationship.<sup>298</sup>

Each family lawyer's bill will likely be paid by a single individual, given that the family relationship has broken down. Comparing the average legal bills against the incomes of median "lone-parent families" and "unattached individuals" establishes the inaccessibility of family legal services to middle-class Ontarians even more dramatically. The average 2009 legal fee for a contested divorce in Ontario (\$12,602) is equal to 58% and 40% of the projected median 2009 incomes for unattached individuals and lone-parent families, respectively.

Nor are the lawyers' fees the only financial expense. The following finding is from the Ontario Civil Legal Needs project, which conducted focus groups with justice system workers:

In addition to actual legal costs, the focus group participants pointed out a number of associated costs of accessing services that their clientele were not generally aware of and therefore not prepared for. Among these costs were those related to transportation, obtaining documentation, trial costs outside of the lawyer's services (such as expert witness fees), and childcare costs (as childcare would sometimes be needed to enable a client to attend hearings and trials).<sup>299</sup>

Family litigation also has a very substantial cost in time. In some jurisdictions, litigants must return to court many times before their matter is called, due to insufficient judicial resources. In 2007 the *Toronto Star* told the story of Siddika Sumar, who spent \$256,963.13 in legal fees spent on her family law case between 2004 and 2007. On 11 occasions, she attended the Newmarket court with her lawyer, only to find that there was no judge available or that the matter had been adjourned.<sup>300</sup> Newmarket is known as a particularly overburdened family court, and this story is by no means representative of all Ontarians' experience. The particular problems faced by family courts in the "905 belt" around Toronto may help explain the OCLN telephone survey finding that residents



of the “Outer GTA” [Greater Toronto Area] were among those whose family relationship legal problems had persisted for the longest periods of time without resolution.<sup>301</sup>”

However, even in the smoothest-running family courts, substantial time is required to prepare and attend. For many, this means seeking time away from work, arranging day care, etc. It has been estimated that the majority of all Ontario family litigants are unrepresented by lawyers.<sup>302</sup> For these individuals the cost in money is reduced but the cost in personal time and stress must surely be increased. An hour which a citizen spends in, or preparing for, a family court appearance is an hour which cannot be spent contributing to Ontario’s society or economy. For example, in the access dispute *Geremia v. Harb*, the father was self-represented during the majority of the litigation.<sup>303</sup> At the end, he claimed \$155,688.53 in costs, arriving at this figure by multiplying the hours he had spent on his case by a notional rate of \$110 per hour. If accurate, this would suggest that he spent in excess of 1400 hours preparing for this case. Had he spent 1400 hours working as an electrician (his profession), the benefit to Ontario in income taxes alone would have been substantial. While this claim was probably extreme and was not allowed by the court, it provides some indication of the cost in time of family litigation.

The costs of litigation are paid *directly* by adults, but they are also paid *indirectly* by the children of these adults. Parenting requires time, money, and energy, and family litigation can easily consume these scarce resources to the extent that it impairs parenting.<sup>304</sup> Julie Lasonde conducted a round-table consultation with children who had experienced challenges related to parental separation, and found substantial awareness of the price of litigation and its impact on the family’s financial security.<sup>305</sup>

Occasionally, children are involved directly in family litigation.<sup>306</sup> There is a debate about the impact of litigation-involvement on children, but at least in some cases it can be traumatic.<sup>307</sup> This is especially true if children are asked to choose or take sides as between their parents, and inexperienced judges or lawyers may do so.<sup>308</sup> Assessment by a mental health professional or social worker is a much more common form of child involvement in family litigation,<sup>309</sup> but some say that this too can be stressful for children.<sup>310</sup> Children also pay a cost of family litigation because litigation increases inter-parental hostility,<sup>311</sup> which has been clearly demonstrated in the literature to have negative effects on children.<sup>312</sup>

Family litigation also has substantial costs for society and the taxpayer. The most obvious and direct costs to society of family litigation are those involved in paying judges and other court personnel and in operating court rooms. Most judges of the Ontario Court of Justice were paid a salary of \$245,422.45 plus taxable benefits of \$3,659.35, for a total taxable remuneration of \$249,081.80.<sup>313</sup> Remuneration of Superior Court of Justice judges is established by the federal *Judges Act*, which established a 2004 salary and a series of cost-of-living adjustments.<sup>314</sup> According to the Judicial Compensation and Benefits Commission (established under s. 26(1) of the *Judges Act*) the annual salary earned by these judges in 2009 was approximately \$260,064.<sup>315</sup>

While some of these costs are inevitable, there is an argument to be made that counterproductive processes increase these direct costs to the taxpayer. The costs of dysfunctional family litigation borne by adults and children are also costs borne by society as a whole. Social and economic benefits may therefore result from reform

efforts which reduce dysfunctional conflict. **Preventative efforts to reduce family litigation are likely to save more money than they cost. Given its dramatic cost in money, time, and stress, litigation should be society’s last resort in responding to family conflict.**

#### **IV. B. Administrative and non-individualized responses to private support entitlements**

This section will survey the present reality and potential future application of administrative solutions to family support obligations in Ontario. The adjective “administrative” is used here to refer to the resolution of disputes and enforcement of obligations by state agencies which are not courts, and by state employees who are not judges.<sup>316</sup> This Part will first review the law of child support with emphasis on the elements which may make it suitable for administrative solutions. It will then identify administrative responses to family disputes which have already been implemented in Ontario and elsewhere. The author will then argue that, at least with regard to guideline child support, administrative solutions could have substantial benefits in increased compliance and reduced process costs for parties and the state. The costs or drawbacks of such reforms would come in the form reduced potential for discretionary and customized judicial decision-making.

##### *IV. B. 1. Guideline Child Support*

The two primary support obligations in Canadian family law are child support and spousal support. Spousal support has been made more predictable by the creation of the *Spousal Support Advisory Guidelines*,<sup>317</sup> and could conceivably be subject to administrative solutions. However child support, and especially “guideline” child support, is the family law remedy which lends itself most obviously to administrative

responses. “Guideline” child support is the amount payable according to section 3 of the *Child Support Guidelines (CSG)*.<sup>318</sup> The CSG require only two inputs in most cases: (i) individual income of the payor, and (ii) the number of children for whom child support is to be paid. Using these inputs, the amount owing is provided by a series of tables which are part of the legislation.

Of course, Canadian child support law is more complex than simply the calculation of Guideline amounts. In some cases, support must be calculated in a more discretionary fashion – e.g. if custody is shared or if the payor’s income is in excess of \$150,000 per year.<sup>319</sup> Even if the Guideline amount is payable, additional amounts may also be owed for “special expenses.”<sup>320</sup> Determining the payor’s income can in some cases be complex, especially if the payor is self-employed.<sup>321</sup> However in the substantial majority of cases, once payor income and number of children are known there is a readily calculated guideline amount which will be owing. There is, in these cases, relatively little need for sophisticated or individualized decision-making about the Guideline support obligation. It is for this reason that Ontario family court judges can and do make guideline child support orders at pre-trial conferences, in the absence of full argument and record.<sup>322</sup> It is also for this reason that **guideline child support is an area of our family law in which moving away from a judicial model towards an administrative model should be considered.**

#### *IV. B. 2. Status quo in Ontario*

In Ontario, the court system retains primary responsibility for determining support obligations. However, some movement towards an administrative model has already

taken place. This is most obviously true with regard to support *enforcement*, but is also somewhat true with regard to determination and recalculation of support obligations.

The most prominent administrative element of family support procedure in Ontario is the Family Responsibility Office (FRO).<sup>323</sup> A part of the provincial government's Ministry of Community and Social Services, FRO describes its work as "help[ing] people meet their child and spousal support responsibilities."<sup>324</sup> These responsibilities include support obligations created by domestic contracts and paternity agreements which have been filed with a court,<sup>325</sup> in addition to support orders made by a judge.<sup>326</sup> FRO enforces support orders using powers assigned by the *Family Responsibility and Support Arrears Enforcement Act*.<sup>327</sup> For example, FRO has the power to suspend the driver's license of a payor who is in default,<sup>328</sup> or seize his or her property.<sup>329</sup> However FRO states that in most cases, the amount owing is simply forwarded by the payor's employer to FRO.<sup>330</sup> The agency then sends this money to the support recipient.

A secondary administrative support enforcement initiative of the Ontario government is [www.goodparentspay.com](http://www.goodparentspay.com).<sup>331</sup> Visitors to this website are invited to "help Ontario children and families by helping us find missing, irresponsible parents who have defaulted on the payments owed to their kids." When accessed on June 21, 2010, this website contained 39 photographs and physical description of support debtors. The website asks members of the public to send information about these individuals and their whereabouts to the Family Responsibility Office. The Family Responsibility Office and Good Parents Pay are administrative approaches to support enforcement. The Family Law Act also allows provincial agencies granting social assistance to enforce

child support entitlements of recipients,<sup>332</sup> which could arguably be considered another administrative approach to support enforcement.

Enforcement is only one element of the law of support. With regard to the initial determination and recalculation of child support, the Ontario court system has remained in the driver's seat. However, this may be on the verge of changing. The following as-yet-unproclaimed provisions were added to Ontario's *Family Law Act* in late 2009:

#### Recalculation of child support

39.1 (1) The amount payable for the support of a child under an order may be recalculated in accordance with this Act and the regulations made under this Act, by the child support service established by the regulations, in order to reflect updated income information.

#### Effect of recalculation

(2) Subject to any review or appeal process established by the regulations made under this Act, if the child support service recalculates an amount payable for the support of a child under an order, the recalculated amount is, 31 days after the date on which the parties to the order are notified of the recalculation in accordance with the regulations, deemed to be the amount payable under the order.<sup>333</sup>

These provisions appear to envision an administrative "child support service" which could be responsible for recalculating child support in light of payor income changes. However these remain unproclaimed as of June 21, 2010 and the regulations to which they refer have not been made public.

#### *IV. B. 3. Status Quo in Other Provinces*

All of Canada's provinces have Maintenance Enforcement Programs (MEPs) analogous to Ontario's FRO; these were created in the 1980s and 1990s.<sup>334</sup> The essential functions of MEPs are (i) registration of cases; (ii) processing of payments; (iii) monitoring, and (iv) enforcement.<sup>335</sup> Roughly one third of all Canadian family law cases in which child support is owed are enrolled with a MEP.<sup>336</sup> In the West and North of

Canada, the MEP programs are run on “opt-in” basis: the recipient can choose whether to enrol. In the remainder of the country, they are generally “opt-out:” all support orders are enrolled and recipients and payors can only remove themselves under specified conditions.<sup>337</sup>

While enforcement is the element of support law in which administrative solutions are most widespread in Canada, recalculation is also the subject of several recent administrative initiatives. As noted above, any change in payor income is likely to constitute grounds for upward or downward revision. Because few people have incomes which are totally constant from year to year, many payors and recipients are legally entitled to seek a variation.

The *Divorce Act* permits the federal government to enter an agreement with a province “authorizing a provincial child support service designated in the agreement to ... recalculate, at regular intervals, in accordance with the applicable guidelines, the amount of child support orders on the basis of updated income information.”<sup>338</sup> Several such provincial child support services have been established. According to a federal Department of Justice survey conducted in March of 2008, they exist in Prince Edward Island, Manitoba, British Columbia, and Newfoundland.<sup>339</sup> Another was subsequently launched in Alberta,<sup>340</sup> and such programs may exist in other provinces as well.

Newfoundland was the first Canadian province to initiate an administrative child support recalculation service under an agreement with Ottawa. This initiative began with the “Family Justice Services Western” pilot project, which was established in the communities of Corner Brook and Stephenville in 2002. It provided an expansive set of services to individuals with family problems, including mediation, education, and

counselling.<sup>341</sup> However, perhaps the most dramatic innovation was the administrative child support recalculation service. An amendment to provincial legislation allowed provincial employees to recalculate child support obligations after changes in payor incomes, subject to only minimal judicial oversight.<sup>342</sup>

A report prepared for the federal Department of Justice in 2004 evaluated this pilot project.<sup>343</sup> This evaluation document sought to identify the costs, as well as the benefits, of introducing such services on a broader basis. However, section 2.8 of the report identified a divergence between the nominal budget of the pilot project (\$489,460) and the “real cost,” due to the project’s reliance on in-kind contributions from the provincial government and due to an unsustainably low salary for one of the employees.<sup>344</sup> The document also identified some non-financial costs or drawbacks. For example, it identified (without quantifying) the danger of court-annexed mediation in situations of domestic violence or power imbalance.<sup>345</sup> However, the overall evaluation was positive.

Administrative schemes do not yet appear to exist which handle the initial determination of child support, as opposed to the subsequent recalculation or enforcement of a support obligation. Section 25.1 of the *Divorce Act* suggests that while provincial child support services may perform the entire function of recalculation based on income changes by themselves, with regard to the *initial* determination of child support entitlements they may only “assist courts.”<sup>346</sup> As of March of 2008, the Department of Justice had not identified any administrative “Support Establishment Services.” However, several provinces have special legal aid or mediation programs for initial establishment of support.<sup>347</sup>



In Québec, the state has a somewhat more active role in child support collection and enforcement. All child support payments are made to the Minister of Revenue unless an exemption has been granted.<sup>348</sup> If the support debtor is in arrears, the Minister may also in some cases provide advances of money to the support creditor. These advances are limited to a maximum dollar amount of \$1,000 and may not continue for more than three months.<sup>349</sup> One impediment to implementing this system in Ontario is that this province, unlike Québec, does not have its own Ministry of Revenue. That task is performed on Ontario's behalf by the Canada Revenue Agency (CRA), and section IV.B.7 will consider a possible role for the CRA in family support administration. **Alternatively, FRO could perform a similar function, by providing a steady stream of child support benefits to recipients in the event of fluctuations in the amount collected.** The amounts forwarded to recipients by FRO could subsequently be collected from payors with interest.

#### *IV. B. 4. Benefits of Administrative Solutions*

*Increased Compliance and Durability.* With regard to child and spousal support obligations, compliance is a substantial challenge,<sup>350</sup> and increased reliance on administrative techniques may be part of the solution. In 1979, the Law Reform Commission of Canada estimated that "some degree of default" occurs in "as many as 75 per cent of all orders" of this nature.<sup>351</sup> There is also some information about compliance available from provincial Maintenance Enforcement Programs such as FRO. In one sample of MEPs studied by Statistics Canada, only one third of the recipients enrolled received the full amount owing in every month of a given year.<sup>352</sup> Another Statistics Canada document reported that roughly 68% of cases enrolled in a

MEP are in full compliance in any given month.<sup>353</sup> Ontario's Provincial Auditor reported in 2005 that "payment arrears totalled approximately \$1.3 billion," and "approximately 23,000 support recipients, whose cases were in arrears totalling over \$200 million in 2003, were receiving provincial social assistance."<sup>354</sup>

However, many support agreements are not registered with a MEP, and it is difficult or impossible to determine the compliance rate among these. A substantial methodological problem is posed by the large number of cases which are never subject to any formal adjudication. If two parents separate and reach a "kitchen table" agreement about child support without involving the legal system, how is a researcher to know whether those child support obligations were fulfilled?

Paul Millar responded to this challenge with an innovative empirical technique in his 2009 book.<sup>355</sup> Millar used the Statistics Canada Survey of Labour and Income Dynamics data set in order to study support payments in Canada.<sup>356</sup> This survey asked respondents questions about how much they paid and/or received in child and spousal support every month, as part of a general questionnaire about income.<sup>357</sup> Child support is directly tied to the payor's income in most cases, and while spousal support is more complex it is also correlated to payor income. One would therefore expect that support payments would change roughly as often as payor incomes do. However Millar found that income fluctuates much more often and more dramatically than support payments. Millar elaborates on his findings:

The fraction of household income, particularly for support payors, is much lower than would be expected awards dictated by the Canadian child support guidelines. The finding supports the contention that child support is drifting away – on average, lower – from the guidelines as time passes, accounting for the lower than expected amounts of child support as proportion of payors' income.<sup>358</sup>

A key benefit of administrative initiatives in family support law is their potential to increase compliance. Indeed, this is the primary purpose of the maintenance enforcement programs schemes which represent the most substantial administrative initiatives in Canadian family law.<sup>359</sup> The deduction of support at source (e.g. by the employer of the support obligor) removes many of the opportunities for non-payment. The expansion of administrative initiatives, for example into the initial establishment and subsequent recalculation of support obligations, might further increase the number of parents who receive the amounts to which they are entitled by law. It could also bring relief for the payors who have suffered involuntary decreases in income and are therefore entitled to reductions in the obligation. For these among other reasons, Paul Millar suggests that an administrative agencies should perhaps play a stronger role in child support recalculation.<sup>360</sup>

*Reduced Process Costs for the Parties.* Using litigation to determine and enforce guideline child support involves substantial *process costs* for the parties.<sup>361</sup> Parents, especially single parents, are already under substantial time and financial stress. Having to go to court may therefore be especially burdensome for them. Administrative initiatives have the potential to reduce the process costs on parents who receive or pay child support. Shelley Kierstead describes administration recalculation schemes as the “ideal manner by which to foster greater certainty and relieve recipient parents of the potentially daunting burden of initiating negotiations for revised support obligations with a former partner.”<sup>362</sup> The benefits which Kierstead identifies would also be enjoyed by payors who experience involuntary drops in income.<sup>363</sup>

#### *IV. B. 5. Costs and Drawbacks of Administrative Solutions*

*Lack of individualized legal advice and help.* The first significant drawback is that administrative regimes are not likely to offer parties the individualized advice and support which a capable lawyer can provide. This reality is illustrated by the Family Responsibility Office's treatment of "Mr. F," which was the subject of a 2006 report from the Ombudsman of Ontario, André Marin.<sup>364</sup> FRO had issued a Writ of Seizure and Sale against a home belonging to F's former spouse. However, the Writ was issued in the debtor's former name, instead of her new married name. Because the home was registered under the debtor's new name, the Writ was ineffectual. The Ombudsman chastised FRO for not informing Mr. F of the potential need to vary the support order so as to reflect the debtor's new name.<sup>365</sup> The Director of FRO replied that this office,

as a neutral maintenance enforcement program enforcing support orders in Ontario, is unable to provide legal advice to either a support payor or a support recipient.<sup>366</sup>

While the Ombudsman found this explanation unconvincing,<sup>367</sup> there are good reasons why administrative agencies must be cautious about giving legal advice to individuals. To do so can expose them to liability insofar as they lack the resources and statutory mandate to competently offer legal advice. The reality is that parties are unlikely to receive compassionate and individualized service from an administrative agency such as FRO or the Canada Revenue Agency. This is not necessarily the consequence of incompetence or wrong-doing on the part of the agency; it is simply a reflection of the nature of government agencies. Personalized and emotionally responsive service is more likely to come from a lawyer or paralegal who is directly retained by the client.

*The Disempowering Effects of Bureaucracy.* Second, working with an administrative agency may also be more disempowering than working with an individual

legal service provider. Lawyers are, at least in principle, responsible to and directed by their clients. By contrast, Marin characterized the relationship between Mr. F and the FRO as “one of power and dependency,” with the agency in the driver’s seat. Marin noted that s. 6(7) of the *Family Responsibility and Support Arrears Enforcement Act* (the statute which empowers FRO) prevents the parties themselves from initiating enforcement actions once the order has been filed with FRO. He therefore concluded that FRO “has the legal duty to enforce support arrangements, the discretion to use a range of tools to do so, and imposing powers. Meanwhile, the ‘support recipients’ ... have their enforcement rights and interests left entirely in the hands of that Office.”<sup>368</sup>

*Inefficiency and Ineffectiveness of Administrative Agencies.* Third, it should not be assumed that an administrative agency will discharge its assigned functions in an efficient and effective manner, even when those functions appear to be straightforward and the agency’s powers appear to be plenary. As the status quo compliance figures indicate, the provinces’ Maintenance Enforcement Programs described above are by no means completely successful in securing support payment.<sup>369</sup> The Provincial Auditor of Ontario sharply criticized FRO in 2003 for its lack of effectiveness:

We concluded that the Family Responsibility Office did not have satisfactory systems and procedures in place for initiating contact and taking appropriate and timely enforcement action where payers were in arrears on their family-support obligations. In fact, it is our view that, unless the Office takes aggressive enforcement action, supported by effective case management and significantly improved information technology and communications systems, it is in grave danger of failing to meet its mandated responsibilities. We found that the Office’s services were impaired...<sup>370</sup>

A 2005 follow-up by the same office found that “some progress has been made in implementing the recommendations, but “further progress on several recommendations depends on the successful implementation of a new case

management system."<sup>371</sup> While there are tens of thousands of Ontarians in arrears on child support, Good Parents Pay has only 39 profiles publicly available. Clearly, whatever impact this administrative initiative has can only be a “drop in the bucket.”

Other potential costs or drawbacks of administrative initiatives should also be recognized. Removing an area of the law from the domain of the courts may diminish the ability of the common law to develop along with society.<sup>372</sup> Especially in the absence of effective judicial review, administrative agencies may abrogate the rights of citizens in an irresponsible or authoritarian fashion.

Finally, family courts can offer “one-stop-shopping” to Ontarians. Property division and parenting disputes may be resolved along with support issues in a single process. If those family disputes which are most amenable to administrative decision-making (i.e., guideline child support) were to be handled by a separate agency, Ontarians might have to engage in two or more separate processes to resolve their family challenges. This duplication of processes would entail substantial additional process costs. **As Ontario explores the potential of administrative responses to family challenges, it should seek to maximize their benefits (increased compliance and potentially reduced process costs), while reducing their costs (such as citizen disempowerment, bureaucratic inefficiency).**

#### *IV. B. 6. The potential role of the Canada Revenue Agency*

Among the numerous ways in which administrative decision-making in family law could be expanded, one of the more dramatic and comprehensive would be involving the Canada Revenue Agency (CRA) in child support determination, recalculation,

collection and payment. In Quebec, the Minister of Revenue is actively involved in child support collection and payment, and this model could be expanded across the country.

There are several potential advantages to this idea. As noted above, determining the income of self-employed individuals is one of the thorniest challenges in child support law. The CRA is already in the business of precisely determining individual income, in order to assess income tax owing. There might be significant efficiencies in allocating the task of income-determination for child support purposes to the CRA as well. With regard to enforcement, the CRA also has the legal powers and the expertise to collect income tax which is in arrears. These powers might equally be used to collect child support. Finally, the CRA already has some involvement in family disputes, e.g. under the *Family Orders and Agreements Enforcement Assistance Act*.<sup>373</sup>

However, giving responsibility for child support to the CRA would certainly involve that agency in matters with which it has no experience or institutional expertise. For example, the determination of biological parentage involves genetic testing of individuals and the application of legal presumptions. There are also discretionary elements of child support which call for individualized decision-making.<sup>374</sup> Finally, there are constitutional and political impediments to having the CRA involved in child support, which might or might not be overcome.<sup>375</sup> **The province should explore and discuss with the federal government the potential of involving the CRA in family support administration.**

## V. CONCLUSION

In applying cost-benefit analysis to post-relationship family challenges, this paper has asked three questions which are perhaps more familiar in public health than in legal

discourse. First, *why* does the unhealthy condition in question arise? Second, how can the condition, or its worst symptoms, be *prevented* before they arise? Third, given that prevention will not be fully successful, how should we respond to or *treat* the problem when and to the extent that it arises within the population?

Each potential response to family challenges has its own constellation of costs and benefits. Only some of these costs and benefits are capable of quantification and comparison. This paper has sought to identify reforms which seem to have benefits in excess of their costs. Harmonious with the findings of the Law Commission's public consultations, many of these proposals involve moving the point of public intervention earlier in the lifespan of the family, or earlier in the lifespan of the conflict. The Law Commission may conclude that, in Ontario's response to post-separation family challenges, an ounce of prevention is indeed worth a pound of cure.

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<sup>11</sup> "Intimate relationships between adults" includes both marriages and non-marital cohabitational relationships. Statistics Canada estimates that 38% of recent marriages will end in divorce before the 30<sup>th</sup> anniversary. (Anne-Marie Ambert, *Divorce: Facts, Causes & Consequences*, 3d Ed. (Ottawa: Vanier Institute of the Family, 2009), online: Vanier Institute of the Family <[http://www.vifamily.ca/library/cft/divorce\\_09.pdf](http://www.vifamily.ca/library/cft/divorce_09.pdf)> (last accessed: 20 June 2010) at 3). In 2001, 16% of all Canadian couples who lived together were cohabiting without marriage. (Anne-Marie Ambert, *Cohabitation and Marriage: How are they Related?* (Ottawa: Vanier Institute for the Family, 2005), online: Vanier Institute for the Family <<http://www.vifamily.ca/library/cft/cohabitation.pdf>> (last accessed: 20 June 2010) Half of all of these relationships dissolved within five years. (Anne Milan, "One hundred years of families" (2000) 56 Canadian Social Trends 2).

<sup>2</sup> Among lower- and middle-class Ontarians, 12% reported that they had experienced "family relationship problems" within a three year period. (R. Roy McMurtry *et al.*, *Listening to Ontarians: Report of the Ontario Civil Legal Needs Project* (Toronto: Ontario Civil Legal Needs Project Steering Committee, 2010), online: Law Society of Upper Canada <[http://www.lsuc.on.ca/media/may3110\\_oclnreport\\_final.pdf](http://www.lsuc.on.ca/media/may3110_oclnreport_final.pdf)> (last accessed: 20 June 2010) at 21).

<sup>3</sup> These recommendations are identified in **bold** font.



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<sup>4</sup> An interesting, and very broad example of the latter is that offered by Canada's *Vanier Institute of the Family* at <http://www.vifamily.ca/about/definition.html>.

<sup>5</sup> Part I of the Constitution Act, 1982.

<sup>6</sup> According to one recent policy report, family law involves "a restructuring of the family at a time of crisis... when children are involved, family members remain financially, emotionally and practically interdependent indefinitely." (Barbara Landau *et al.*, *Final Report And Recommendations From The Home Court Advantage Summit (November 22-23, 2009)* (Toronto: ADR Institute of Ontario Ontario Bar Association, and Ontario Association for Family Mediation, 2009), online: ADR Institute of Ontario <[http://www.adrontario.ca/media/INTERIM%20REPORT%20FINAL%20BL%20Dec%2010-09%20\\_2\\_.pdf](http://www.adrontario.ca/media/INTERIM%20REPORT%20FINAL%20BL%20Dec%2010-09%20_2_.pdf)> (last accessed: 20 June 2010) at 7.)

<sup>7</sup> *Divorce Act*, R.S.C. 1985, (2d Supp.), c. 3, s. 16(10).

<sup>8</sup> Rhonda Freeman, "Parenting after Divorce: Using Research to Inform Decision-Making about Children" (1998) 15 Can. J. Fam. L. 79 at 95-96; Solangel Maldonado, "Cultivating Forgiveness: Reducing Hostility and Conflict after Divorce" (2008) 43 Wake Forest L.Rev. 441.

<sup>9</sup> See e.g. Andrew S. Watson, "The Children of Armageddon: Problems of Custody Following Divorce" (1969) 21 Syracuse L. Rev. 55 at 78; Elizabeth S. Scott and Robert E. Scott, "Parents As Fiduciaries" (1995) 81 Va. L. Rev. 2403 at 2439-2440; Carol Smart and Bren Neale, *Family fragments?* (Malden, Mass.: Blackwell, 1999) at 198-199.

<sup>10</sup> Paul R. Amato *et al.*, *Alone together : how marriage in America is changing* (Cambridge, Mass.: Harvard University Press, 2007) at 4-8.

<sup>11</sup> Nancy Ver Steegh, "Family Court Reform and ADR: Shifting Values and Expectations Transform the Divorce Process" (2009) 42 Fam. L.Q. 659; Peter Salem, "The Emergence of Triage in Family Court Services: The Beginning of the End for Mandatory Mediation?" (2009) 47 Fam. Ct. Rev. 371; Amy G. Applegate, Amy Holtzworth-Munroe and Brian M. D'Onofrio, "Family Dispute Resolution: Charting A Course For The Future" (2009) 47 Fam. Ct. Rev. 493 at 495.

<sup>12</sup> Laura Kipnis, writing in a polemical vein and with tongue perhaps in cheek, proposes that love and marriage might be "the most efficient kind of social control possible. ... Wouldn't the most elegant means of producing acquiescence be to somehow transplant those social controls so seamlessly into the guise of individual needs that the difference between them dissolved? ... what if it could be accomplished through love?" (Laura Kipnis, *Against love : a polemic* (New York: Pantheon Books, 2003) at 39).

<sup>13</sup> Meg Luxton, "Conceptualizing 'Families': Theoretical Frameworks and Family Research" in Maureen Baker ed., *Families : changing trends in Canada*, 5th ed. (Toronto.: McGraw-Hill Ryerson, 2005) 29 at 45.

<sup>14</sup> Minority judgment of L'Heureux-Dubé J. in *Nova Scotia (Attorney General) v. Walsh*, [2002] 4 SCR 325, 2002 SCC 83 (S.C.C.); Caroline A. Thomas, "The Roles of Registered Partnerships and Conjugalities in Canadian Family Law" (2006) 22 Can. J. Fam. L. 223; Nicholas Bala, "Controversy Over Couples in Canada: The Evolution of Marriage and Other Adult Interdependent Relationships" (2003) 29 Queen's L.J. 41.

<sup>15</sup> Majority judgment of Bastarache J. in *Nova Scotia (Attorney General) v. Walsh*, note 14; Noel Semple, "In Sickness And In Health? Spousal Support And Unmarried Cohabitants" (2008) 24 Can. J. Fam. L. 317.

<sup>16</sup> Brenda Cossman and Bruce Ryder, "What is Marriage-Like Like? The Irrelevance of Conjugalities" (2001) 18 Can. J. Fam. L. 269; *Beyond Conjugalities: Close Personal Relationships Between Adults* (Ottawa: Law Commission of Canada, 2001), online: Law Commission of Canada <[http://www.lcc.gc.ca/research\\_project/cpra-en.asp](http://www.lcc.gc.ca/research_project/cpra-en.asp)> (last accessed: 20 June 2010). See also the

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European Court of Human Rights Case of Burden and Burden v. the United Kingdom (Application no. 13378/05, judgment issued on April 29 2008). In this case, two cohabiting sisters challenged English law for failing to extend to them a tax benefit which would have been available had their cohabitation been “conjugal” in nature.

<sup>17</sup> Ernest Watson Burgess, Mary Margaret Thomes and Harvey J. Locke, *The family, from institution to companionship*, [3d ed. (New York,: American Book Co., 1963).

<sup>18</sup> Amato *et al.*, note 10 at 240.

<sup>19</sup> Andrew J. Cherlin, "The deinstitutionalization of American marriage" (2004) 66 *J.Marriage & Fam.* 848 at 848.

<sup>20</sup> Amato *et al.*, note 10 at 240.

<sup>21</sup> Kerry Daly, *The Changing Culture of Parenting* (Ottawa: Vanier Institute of the Family, 2004), online: Vanier Institute of the Family <<http://www.vifamily.ca/library/cft/parenting.html>> (last accessed: 20 June 2010) at 4 (citation omitted).

<sup>22</sup> Zheng Wu, *Cohabitation : an alternative form of family living* (Oxford: Oxford University Press, 2000) and John Eekelaar and Mavis Maclean, "Marriage and the Moral Bases of Personal Relationships," (2004) 31 *J. of Law and Soc.* 510.

<sup>23</sup> *Family Law Act (Ontario)*, R.S.O. 1990, c. F.3 ("FLA"), Part IV.

<sup>24</sup> George M. Guess and Paul G. Farnham, "Cost-Benefit Analysis: The Case of Environmental Air Quality Standards" in George M. Guess & Paul G. Farnham eds., *Cases in public policy analysis* 2nd ed. (Washington, D.C.: Georgetown University Press, 2000) 303.

<sup>25</sup> Robert Sugden and Alan H. Williams, *The principles of practical cost-benefit analysis* (New York: Oxford University Press, 1978) at 89-90.

<sup>26</sup> John Hicks, "The Foundations of Welfare Economics" (1939) 49 *Economic Journal* 696 and Nicholas Kaldor, "Welfare Propositions in Economics and Interpersonal Comparisons of Utility" (1939) 49 *Economic Journal* 549.

<sup>27</sup> E.g. see Chapter 12 in Tefvik F. Nas, *Cost-benefit analysis: theory and application* (Thousand Oaks, Calif.: Sage Publications, 1996).

<sup>28</sup> Nas, note 27 at chap. 13.

<sup>29</sup> Frank Ackerman and Lisa Heinzerling, *Priceless: on knowing the price of everything and the value of nothing* (New York: Distributed by W.W. Norton, 2004).

<sup>30</sup> Guess and Farnham, note 24 at 308.

<sup>31</sup> Office of the Parliamentary Budget Officer (Canada), *Methodology for Estimating the Fiscal Impact of the Costs Incurred by the Government of Canada in Support of the Mission in Afghanistan* (Ottawa: Office of the Parliamentary Budget Officer (Canada), 2008), online: Parliament of Canada <[http://www2.parl.gc.ca/Sites/PBO-DPB/documents/Afghanistan\\_Cost\\_Methodology\\_FINAL\\_E\\_WEB.pdf](http://www2.parl.gc.ca/Sites/PBO-DPB/documents/Afghanistan_Cost_Methodology_FINAL_E_WEB.pdf)> (last accessed: 20 June 2010).

<sup>32</sup> Commission on the Measurement of Economic Performance and Social Progress, "Working Papers and Reports," online: <<http://www.stiglitz-sen-fitoussi.fr/en/documents.htm>> (last accessed: 20 June 2010).

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<sup>33</sup> Nathan Laurie, *The Cost Of Poverty: An Analysis Of The Economic Cost Of Poverty In Ontario* (Toronto: Ontario Association of Food Banks, 2008), online: Ontario Association of Food Banks <[www.oafb.ca/assets/pdfs/CostofPoverty.pdf](http://www.oafb.ca/assets/pdfs/CostofPoverty.pdf)> (last accessed: 20 June 2010) at 4.

<sup>34</sup> Laurie, note 33 at 7.

<sup>35</sup> Cass R. Sunstein, *Risk and reason : safety, law, and the environment* (Cambridge ; New York: Cambridge University Press, 2002) at 124.

<sup>36</sup> Clifford Cobb, Ted Halstead and Jonathan Rowe, *The genuine progress indicator : summary of data and methodology* ([San Francisco, CA]: Redefining Progress, 1995); GPIAtlantic, "Genuine Progress Index for Atlantic Canada," online: <<http://www.gpiatlantic.org/gpi.htm>> (last accessed: 20 June 2010).

<sup>37</sup> See, e.g. Clarke Matthew and Lawn Philip, "Measuring Victoria's genuine progress: A Genuine Progress Indicator (GPI) for Victoria" (2005) 24 *Economic Papers - Economic Society of Australia* 368 at 370-1.

<sup>38</sup> However, certain important efforts have been made, e.g. Rachel Ebling, Kyle D. Pruett and Marsha Kline Pruett, "'Get Over It:' Perspectives On Divorce From Young Children" (2009) 47 *Fam. Ct. Rev.* 665.

<sup>39</sup> Janet Mosher *et al.*, *Walking on Eggshells: Abused Women's Experiences of Ontario's Welfare System* (Toronto: Osgoode Hall Law School (York University), 2004), online: York University <[http://www.yorku.ca/yorkweb/special/Welfare\\_Report\\_walking\\_on\\_eggshells\\_final\\_report.pdf](http://www.yorku.ca/yorkweb/special/Welfare_Report_walking_on_eggshells_final_report.pdf)> (last accessed: 20 June 2010).

<sup>40</sup> *General Regulation under the Ontario Works Act, 1997*, O. Reg. 134/98, s. 13(1).

<sup>41</sup> *Ontario Works Policy Directives: 5.5 Family Support (February 2009)* (Toronto: Ministry of Community and Social Services (Ontario), 2009), online: Ministry of Community and Social Services (Ontario) <[http://www.mcsc.gov.on.ca/en/mcsc/programs/social/directives/directives/OWDirectives/5\\_5\\_OW\\_Directives.aspx](http://www.mcsc.gov.on.ca/en/mcsc/programs/social/directives/directives/OWDirectives/5_5_OW_Directives.aspx)> (last accessed: 20 June 2010) See also analogous provisions regarding the Ontario Disability Support Plan: *Ontario Disability Support Program Income Support Directives: 5.15 - Spousal and Child Support (July 2009)* (Toronto: Ministry of Community and Social Services (Ontario), 2009), online: Ministry of Community and Social Services (Ontario) <[http://www.mcsc.gov.on.ca/documents/en/mcsc/social/directives/odsp/income\\_Support/5\\_15.pdf](http://www.mcsc.gov.on.ca/documents/en/mcsc/social/directives/odsp/income_Support/5_15.pdf)> (last accessed: 20 June 2010).

<sup>42</sup> Mosher *et al.*, note 39 at 44.

<sup>43</sup> Mosher *et al.*, note 39 at 44.

<sup>44</sup> E.g. Rae Kaspiew *et al.*, *Evaluation of the 2006 family law reforms* (Melbourne: Australian Institute of Family Studies, 2009), online: Australian Institute of Family Studies <<http://www.aifs.gov.au/institute/pubs/fle/>> (last accessed: 20 June 2010) at 58 and Alison P. Hobbs, *Client evaluation of a mandatory child custody mediation program* (Psy D, Chestnut Hill College 2004) [unpublished] Online: <http://proquest.umi.com/pqdweb?did=1031036421&Fmt=7&clientId=65345&RQT=309&VName=PQD>. For an excellent example of an evaluative methodology which deployed various empirical techniques, see Alfred A. Mamo, Peter G. Jaffe and Debbie G. Chiodo, *Recapturing and Renewing the Vision of the Family Court* (Toronto: Ministry of the Attorney General (Ontario), 2007), online: Centre for Research & Education on Violence against Women and Children <<http://www.crvawc.ca/documents/Family%20Court%20Study%202007.pdf>> (last accessed: 20 June 2010) at 17 and thereafter.

<sup>45</sup> Kaspiew *et al.*, note 44 at 35.

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<sup>46</sup> Hon Diana Bryant, "Speech to the Inaugural Family Law System Conference," Old Parliament House, Canberra, February 19, 2009(last accessed: 20 June 2010).

<sup>47</sup> Maldonado, note 8.

<sup>48</sup> E.g. Jennifer E. McIntosh, Hon Diana Bryant and Kristen Murray, "Evidence of a Different Nature: The Child- Responsive and Less Adversarial Initiatives of the Family Court of Australia" (2008) 46 Fam. Ct. Rev. 125 at 132.

<sup>49</sup> However formal CBA has been deployed in the related field of youth criminal justice initiatives: Beth Green and Eric J. Bruns, *King County Family Treatment Court Outcomes Evaluation Design: Cost Benefit Evaluation Design* (Seattle: King County, 2006), online: King County (Washington State) <<http://www.kingcounty.gov/courts/juvenilecourt/~media/courts/JuvenileCourt/documents/ftcsustain.ashx>> (last accessed: 20 June 2010). See also Vera Institute of Justice, "Cost-Benefit Analysis of Programs for Court-Involved Youth in New York," online: <<http://www.vera.org/project/cba-court-involved-youth-new-york.>> (last accessed: 20 June 2010).

<sup>50</sup> OBA Family Law Section, ADR Institute Of Ontario and Ontario Association Of Family Mediators, *Family Law Process Reform: Supporting Families To Support Their Children* (Toronto: Ontario Association for Family Mediation, 2009), online: Ontario Association for Family Mediation <<http://www.oafm.on.ca/Documents/OBA%20OAFM%20ADR%20Institute%20submission%20Apr%207%2009.pdf>> (last accessed: 20 June 2010) at 7.

<sup>51</sup> OBA Family Law Section, ADR Institute Of Ontario and Ontario Association Of Family Mediators, note 50 at Appendix C.

<sup>52</sup> E.g. Jennifer E. McIntosh, "Legislating For Shared Parenting: Exploring Some Underlying Assumptions" (2009) 47 Fam. Ct. Rev. 389 at 391; Seth J. Schwartz and Gordon E. Finley, "Mothering, Fathering, And Divorce: The Influence Of Divorce On Reports Of And Desires For Maternal And Paternal Involvement" (2009) 47 Fam. Ct. Rev. 506 at 506; Nicholas Bala and Nicole Bailey, "Enforcement of Access & Alienation of Children: Conflict Reduction Strategies & Legal Responses" (2004) 23 C.F.L.Q. 1.

<sup>53</sup> Andrew Schepard, "Parental Conflict Prevention Programs and the Unified Family Court: A Public Health Perspective" (1998) 32 Fam. L.Q. 95 at 95 and 105; David Doolittle *et al.*, *The Scientific Basis of Child Custody Decisions* (New York: Wiley, 1999) note 53 at 426 and 430; Joan B. Kelly and Robert E. Emery, "Children's Adjustment Following Divorce: Risk and Resilience Perspectives" (2003) 52 Family Relations 352 at 353.

<sup>54</sup> E.g. Martha Shaffer, "Joint Custody, Parental Conflict and Children's Adjustment to Divorce: What the Social Science Literature Does and Does Not Tell Us" (2007) 26 C.F.L.Q. 285 at 314; Richard A. Warshak, "Punching The Parenting Time Clock: the Approximation Rule, Social Science, and the Baseball Bat Kids" (2007) 45 Fam. Ct. Rev. 600; Michael Saini and Rachel Birnbaum, "Linking Judicial Decision-making in Joint Custody Awards with Evidence-based Practice: It Is Possible" (2005) 24 C.F.L.Q. 139. However a few advocates for a joint custody presumption actually claim that this reform would reduce inter-parental conflict. (e.g. Landon Pearson and Roger Gallaway, *For the sake of the children : report of the Special Joint Committee on Child Custody and Access* (Ottawa: Parliament of Canada, 1998), online: Parliament of Canada <<http://www2.parl.gc.ca/HousePublications/Publication.aspx?DocId=1031529&Language=E&Mode=1&Parl=36&Ses=1>> (last accessed: 20 June 2010), at vi); Jill Burrett and Michael Green, "The problem with caution: Comments on the McIntosh/Chisholm Study Cautionary notes on the shared care of children in conflicted parental separation," online: <[www.familylawwebguide.com.au/news/pg/news/view/335](http://www.familylawwebguide.com.au/news/pg/news/view/335)> (last accessed: 20 June 2010).

<sup>55</sup> [2009] O.J. No. 6028.

<sup>56</sup> [2009] O.J. No. 6028, note 55 at para 51.

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<sup>57</sup> [2009] O.J. No. 6028, note 55 at para 102.

<sup>58</sup> [2009] O.J. No. 6028, note 55 at paras 126-127.

<sup>59</sup> *Civil Legal Needs of Lower and Middle-Income Ontarians: Quantitative Research* (Toronto: Environics Research Group, 2009), online: Law Society of Upper Canada <[http://www.lsuc.on.ca/media/may3110\\_oclnquantitativeresearchreport.pdf](http://www.lsuc.on.ca/media/may3110_oclnquantitativeresearchreport.pdf)> (last accessed: 20 June 2010), at 68.

<sup>60</sup> The Bank of Canada warned in December 2009 that “the vulnerability of Canadian households to adverse wealth and income shocks has risen in recent years as aggregate debt levels have increased in relation to income.” While the focus of the Bank’s report was the potential impact of global financial crisis on Canadian households, family separation also qualifies as a “wealth and income shock.” ( *Financial System Review* (Ottawa: Bank of Canada, 2009), online: Bank of Canada <[http://www.bankofcanada.ca/en/fsr/2009/fsr\\_1209.pdf](http://www.bankofcanada.ca/en/fsr/2009/fsr_1209.pdf)> (last accessed: 20 June 2010) at 5.)

<sup>61</sup> Roger Sauvé, *The Current State of Canadian Family Finances: 2009 Report* (Ottawa: Vanier Institute, 2010), online: Vanier Institute <<http://www.vifamily.ca/library/cft/famfin09.pdf>> (last accessed: 20 June 2010) at 30. Data from Statistics Canada.

<sup>62</sup> Sauvé, note 61 at 13.

<sup>63</sup> Sauvé, note 61 at 14.

<sup>64</sup> Sauvé, note 61 at 12.

<sup>65</sup> Canadian Payroll Association, *Majority of Canadian employees living paycheque to paycheque* (Toronto: Canadian Payroll Association, 2009), online: CNW Group <<http://www.newswire.ca/en/releases/archive/September2009/14/c4808.html>> (last accessed: 20 June 2010).

<sup>66</sup> [2009] O.J. No. 6028, note 55 at 9.

<sup>67</sup> Roderic Beaujot and Zenaida R. Ravanera, "Family Models for Earning and Caring: Implications for Child Care and for Family Policy" (2009) 3 *Canadian Studies in Population* 145 at 147, citing Gary Becker, *A Treatise on the Family*. (Cambridge, MA: Harvard University Press, 1991).

<sup>68</sup> Gillian Ranson identified "persistence of traditional beliefs and expectations about mothering and fathering" as a leading reason for the persistence of traditional gender roles within families." (Gillian Ranson, *Against the grain: couples, gender, and the reframing of parenting* (Toronto: University of Toronto Press, 2010) at 3). Ranson also noted two other possible explanations. First, women may wish to retain control over the household and men may wish to retain control over the income for cultural reasons. Second, men are in many cases able to earn more money than their female partners due to the gender gap, which creates a greater incentive for men to work. According to a recent American study the gender gap is slowly narrowing but full-time female employees still earn 80% of what full-time male employees earn (Ellen Galinsky, Kerstin Aumann and James T. Bond, *Times Are Changing: Gender and Generation at Work and at Home: Families and Work Institute*, 2009), online: Families and Work Institute <[familiesandwork.org/site/research/reports/Times\\_Are\\_Changing.pdf](http://familiesandwork.org/site/research/reports/Times_Are_Changing.pdf)> (last accessed: 20 June 2010) at 7).

<sup>69</sup> This fact is recognized, for example, in the *Spousal Support Advisory Guidelines*, which apply one of two entirely distinct sets of formulae depending on whether or not there is a child support obligation between the parties (Carol Rogerson and Rollie Thompson, *Spousal Support Advisory Guidelines (Final Version)*: Department of Justice (Canada), 2008), online: Department of Justice (Canada) <<http://www.justice.gc.ca/eng/pi/fcy-fea/spo-epo/g-ld/spag/index.html>> (last accessed: 20 June 2010)). Carol Rogerson (one of the authors of the spousal support advisory guidelines) reviews the literature on

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the financial impact of parenting in an earlier document prepared for the Guidelines project: Carol Rogerson, *Developing Spousal Support Guidelines in Canada: Beginning the Discussion*: Department of Justice (Canada), 2002), online: Department of Justice (Canada) <<http://www.justice.gc.ca/eng/pi/fcy-fea/spo-epo/g-ld/ss-pae/pdf/ss-pae.pdf>> (last accessed: 20 June 2010) at 31.

<sup>70</sup> Beaujot and Ravanera, note 67 at 147.

<sup>71</sup> According to one recent report, employed Canadian parents of children under 12 are spending substantially *more* time with those children, and this trend is also seen abroad. (Daly, note 21). An American study found that mothers and fathers born after 1980 are "spending considerably more time with their children" than mothers and fathers born before this date (Galinsky, Aumann and Bond, note 68 at 15). This could be due to expanding expectations of what is involved in being a "good parent."

<sup>72</sup> *Moge v. Moge*, 1992 3 S.C.R. 813, 43 R.F.L. (3d) 345, 1992 CarswellMan 143 (S.C.C.) at section VI(5).

<sup>73</sup> Gillian Ranson, "Paid and Unpaid Work: How do Families Divide their Labour?" in Maureen Baker ed., *Families : changing trends in Canada*, 5th ed. (Toronto.: McGraw-Hill Ryerson, 2005) 99 at 107.

<sup>74</sup> *Caught in the Time Crunch: Time Use, Leisure and Culture in Canada* (Toronto: Canadian Index of Wellbeing, 2010), online: Canadian Index of Wellbeing <[http://www.ciw.ca/Libraries/Documents/Caught\\_in\\_the\\_Time\\_Crunch.sflb.ashx](http://www.ciw.ca/Libraries/Documents/Caught_in_the_Time_Crunch.sflb.ashx)> (last accessed: 20 June 2010) at 5-6.

<sup>75</sup> Naturally, a different set of questions must be asked about families with same-sex partners. Gillian Ranson notes that little research has been performed to date on these households but "what there is suggests a division of family work that is much more egalitarian than in heterosexual households." (Ranson, "Paid and Unpaid Work: How do Families Divide their Labour?" in Baker, ed., note 73 at 110.) If this is true, it would follow that those exiting same-sex relationships are less likely to experience economic challenges due to earning-potential sacrifices.

<sup>76</sup> Joseph Pleck, "Paternal involvement: levels, sources and consequences" at 66-103 in Michael Lamb ed., *The Role of the Father in Child Development*, 3rd edition (New York: Wiley and Sons., 1997).

<sup>77</sup> Linda Duxbury and Chris Higgins, *2001 National Work–Life Conflict Study: Report One* (Ottawa: Health Canada, 2001) at 31.

<sup>78</sup> Duxbury and Higgins, note 77.

<sup>79</sup> Paul Millar, *The Best Interests of Children: An Evidence-Based Approach* (Toronto: University of Toronto Press, 2009) at 83.

<sup>80</sup> Beaujot and Ravanera, note 67 at 149.

<sup>81</sup> Daly, note 21 at 12.

<sup>82</sup> J. Thomas Oldham, "Changes In The Economic Consequences Of Divorces, 1958-2008" (2008) 42 Fam. L.Q. 419 at 425, citing Lynne M. Casper and Suzanne M. Bianchi, *Continuity & Change in the American Family* (Thousand Oaks, Calif. : Sage Publications, 2002.)

<sup>83</sup> Ranson, *Against the Grain*, note 68 at 15.

<sup>84</sup> Beaujot and Ravanera, note 67 at 149.

<sup>85</sup> Beaujot and Ravanera, note 67.

<sup>86</sup> Beaujot and Ravanera, note 67 at 152.

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- <sup>87</sup> Beaujot and Ravanera, note 67 at 147.
- <sup>88</sup> Ranson, *Against the Grain*, note 68.
- <sup>89</sup> Ranson, *Against the Grain*, note 68 at 17, citation omitted.
- <sup>90</sup> Beaujot and Ravanera, note 67 at 149.
- <sup>91</sup> Statistics Canada Social and Aboriginal Statistics Division, *Women in Canada: A Gender-based Statistical Report (Catalogue no. 89-503-XIE)* (Ottawa: Minister of Industry (Canada), 2006), online: Statistics Canada <<http://www.statcan.gc.ca/pub/89-503-x/89-503-x2005001-eng.pdf>> (last accessed: 20 June 2010) at 133.
- <sup>92</sup> Statistics Canada Social and Aboriginal Statistics Division, note 91 at 152.
- <sup>93</sup> Statistics Canada Social and Aboriginal Statistics Division, note 91 at 151.
- <sup>94</sup> Daly, note 21 at 5.
- <sup>95</sup> Ranson, *Against the Grain*, note 68 at 15.
- <sup>96</sup> Beaujot and Ravanera, note 67 at 147.
- <sup>97</sup> Beaujot and Ravanera, note 67 at 149: "Men's employment ratios have declined since 1981 and women's have increased since 1971."
- <sup>98</sup> Galinsky, Aumann and Bond, note 68 at 16.
- <sup>99</sup> Daly, note 21 at 12. See also Beaujot and Ravanera, note 67 at 148.
- <sup>100</sup> [2009] O.J. No. 6028, note 55 at 14.
- <sup>101</sup> Ranson, *Against the Grain*, note 68 at 25, paraphrasing Oriel Sullivan, *Changing Gender Relations, Changing Families: Tracing the Pace of Change*. (New York: Rowman and Littlefield (Gender Lens Series), 2006).
- <sup>102</sup> *Moge v. Moge*, note 72 at sections VI(4) and (5).
- <sup>103</sup> Christy Spivey, "Time off at What Price - The Effects of Career Interruptions on Earnings" (2005) 59 *Indus. & Lab. Rel. Rev.* 119.
- <sup>104</sup> Spivey, note 103 at 138.
- <sup>105</sup> Spivey, note 103 at 137.
- <sup>106</sup> Robert Leckey, "Families in the Eyes of the Law: Contemporary Challenges and the Grip of the Past" (2009) 15 *IRPP Choices* at 9. See also Paul Robinson, *Profile of Child Support Beneficiaries; Catalogue no. 85-002-X; March 2009: Juristat Vol. 29, no. 1*. (Ottawa: Statistics Canada, 2009), online: Statistics Canada <<http://www.statcan.gc.ca/pub/85-002-x/2009001/article/10784-eng.htm>> (last accessed: 20 June 2010): "In 2005 ... 24% of female lone-parent families lived in low income, compared to 11% of male lone-parent families and 6% of couple families." Some although not all women who lead lone-parent families were previously married or cohabiting in a conjugal relationship.
- <sup>107</sup> Carol Rogerson, "Spousal Support After Moge" (1996) 14 *C.F.L.Q.* 281 at FN14 and *Moge v. Moge*, note 72: "These same sacrifices may also enhance the earning potential of the other spouse (usually the husband) who, because his wife is tending to such matters, is free to pursue economic goals."

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<sup>108</sup>[2009] O.J. No. 6028, note 55 at para 9.

<sup>109</sup> Ontario's *Family Law Act* states that "an order for the support of a spouse should recognize the spouse's contribution to the relationship and the economic consequences of the relationship for the spouse." (*FLA*, note 23 at 33(8)(a). A similar provision is found in the *Divorce Act*, note 7 at 15.2(6)(a).) See also *Canadian Divorce Law and Practice, Vol. 3: Spousal Support*, 2nd ed. by James C. MacDonald, Ann C. Wilton & Noel Semple (Toronto: Carswell, 2009), Overview and Chapter 6; Semple, note 15.

<sup>110</sup> Rogerson, *Beginning the Discussion*, note 69 at 59.

<sup>111</sup> Rogerson and Thompson, *Spousal Support Advisory Guidelines (Final Version)*, note 69 at 113.

<sup>112</sup> McMurtry *et al.*, note 2 at 21.

<sup>113</sup> The second- and third- most common problems were "wills and powers of attorney problems" and "housing or land problems" respectively (McMurtry *et al.*, note 2 at 21).

<sup>114</sup> *Ontario Civil Legal Needs: Quantitative Research*, note 59 at 68.

<sup>115</sup> *Ontario Civil Legal Needs: Quantitative Research*, note 59 at 46. It should be noted that the size of this subsample was small (76 respondents).

<sup>116</sup> Two long-term studies involving "children of divorce" and focusing on the effects of divorce upon them reached opposite conclusions. Wallerstein *et al.* found strong negative impacts on many children (Judith S. Wallerstein, Julia Lewis and Sandra Blakeslee, *The unexpected legacy of divorce : a 25 year landmark study*, 1st ed. (New York: Hyperion, 2000)). Heatherington and Kelly reached more optimistic conclusions (E. Mavis Hetherington and John Kelly, *For better or for worse : divorce reconsidered* (New York: W.W. Norton, 2002)).

<sup>117</sup> Robert E. Emery, David Sbarra and Tara Grover, "Divorce Mediation: Research and Reflections" (2005) 43 *Fam. Ct. Rev.* 22 at 25. For useful literature review see Lia Marie Constance Versaavel, *Out of court: Public policy impacts concerning resolution of child custody conflicts* (M.A., Royal Roads University (Canada) 2006) [unpublished] at 29-31 and Millar, note 79 at 46.

<sup>118</sup> Millar, note 79 at 84.

<sup>119</sup> Glenn A. Gilmour, *High-Conflict Separation And Divorce: Options For Consideration (Report # 2004-FCY-1E)* (Ottawa: Department of Justice (Canada), 2004), online: Department of Justice (Canada) <[http://www.justice.gc.ca/eng/pi/fcy-fea/lib-bib/rep-rap/2004/2004\\_1/index.html](http://www.justice.gc.ca/eng/pi/fcy-fea/lib-bib/rep-rap/2004/2004_1/index.html)> (last accessed: 20 June 2010) at 4-7 and Janet R. Johnston, "High-Conflict Divorce" (1994) 4 *The Future of Children* 165.

<sup>120</sup>[2009] O.J. No. 6028, note 55 at para 78.

<sup>121</sup> E.g., making this point with regard to parenting disputes, see Nelson Weisman, "On Access After Parental Separation" (1992) 36 *R.F.L.* (3d) 35.

<sup>122</sup> Schepard, note 53.

<sup>123</sup> An interesting example of literature which starts from the premise that many marriages should be "saved" from divorce if possible is Nester C. Kohut, *Therapeutic family law : a complete guide to marital reconciliations*, [2nd ed. ([Chicago]: Family Law Publications, 1968).

<sup>124</sup> *Divorce Act*, note 7, s. 9(1)(a) and (b).

<sup>125</sup> Katherine Shaw Spaht, "How Law Can Reinvigorate a Robust Vision of Marriage and Rival Its Post-Modern Competitor" (2004) 2 *Geo. J.L. & Pub. Pol'y* 449.



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- <sup>126</sup> Steven L. Nock, Laura Ann Sanchez and James D. Wright, *Covenant marriage : the movement to reclaim tradition in America* (New Brunswick, NJ: Rutgers University Press, 2008).
- <sup>127</sup> Richard E. Susskind, *The end of lawyers? : rethinking the nature of legal services* (Oxford: Oxford University Press, 2008) at 224 and 231.
- <sup>128</sup> Julie Lassonde, "Remarks delivered at Annual Meeting of the Canadian Law and Society Association," Concordia University, Montreal, June 3, 2010.
- <sup>129</sup> McMurtry *et al.*, note 2 at 22.
- <sup>130</sup> Robert E. Emery, "Interparental Conflict and Social Policy" in John H. Grych & Frank D. Fincham eds., *Interparental conflict and child development : theory, research, and applications* (New York: Cambridge University Press, 2001) 417 at 430; Shepard, note 53.
- <sup>131</sup> Ministry of Education (Ontario), *The Ontario Curriculum Grades 11 and 12: Health and Physical Education* (Toronto: Ministry of Education (Ontario), 2000), online: Ministry of Education (Ontario) <<http://www.edu.gov.on.ca/eng/curriculum/secondary/health1112curr.pdf>> (last accessed: 20 June 2010) at 18.
- <sup>132</sup> FLA, note 23, ss. 52 and 53.
- <sup>133</sup> Justice Québec, "De facto spouses," online: <<http://www.justice.gouv.qc.ca/english/publications/generale/union-a.htm>> (last accessed: 20 June 2010).
- <sup>134</sup> Ministry of the Attorney General (Ontario), "Family Law Resources," online: <[http://www.attorneygeneral.jus.gov.on.ca/english/justice-ont/family\\_law.asp](http://www.attorneygeneral.jus.gov.on.ca/english/justice-ont/family_law.asp)> (last accessed: 20 June 2010).
- <sup>135</sup> Willem Adema, *Babies and bosses. Volume 4, Canada, Finland, Sweden and the United Kingdom: reconciling work and family life* (Paris: Organisation for Economic Co-operation and Development, 2005) at 90.
- <sup>136</sup> Ranson, "Paid and Unpaid Work: How do Families Divide their Labour?" in Baker, ed., note 73 at 105.
- <sup>137</sup> *Starting strong II: early childhood education and care* (Paris: OECD, 2006) at 104.
- <sup>138</sup> *Starting strong II: early childhood education and care*, note 137 at 105.
- <sup>139</sup> *Starting strong II: early childhood education and care*, note 137 at 297. Drawing on the OECD data source, a subsequent report noted substantially higher access for children on this same measure in other countries: "Belgium 63%; Denmark 78%; France 69%; Portugal 40%; U.K. 60%." (Childcare Resource and Research Unit, *Early learning and child care: How does Canada measure up? International comparisons using data from Starting Strong 2 (Organisation for Economic Co-operation and Development, 2006)* (Toronto: University of Toronto Childcare Resource and Research Unit, 2006), online: Childcare Resource and Research Unit <[http://www.childcarecanada.org/pubs/pdf/BN\\_EarlyLearning06.pdf](http://www.childcarecanada.org/pubs/pdf/BN_EarlyLearning06.pdf)> (last accessed: 20 June 2010) at 4.
- <sup>140</sup> Canada Revenue Agency, "Canada Child Tax Benefit (CCTB)," online: <<http://www.cra-arc.gc.ca/bnfts/cctb/menu-eng.html>> (last accessed: 20 June 2010).
- <sup>141</sup> Adema, note 135 at 23.
- <sup>142</sup> Ministry of Education (Ontario), "Phase Two: Full-Day Kindergarten For Four- and Five-Year-Olds: Backgrounder (June 15, 2010)," online: <<http://www.edu.gov.on.ca/eng/document/nr/10.06/bg0615.html>> (last accessed: 20 June 2010).

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- <sup>143</sup> Lisa Philipps, "Income Splitting and Gender Equality: The Case for Incentivizing Intra-Household Wealth Transfers" in Kim Brooks *et al.* eds., *Challenging Gender Inequality in Tax Policy Making: Comparative Perspectives* (Oxford: Hart Publishing Inc., 2010) at 5.
- <sup>144</sup> Kathleen A. Lahey, *Women and Employment: Removing Fiscal Barriers to Women's Labour Force Participation* (Ottawa: Status of Women Canada, 2005), online: Status of Women Canada <<http://dsp-psd.pwgsc.gc.ca/Collection/SW21-122-2005E.pdf>> (last accessed: 20 June 2010) at vii.
- <sup>145</sup> Lahey, note 144 at 23.
- <sup>146</sup> Lahey, note 144 at 23.
- <sup>147</sup> Philipps, note 143 at 11: "encouraging intra-household transfers promotes the long-term financial security of a lesser-earning spouse or partner, even where the transferor continues to exercise a degree of informal influence over the use of property or income while the relationship subsists."
- <sup>148</sup> Canada Revenue Agency, "Pension income splitting," online: <<http://www.cra-arc.gc.ca/tx/ndvdl/tpcs/pnsn-splt/menu-eng.html>> (last accessed: 20 June 2010).
- <sup>149</sup> Philipps, note 143 at 10.
- <sup>150</sup> Philipps, at 13-14: "the failure of public policy to value the work of caregivers is significantly linked to women's ongoing economic inequality ... a system of refundable tax credits or other state transfers is needed to increase the autonomy of primary caregivers by providing an alternate source of economic security."
- <sup>151</sup> *Beyond Conjuality: Close Personal Relationships Between Adults* at 73.
- <sup>152</sup> Canada Revenue Agency, "Line 315 - Caregiver amount," online: <<http://www.cra-arc.gc.ca/tx/ndvdl/tpcs/ncm-tx/rtrn/cmpltng/ddctns/Ins300-350/315/menu-eng.html>> (last accessed: 20 June 2010).
- <sup>153</sup> Lahey,
- <sup>154</sup> *Best Practices at Family Justice System Entry Points: Needs of Users and Responses of Workers in the Justice system* (Toronto: Law Commission of Ontario, 2009), online: Law Commission of Ontario <<http://www.lco-cdo.org/en/family-law-process-consultation-paper>> (last accessed: 20 June 2010) at 10.
- <sup>155</sup> McMurtry *et al.*, note 2 at 22.
- <sup>156</sup> See "IV. A. 2. Increasing the supply and affordability of legal services," below.
- <sup>157</sup> Mamo, Jaffe and Chiodo, note 44 at 16; *Best Practices at Family Justice System Entry Points: Needs of Users and Responses of Workers in the Justice system* note 154 at 8.
- <sup>158</sup> McMurtry *et al.*, note 2 at 57-8.
- <sup>159</sup> E.g. "Canadian Legal Information Institute," online: <<http://www.canlii.org/>> (last accessed: 20 June 2010), "ServiceOntario E-Laws," online: <[www.e-laws.gov.on.ca](http://www.e-laws.gov.on.ca)> (last accessed: 20 June 2010).
- <sup>160</sup> Ministry of the Attorney General (Ontario), note 134.
- <sup>161</sup> These were "Ministry of the Attorney General's Justice Ontario website ([www.attorneygeneral.jus.on.ca/english/justice-ont/](http://www.attorneygeneral.jus.on.ca/english/justice-ont/)), the Law Society website ([www.lsuc.on.ca](http://www.lsuc.on.ca)), the Law Society's Lawyer Referral Service site ([www.lsuc.on.ca/public/a/faqs/---lawyer-referral-service/](http://www.lsuc.on.ca/public/a/faqs/---lawyer-referral-service/)), the LAO site ([www.legalaid.on.ca](http://www.legalaid.on.ca)), and PBLO's Law Help Ontario ([www.lawhelpontario.org](http://www.lawhelpontario.org))." (McMurtry *et al.*, note 2 at 28).

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<sup>162</sup> McMurtry *et al.*, note 2 at 28.

<sup>163</sup> Family Law Education for Women, "All Women: One Family Law," online: <<http://www.onefamilylaw.ca/en/home/>> (last accessed: 20 June 2010) See also Ministry of the Attorney General (Ontario), note 134, and Ontario Women's Justice Network (OWJN) [www.owjn.org](http://www.owjn.org).

<sup>164</sup> "The Canadian Charter of Rights and Freedoms guarantee[s] all women in Ontario the right to access public family law to resolve their family law disputes." (<http://www.onefamilylaw.ca/en/background>) This principle also animated the 2006 statutory reforms banning the use of religious family law arbitration. (*Family Statute Law Amendment Act, 2006*, Assented to February 23, 2006 and *Family Arbitration*, O. Reg. 134/07.) It is central to the province's family law policy response to the "diversity of ... family members' identities in Ontario," to which the Commission referred in the Call for Papers (*Best Practices at Family Justice System Entry Points: Needs of Users and Responses of Workers in the Justice system* note 154).

<sup>165</sup> McMurtry *et al.*, note 2 at 28.

<sup>166</sup> *Family Law Rules*, O. Reg. 114/99, Rule 8.1: Mandatory Information Program In The Superior Court Of Justice In Toronto.

<sup>167</sup> Personal communication, Professor Shelley Kierstead (Osgoode Hall Law School). November 2, 2009 and comments of Justice Mary Jane Hatton, AFCC Ontario Chapter Meeting, April 13 2010.

<sup>168</sup> Superior Court of Justice (361 University Ave., Toronto) Mandatory Information Program, observed April 28, 2010. Ontario Court of Justice Parent Information Session (47 Sheppard East, Toronto), observed May 10, 2010.

<sup>169</sup> Desmond Ellis and Dawn Y. Anderson, "The impact of participation in a parent education program for divorcing parents on the use of court resources: An evaluation study" (2003) 21 *Conflict Resolution Quarterly* 169 at 184-5.

<sup>170</sup> Versaevel, note 117.

<sup>171</sup> Versaevel, note 117 at 67.

<sup>172</sup> Shelley Kierstead, *Parent education programs in family law courts: Perils and potential* (D Jur, York University (Canada) 2005) [unpublished].

<sup>173</sup> Kierstead, note 172 at 169.

<sup>174</sup> Law Society of Upper Canada, "AccessCLE," online: <<http://lx07.lsuc.on.ca:80/R?RN=449973704>> (last accessed: 20 June 2010).

<sup>175</sup> *Law Society Act*, R.S.O. 1990, c. L.8, at 4.2(2) and (3).

<sup>176</sup> Rogerson and Thompson, *Spousal Support Advisory Guidelines (Final Version)*, note 69.

<sup>177</sup> "DivorceMate Software Inc.," online: <<http://www.divorcemate.com/>> (last accessed: 20 June 2010).

<sup>178</sup> "DivorceMate Software Inc.," note 177 at <http://www.divorcemate.com/ppu.asp>.

<sup>179</sup> Susskind, note 127 at 241.

<sup>180</sup> *FLA*, note 23, Part II.

<sup>181</sup> *FLA*, note 23 at s. 19.

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<sup>182</sup> Susskind, note 127 at 241.

<sup>183</sup> This was confirmed by the OCLN telephone survey, according to McMurtry *et al.*, note 2 at 59.

<sup>184</sup> Lassonde, note 128.

<sup>185</sup> Ontario Bar Association, *Getting It Right: The Report of the Ontario Bar Association Justice Stakeholder Summit* (Toronto: Ontario Bar Association, 2008), online: Ontario Bar Association <[http://www.oba.org/en/pdf/Justice\\_Summit\\_sml.pdf](http://www.oba.org/en/pdf/Justice_Summit_sml.pdf)> (last accessed: 20 June 2010) at 8.

<sup>186</sup> OBA Family Law Section, ADR Institute Of Ontario and Ontario Association Of Family Mediators, note 50 at 6.

<sup>187</sup> D. A. Rollie Thompson and Lynn Reiersen, "A Practicing Lawyer's Field Guide to the Unrepresented" (2002) 19 C.F.L.Q. 529 at 529-530.

<sup>188</sup> Anne-Marie Langan, "Threatening the Balance of the Scales of Justice: Unrepresented Litigants in the Family Courts of Ontario" (2005) 30 Queen's L.J. 825 at 832.

<sup>189</sup> Kelly Harris, "The Going Rate" *Canadian Lawyer* (June, 2009) 32 at 36. The latter figure refers to civil cases generally, not to family cases specifically.

<sup>190</sup> *Ontario Civil Legal Needs: Quantitative Research*, note 59. The category "low- and middle-class Ontarians" was defined to include all those who lived in homes with annual household incomes of less than \$75,000.

<sup>191</sup> *Ontario Civil Legal Needs: Quantitative Research*, note 59.

<sup>192</sup> Legal Aid Ontario, *Legal Aid Ontario Update, at page 18 in Briefly Speaking (magazine of the Ontario Bar Association)* (Toronto: Ontario Bar Association, 2010), online: Legal Aid Ontario <[http://www.oba.org/En/briefly/PDF/Briefly%20Speaking\\_JuneWeb.pdf](http://www.oba.org/En/briefly/PDF/Briefly%20Speaking_JuneWeb.pdf)> (last accessed: 20 June 2010) at 19.

<sup>193</sup> McMurtry *et al.*, note 2.

<sup>194</sup> *Ontario Civil Legal Needs: Quantitative Research*, note 59 at 52.

<sup>195</sup> Legal Aid Ontario, "Family Law Offices," online: <<http://www.lao.on.ca/en/contact/contact.asp?type=family>> (last accessed: 20 June 2010).

<sup>196</sup> Legal Aid Ontario, *Legal Aid Ontario Update*, note 192 at 19.

<sup>197</sup> See, for example, Michael Trebilcock, *Report of the Legal Aid Review* (Toronto: Ministry of the Attorney General (Ontario), 2008), online: Ministry of the Attorney General (Ontario) <[http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/trebilcock/legal\\_aid\\_report\\_2008\\_EN.pdf](http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/trebilcock/legal_aid_report_2008_EN.pdf)> (last accessed: 20 June 2010).

<sup>198</sup> OBA Family Law Section, ADR Institute Of Ontario and Ontario Association Of Family Mediators, note 50 at 14.

<sup>199</sup> McMurtry *et al.*, note 2 at 4.

<sup>200</sup> Law Society of Upper Canada, "Lawyer Referral Service," online: <<http://www.lsuc.on.ca/public/a/faqs--lawyer-referral-service/>> (last accessed: 20 June 2010).

<sup>201</sup> Vikki L. Conwell, "Family law centers a growing alternative to attorneys" *Atlanta Journal-Constitution* (March 16, 2010).

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<sup>202</sup> Above, at note 200.

<sup>203</sup> See also Susskind, note 127 at 240.

<sup>204</sup> For an account of the market barriers to the practice of law erected by LSUC and other Canadian law societies, see Chapter 4 in *Self-regulated professions: Balancing competition and regulation* (Ottawa: Competition Bureau (Canada), 2007), online: Competition Bureau (Canada) <[http://www.bureaudelaconurrence.gc.ca/eic/site/cb-bc.nsf/vwapj/Professions%20study%20final%20E.pdf/\\$FILE/Professions%20study%20final%20E.pdf](http://www.bureaudelaconurrence.gc.ca/eic/site/cb-bc.nsf/vwapj/Professions%20study%20final%20E.pdf/$FILE/Professions%20study%20final%20E.pdf)> (last accessed: 20 June 2010).

<sup>205</sup> *Solicitors Act*, R.S.O. 1990, c. S.15, s. 1.

<sup>206</sup> *Competition Bureau, Self-Regulated Professions*, note 204 at 70.

<sup>207</sup> Law Society of Upper Canada, "Paralegals," online: <<http://www.lsuc.on.ca/paralegals/>> (last accessed: 20 June 2010).

<sup>208</sup> *Competition Bureau, Self-Regulated Professions*, note 204 at 69.

<sup>209</sup> Tracey Tyler, "Ontario paralegals try to expand their turf: Non-lawyers seek right to represent clients in family law cases, including simple divorces" *Toronto Star* (Apr 29, 2010) 14.

<sup>210</sup> Kirk Makin, "Showdown looms over expansion of paralegal services" *The Globe and Mail* (May 5, 2010) A.10.

<sup>211</sup> Makin, note 210.

<sup>212</sup> Law Society of Upper Canada, "News Release: Continuing professional development requirement supports professional competence (February 25, 2010)," online: <[http://www.lsuc.on.ca/media/feb10\\_finalcpdrequirementrelease.pdf](http://www.lsuc.on.ca/media/feb10_finalcpdrequirementrelease.pdf)> (last accessed: 20 June 2010).

<sup>213</sup> *Competition Bureau, Self-Regulated Professions*, note 204 at 65: "Law societies should justify the duration of the professional legal training course and articling as the minimum necessary to properly and effectively practise law while protecting the public interest. When reviewing the duration of education and training lawyers require, law societies should look at other law societies that have maintained the quality of legal services while requiring shorter periods for training and articling."

<sup>214</sup> Lassonde, note 128.

<sup>215</sup> Kaspiew *et al.*, note 44 at E1.

<sup>216</sup> Kaspiew *et al.*, note 44 at 59.

<sup>217</sup> The Ontario Civil Legal Needs survey found higher rates of satisfaction with lawyers than with paralegals, but did not pose this question with specific regard to family law problems (McMurtry *et al.*, note 2 at 36).

<sup>218</sup> See also Susskind, note 127 at 237, who calls for a "healthy third sector... recognizing that many citizens who are in need of legal assistance want a kind, empathetic ear with only a light sprinkling of legal expertise" and "a new wave of imaginative, entrepreneurial and market-driven alternative providers of legal service ... bringing new ways of making state funding go further, keeping law firms on their toes, and delivering service in a manner with which consumers are comfortable."

<sup>219</sup> Susskind, note 127 at 237.

<sup>220</sup> McMurtry *et al.*, note 2 at 44.

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<sup>221</sup> E.g. Janet Reno, "The federal government and appropriate dispute resolution: Promoting problem solving and peacemaking as enduring values in our society" (2001) 19 *Alternatives to the High Cost of Litigation* 16.

<sup>222</sup> See, e.g., the Association of Dispute Resolvers webpage at <http://www.leadr.com.au/adr.htm>.

<sup>223</sup> Trina Grillo, "The Mediation Alternative: Process Dangers for Women" (1991) 100 *Yale Law Journal* 1545

<sup>224</sup> Ambert, *Divorce: Facts, Causes & Consequences*, 3d Ed. and Ver Steegh, note 11 at 671.

<sup>225</sup> Salem, note 11 at 371.

<sup>226</sup> Emery, "Interparental Conflict and Social Policy" in Grych and Fincham Eds., note 130 at 421; Shepard, note 53.

<sup>227</sup> Julie Macfarlane, *The new lawyer : how settlement is transforming the practice of law* (Vancouver: University of British Columbia Press, 2008).

<sup>228</sup> OBA Family Law Section, ADR Institute Of Ontario and Ontario Association Of Family Mediators, note 50 at 5.

<sup>229</sup> Allan E. Barsky, "Mediative evaluations: The pros and perils of blending roles" (2007) 45 *Fam. Ct. Rev.* 560 and Mamo, Jaffe and Chiodo, note 44.

<sup>230</sup> Resolution through solicitor negotiation is not generally considered a form of ADR, but it is certainly a very common way to avoid all or most of the steps in courtroom litigation. Favourable evaluations of the lawyer role in family dispute resolution include Rosemary and Gary Skoloff and Robert J. Levy, "Custody Doctrines and Custody Practice: A Divorce Practitioner's View" (2002) 36 *Fam. L.Q.* 79 and Rosemary Hunter, "Adversarial Mythologies: Policy Assumptions and Research Evidence in Family Law" (2003) 30 *Journal of Law and Society* 156. A less rosy view is found in Marsha Kline Pruett and Tamara D. Jackson, "The Lawyer's Role during the Divorce Process: Perceptions of Parents, Their Young Children, and Their Attorneys" (1999) 33 *Fam. L.Q.* 288 and Marsha Kline Pruett, "Divorce in legal context: outcomes for children" (1998) 13 *Connecticut Family Lawyer* 1. Julie MacFarlane is among those who identify different modes of legal practice with different degrees of adversarialism and collaboration. (Julie Macfarlane, "Will Changing the Process Change the Outcome? The Relationship Between Procedural and Systemic Change" (2005) 65 *La. L. Rev.* 1487 and Macfarlane, *The New Lawyer*, note 227.) In a custody or access dispute, an assessment conducted by a social worker, psychologist or psychiatrist may also have the effect of producing a settlement, even if the formal or original purpose of this service is to provide evidence for use in litigation. (Michael A. Saini, "Evidence Base of Custody and Access Evaluations" (2008) 8 *Brief Treat Crisis Interven.* 111; Johnston, note 119 at 178.) Settlement is rendered more likely if the parties believe that the judge will follow the assessor's recommendations. Evaluations may also unintentionally produce settlement if the process focuses the parties on the needs of their children. (Peter Ash and Melvin J. Guyer, "Court implementation of mental health professionals' recommendation in contested child custody and visitation cases" (1984) 12 *Bulletin of the American Academy of Psychiatry and the Law* 137 at 145; Andrew Shepard, *Children, Courts, and Custody: Interdisciplinary Models for Divorcing Families* (New York: Cambridge University Press, 2004) at 153.

<sup>231</sup> E.g. Joanne Goss, "Judicial Dispute Resolution: Program Setup and Evaluation in Edmonton" (2004) 42 *Fam. Ct. Rev.* 511; Yvonne Pearson *et al.*, "Early Neutral Evaluations: Applications to Custody and Parenting Time Cases Program Development and Implementation in Hennepin County, Minnesota" (2006) 44 *Fam. Ct. Rev.* 672.

<sup>232</sup> For example, a sample of 19 cases in which 16 settled in S. Margaret Lee and Robert Kaufman, "Interdisciplinary Settlement Conferences: Utilizing Volunteer Mental Health Professionals and Family Law Attorneys to Settle Challenging Cases" *AFCC News* (Winter, 2010) 2.

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<sup>233</sup> Much of the literature surveyed here can be classified as “evaluation research,” an approach which has its own distinct methodology. (See e.g. Herbert J. Rubin and Irene Rubin, *Qualitative interviewing : the art of hearing data*, 2nd ed. (Thousand Oaks, Calif.: Sage, 2005)). In this context, deploying multiple methods to answer research questions in this way, a process known as “triangulation,” is identified as key to producing reliable conclusions. Norman K. Denzin and Yvonna S. Lincoln, *The SAGE handbook of qualitative research*, 3rd ed. (Thousand Oaks, Calif.: Sage, 2005) at 5.

<sup>234</sup> Canada Department of Justice, *Evaluation of the Divorce Act Phase 2: monitoring and evaluation* (Ottawa: Bureau of Review, 1990) and *3.03–Family Responsibility Office, in 2003 Annual Report* (Toronto: Office of the Provincial Auditor of Ontario, 2003), online: Office of the Provincial Auditor of Ontario <[http://www.auditor.on.ca/en/reports\\_en/en03/303en03.pdf](http://www.auditor.on.ca/en/reports_en/en03/303en03.pdf)> (last accessed: 20 June 2010) and M. Marion Boyd, *Dispute Resolution in Family Law: Protecting Choice, Promoting Inclusion* (Toronto: Ministry of the Attorney General (Ontario), 2004).

<sup>235</sup> Mamo, Jaffe and Chiodo, note 44.

<sup>236</sup> Eileen Pruett and Cynthia Savage, "Statewide Initiatives to Encourage Alternative Dispute Resolution and Enhance Collaborative Approaches to Resolving Family Issues" (2004) 42 Fam. Ct. Rev. 232.

<sup>237</sup> Liza Cohen Hita *et al.*, "Family Court- University Partnership to Benefit Divorcing Families: The Experience of Maricopa County (Arizona) Family Court Department and Arizona State University's Prevention Research Center" (2009) 47 Fam. Ct. Rev. 436.

<sup>238</sup> E.g. Andrew Schepard, "New York lacks strong mediation component in child custody cases" *New York Law Journal* (May 13, 2009) and a special 2005 issue of the *Family Law Quarterly* edited by Marianne Blair and Merle Weiner. ("Resolving Parental Custody Disputes - A Comparative Exploration Symposium on Comparative Custody Law.")

<sup>239</sup> Ministry of the Attorney General (Ontario), *Court Services Division Annual Report 2008/2009* (Toronto: Queen's Printer for Ontario, 2009), online: Ministry of the Attorney General (Ontario) <[http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/courts\\_annual\\_08/Court\\_Services\\_Annual\\_Report\\_TOC\\_EN.pdf](http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/courts_annual_08/Court_Services_Annual_Report_TOC_EN.pdf)> (last accessed: 20 June 2010) at 1.

<sup>240</sup> Ministry of the Attorney General (Ontario), *Court Services Division Annual Report 2008/2009* note 239 at 32.

<sup>241</sup> Maldonado, note 8; Salem, note 11; Nicholas Bala and Annelise Saunders, "Understanding the Family Context: Why the Law of Expert Evidence is Different in Family Law Cases" (2002) 20 C.F.L.Q. 277 at 9(f). The Families in Transition programs offered by Family Service Toronto (<http://www.familyservicetoronto.org/programs/families.html>) appear to blend closed mediation with therapy and educational initiatives in a holistic fashion.

<sup>242</sup> Joan B. Kelly, "Family Mediation Research: Is There Empirical Support for the Field?" (2004) 22 Conflict Resolution Quarterly 3; Cornelia Brentano and Alison Clarke-Stewart, *Divorce: Causes and Consequences* (New Haven, CT: Yale University Press, 2006) at 189. On the other hand, Rosemary Hunter refers to empirical evidence that solicitor negotiations produce more full settlements than mediation does. (Hunter, note 230).

<sup>243</sup> Jennifer E. McIntosh *et al.*, "Child-Focused and Child-Inclusive Divorce Mediation: Comparative Outcomes from a Prospective Study of Postseparation Adjustment" (2008) 46 Fam. Ct. Rev. 105.

<sup>244</sup> Penelope E. Bryan, "Killing Us Softly: Divorce Mediation and the Politics of Power" (1992) 40 Buff. L. Rev. 441.

<sup>245</sup> Dana Royce Baerger *et al.*, "A methodology for reviewing the reliability and relevance of child custody evaluations" (2002) 18 J.Am.Acad.Matrimonial Law. 35 at 44-5.

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<sup>246</sup>The Alberta Institute of Law Research and Reform, writing about that province's *amicus curiae* program of custody and access evaluations, estimated that 90% of the cases reached settlement after receiving the report (Alberta Law Reform Institute, *Protection of Children's Interests in Custody Disputes (Report No. 43)* (Edmonton: Alberta Law Reform Institute, 1984)). In the seminal 1984 study of psychiatrist custody evaluations done by Ash and Guyer, disputes were referred to the evaluators by the parties or by court order. During the course of the evaluation, 14 percent of the cases were settled and after the evaluators' recommendations were delivered, a further 69 percent reached an agreement or dropped petitions to modify existing arrangements. (Ash and Guyer, note 230 at 145.) Writing in 1994 about expert evaluations in general, Janet Johnston estimated that 70% to 90% of disputes settle after receiving the recommendations. (Johnston, note 119 at 178.) See also Saini, "Evidence Base of Custody and Access Evaluations" note 230.

<sup>247</sup>Gary W. Austin and Peter G. Jaffe, "Clinical Comments on *Linton v. Clarke*" (1995) 10 R.F.L. (4th) .

<sup>248</sup> *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 112.

<sup>249</sup> Barbara J. Fidler and Rachel Birnbaum, "Child Custody Disputes: Private and Public Assessments" (2006) 25 C.F.L.Q. 137 at 155; Rachel Birnbaum and Helen Radovanovic, "Brief intervention model for access-based postseparation disputes: Family and court outcomes" (1999) 37 Fam.& Concil.Cts.Rev. 504 at 507.

<sup>250</sup> *Children's Law Reform Act*, R.S.O. 1990, c. C.12. Adding the following text is one way in which the legislature might do so, while allowing the judge to prevent this informal mediation in cases in which it would be inappropriate:

32. If an application is brought in respect of custody of or access to a child, and if the Children's Lawyer has caused an investigation to be made with regard to that child pursuant to s. 112 of the Courts of Justice Act, then the Children's Lawyer shall confer with the parties and endeavour to obtain an agreement in respect of the matter if

(a) the court has not ordered otherwise and,

(b) in the opinion of the Children's Lawyer, doing so would be in the best interest of the child.

<sup>251</sup> Ver Steegh, note 11 at 669-670.

<sup>252</sup> Susan Pigg, "Collaboration, not litigation; Many divorcing couples are sitting down together, along with their lawyers, to hammer out agreements" *Toronto Star* (Jan 28, 2009) L1 and lecture delivered by Victoria Smith, LL.B. (Toronto collaborative family lawyer) to Advanced Family Law class at University of Toronto Faculty of Law. March 23, 2010.

<sup>253</sup> The author has obtained a model agreement of this nature from Victoria Smith.

<sup>254</sup> Wanda Wieggers and Michaela Keet, "Collaborative Family Law and Gender Inequalities: Balancing Risks and Opportunities" (2008) 46 O.H.L.J. 738.

<sup>255</sup> Hilary Linton, "Collaborative Law: Thinking About The Alternatives" (2008) Canadian Family Law Matters 1.

<sup>256</sup> AFCC Task Force on Parenting Coordination, "Parenting Coordination: Implementation Issues" (2003) 41 Fam. Ct. Rev. 533; Christine A. Coates *et al.*, "Parenting Coordination for High-Conflict Families" (2004) 42 Fam. Ct. Rev. 246; Linda Chodos, "Remarks delivered at Conference entitled 'Family Law: The Voice of the Child'," Law Society of Upper Canada, Toronto, March 5, 2009.

<sup>257</sup> Doolittle *et al.*, note 53 at 437; Maldonado, note 8.



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<sup>258</sup> A private online service named "Our Family Wizard" offers services which might be considered a virtual or automated form of parenting coordination. ("Our Family Wizard," online: <<http://www.ourfamilywizard.com/ofw/index.cfm>> (last accessed: 20 June 2010) under the "Parents" tab.) This is arguably an example of what Richard Susskind identified as *online dispute resolution*, in which "the process of resolving a dispute, especially the formulation of the solution, is entirely or largely conducted by or through the internet." (Susskind, note 127 at 219.) Another prominent example of online dispute resolution is "CyberSettle," online: <<http://www.cybersettle.com>> (last accessed: 20 June 2010). See also, re computer-aided family dispute resolution: John Zeleznikow and Andrew Stranieri, "Split—Up: An intelligent decision support system which provides advice upon property division following divorce" (1998) 6 *Journal of Law and Information Technology* 190 and Arno R. Lodder and John Zeleznikow, "Developing an Online Dispute Resolution Environment: Dialogue Tools and Negotiation Support Systems in a Three Step Model" (2005) 10 *Harv. Negot. L. Rev.* 287.

<sup>259</sup> *Arbitration Act*, 1991, S.O. 1991, c. 17.

<sup>260</sup> *Family Arbitration Regulation*, note 164, s. 2(4). Regarding the origin of this provision in the Shari'a controversy of 2006, see Mohammad Fadel, "Political Liberalism, Islamic Family Law And Family Law Pluralism: Lessons From New York On Family Law Arbitration" in Joel A. Nichols ed., *Marriage and Divorce in a Multi-Cultural Context: Reconsidering the Boundaries of Civil Law and Religion*: Cambridge University Press, 2010) ; M. Boyd, note 234.

<sup>261</sup> M. Boyd, note 234 at 35 and after.; Lorne Wolfson and Sara Mintz, "Mediation and Arbitration Agreements – What you Need to Know (Paper presented to Continuing Legal Education event entitled 'The Advanced Guide to Negotiating, Challenging, and Drafting Domestic Contracts')," Osgoode Hall Law School, Toronto, January 20, 2010(last accessed: 20 June 2010).

<sup>262</sup> Wolfson, note 264.

<sup>263</sup> M. Boyd, note 234 at 36.

<sup>264</sup> Lecture delivered to Advanced Family Law class at University of Toronto Faculty of Law. March 16, 2010.

<sup>265</sup> Maxine N. Kerr, "Case, Settlement, and Pre-Trial Conferences" in Ontario Bar Association Continuing Legal Education ed., *Using the Family Law Rules to Your Advantage 2006*)

<sup>266</sup> *Divorce Act*, S.C. 1967-8, c. 24.

<sup>267</sup> The most important statutes for private family law disputes are the *Divorce Act*, note 7, the *FLA*, and the *Children's Law Reform Act*, note 250. Child protection disputes are governed primarily by the *Child and Family Services Act (Ontario)*, R.S.O. 1990, c. C.11. However a wide variety of other statutes are also applicable to family law disputes.

<sup>268</sup> *Family Law Rules*, note 166, R. 1(2).

<sup>269</sup> Ministry of the Attorney General (Ontario), *Court Services Division Annual Report 2008/2009* note 239 at 32.

<sup>270</sup> Ministry of the Attorney General (Ontario), "Ontario's Family Courts Structure," online: <<http://www.attorneygeneral.jus.gov.on.ca/english/family/famcourts.asp>> (last accessed: 20 June 2010).

<sup>271</sup> These are listed in the *Family Law Rules* note 166, R. 1(3).

<sup>272</sup> Nancy E. Cooper, "Court in Kashechewan" *Briefly Speaking (magazine of the Ontario Bar Association)* (June 2010).

<sup>273</sup> Jane Spinak, "Romancing the Court" (2008) 46 *Fam. Ct. Rev.* 258.

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<sup>274</sup> E.g. OBA Family Law Section, ADR Institute Of Ontario and Ontario Association Of Family Mediators, note 50 at 19: "we wholeheartedly support the concept of a specialized court to deal with only family cases.: See also Landau *et al.*, note 6 at 5 and Harvey Brownstone, *Tug Of War: A Judge's Verdict on Separation, Custody Battles, and the Bitter Realities of Family Court* (Toronto: ECW Press, 2009) at 44.

<sup>275</sup> Mamo, Jaffe and Chiodo, note 44.

<sup>276</sup> The Honourable Mr. Justice George Czutrin, Interview conducted at Superior Court of Justice, Toronto. February 8, 2010.

<sup>277</sup> Czutrin, note 276; Donna Wowk, Interview conducted at Niman Zemans Gelgoot LLP, Toronto. February 22, 2010; Linda Diebel, "Family Court Crisis; Shortage of Judges is Running up Costs, Putting Lives on Hold" *Toronto Star* (December 9, 2007) A1.

<sup>278</sup> See notes 166 and 167, above.

<sup>279</sup> OBA Family Law Section, ADR Institute Of Ontario and Ontario Association Of Family Mediators, note 50 at 15.

<sup>280</sup> The Honourable Mr. Justice Emile Kruzick, Interview conducted at Superior Court of Justice, Brampton, Ontario. March 18, 2010.

<sup>281</sup> Czutrin, note 276.

<sup>282</sup> Particularly helpful in evaluating these initiatives is the published literature reports on interviews with justice system participants such as mediators, (Dawne Martens, *Exploring children's rights in custody and access* (MR47045, University of Windsor (Canada) 2008) [unpublished] ; Bryna Bogoch and Ruth Halperin Kaddari, "Co-optation, competition and resistance: mediation and divorce professionals in Israel" (2007) 14 *International Journal of the Legal Profession* 115), lawyers, (Joanne J. Paetsch, Lorne D. Bertrand and Nicholas Bala, *The Child-centred Family Justice Strategy: Baseline Information from Family Law Practitioners* (Ottawa: Department of Justice (Canada), 2005), online: Department of Justice (Canada) <<http://www.justice.gc.ca/eng/pi/fcy-fea/lib-bib/rep-rap/2005/biflp-dbpdf/p1.html>> (last accessed: 20 June 2010)), child custody assessors, (Paula J. Caplan and Jeffery Wilson, "Assessing the Child Custody Assessors" (1990) 27 *Reports on Family Law*, 3d Series 121) and judges. (Rachel Birnbaum and Nicholas Bala, "Judicial Interviews with Children in Custody and Access Cases: Comparing Experiences in Ontario and Ohio" (2010) 24 *International Journal of Law, Policy, and the Family* [forthcoming].) These "insiders" have helped researchers identify the costs of litigation and its alternatives. Turning from the employees to the users of the system, one finds pioneering work by sociologist Carol Smart and her colleagues in England, based on interviews and observations of parent litigants. (Carol Smart and Vanessa May, "Why Can't They Agree? The Underlying Complexity of Contact and Residence Disputes" (2004) 26 *Journal of Social Welfare and Family Law* 347; Carol Smart *et al.*, *Residence and Contact Disputes in Court: Volume 1 (Research Report No 6/03)* (London, UK: Research Unit Department for Constitutional Affairs (UK), 2003); Carol Smart *et al.*, *Residence and Contact Disputes in Court: Volume 2* (London: Department of Constitutional Affairs (UK), 2005); Smart and Neale, *Family fragments?*, note 9. See also Pruett, "Divorce in legal context: outcomes for children," note 230. Also helpful is Randall W. Leite and Kathleen Clark, "Participants' Evaluations of Aspects of the Legal Child Custody Process and Preferences for Court Services" (2007) 45 *Fam. Ct. Rev.* 260, in which Ohio family litigants responded to a survey about which family court interventions and programs they had found useful.) In Canada, Rachel Birnbaum and Nick Bala have interviewed children who had been represented by their own lawyers during custody and access litigation. (Rachel Birnbaum and Nicholas Bala, "The Child's Perspective On Representation: Young Adults Report On Their Experiences With Child Lawyers" (2009) 25 *Can. J. Fam. L.* 11) Australia has taken a leadership role in family court reform, and the evaluative literature on these initiatives is very helpful. (McIntosh, Bryant and Murray, "Evidence of a Different Nature" note 48.)

<sup>283</sup> Bryant, note 46.

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<sup>284</sup> Gerald W. Hardcastle, "Adversarialism and the Family Court: A Family Court Judge's Perspective" (2005) 9 UC Davis J. Juv. L. & Pol'y 57.

<sup>285</sup> Nigel Dunlop, "The Family Mediation Pilot: Where To Now? (Originally published New Zealand Law Journal, July 2006)," online: <<http://www.nigeldunlop.co.nz/WhereToNow.html>> (last accessed: 20 June 2010).

<sup>286</sup> *Moge v. Moge*, note 72.

<sup>287</sup> Regarding the public value of adjudication, see also Owen Fiss, "Against Settlement" (1984) 93 Yale L.J. 1073.

<sup>288</sup> Hardcastle, note 284 ;Daniel W. Shuman, "The Role of Mental Health Experts in Custody Decisions: Science, Psychological Tests, and Clinical Judgment" (2002) 36 Fam. L.Q. 135.

<sup>289</sup> Smart *et al.*, *Residence and Contact Disputes, Vol. 1*, note 282 at 40.

<sup>290</sup> *Ontario Civil Legal Needs: Quantitative Research*, note 59 at 49.

<sup>291</sup> Harris, note 189 at 36.

<sup>292</sup> Harris, note 189.

<sup>293</sup> A 2007 article suggested typical costs of \$1500-\$6000 for a social worker assessment, and \$3,000 to \$20,000 or more for a psychologist assessment. (Nicholas Bala, *Mohan, Assessments & Expert Evidence: Understanding the Family Law Context. (Queen's Faculty of Law Legal Studies Research Paper Series, Working Paper No. 07-02)* (Kingston, Ontario: Social Science Research Network, 2007), online: Social Science Research Network <<http://ssrn.com/abstract=989761>> (last accessed: 20 June 2010) at 25. Online: Social Science Research Network, <http://ssrn.com/abstract=989761>).

<sup>294</sup> Above, II. A. Economic Vulnerability of Canadian Families.

<sup>295</sup> *Table 1-7: Median market income by selected family types — Ontario (2007 figures)* (Ottawa: Statistics Canada, 2009), online: Statistics Canada <<http://www.statcan.gc.ca/pub/75-202-x/2007000/t163-eng.htm>> (last accessed: 20 June 2010).

<sup>296</sup> The 2007 figure was multiplied by 1.009911632<sup>2</sup> to reflect two years of the average 1998-2007 income growth.

<sup>297</sup> Sauvé, note 61 at 12.

<sup>298</sup> See section II. B. Sacrifices in Earning Potential Undertaken in Intact Families, above.

<sup>299</sup> McMurtry *et al.*, note 2 at 42.

<sup>300</sup> Diebel, note 277.

<sup>301</sup> *Ontario Civil Legal Needs: Quantitative Research*, note 59 at 46.

<sup>302</sup> See notes 185 and 186, above.

<sup>303</sup> *Geremia v. Harb*, [2008] O.J. No. 1716, 54 R.F.L. (6th) 274, 90 O.R. (3d) 185.

<sup>304</sup> Schepard, note 53 at 105.

<sup>305</sup> Lassonde, note 128. One child asked why a single-line email from a lawyer cost that child's parent \$100.

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<sup>306</sup> Noel Semple, "The Silent Child: A Quantitative Analysis of Children's Evidence in Canadian Custody and Access Cases" (2010) 29 C.F.L.Q. 1 at 13.

<sup>307</sup> Ronda Bessner, *The Voice of the Child in Divorce, Custody and Access Proceedings* (Ottawa: Department of Justice (Canada), 2002), online: Department of Justice (Canada) <[dsp-psd.communication.gc.ca/Collection/J3-1-2002-1E.pdf](http://dsp-psd.communication.gc.ca/Collection/J3-1-2002-1E.pdf)> (last accessed: 20 June 2010) at 56; Nicholas Bala, "Child Representation in Alberta: Role and Responsibilities of Counsel for the Child in Family Proceedings" (2006) 43 Alta. L. Rev. 845; Pearson and Gallaway, *For the Sake of the Children*, note 54 at Chapter 2, Section B.

<sup>308</sup> Interview with Dr. A, a Toronto psychiatrist who regularly conducts child custody and access assessments. February 4, 2010.

<sup>309</sup> Semple, "The Silent Child" note 306.

<sup>310</sup> Bala, *Mohan, Assessments & Expert Evidence*, note 293 at 36.

<sup>311</sup> Brownstone, note 274 at 12; Emery, Sbarra and Grover, "Divorce Mediation: Research and Reflections," note 117 at 35; Freeman, note 8 at 104; Hardcastle, note 284 ;at 66; Janet Weinstein, "And Never the Twain Shall Meet: The Best Interests of Children and the Adversary System" (1997) 52 U.Miami L.Rev. 79; Pruett and Jackson, "Lawyer's Role," note 230.

<sup>312</sup> Schepard, "Public Health Perspective," note 53 at 95 and 105; Doolittle *et al.*, note 53 at 426 and 430; Kelly and Emery, "Children's Adjustment Following Divorce: Risk and Resilience Perspectives," note 53 at 353.

<sup>313</sup> 231 of the 288 judges received this amount; 21 judges were paid more than this amount and 36 were paid less. The average total remuneration of all OCJ judges was \$246,653.35. (Ontario Ministry of Finance, *Disclosure for 2009 under the Public Sector Salary Disclosure Act, 1996: Judiciary* (Toronto: Queen's Printer for Ontario, 2010)).

<sup>314</sup> *Judges Act.*, R.S., 1985, c. J-1, ss. 12(d) and 25.

<sup>315</sup> Judicial Compensation and Benefits Commission, *Final Report And Recommendations Of The Third Quadrennial Commission* (Ottawa: Judicial Compensation and Benefits Commission, 2008), online: Judicial Compensation and Benefits Commission <<http://www.quadcom.gc.ca/Media/Pdf/2007/RapportFinalEn.pdf>> (last accessed: 20 June 2010) at 25 and FN78.

<sup>316</sup> This definition is harmonious with the first two definitions of the word "administration" in *Black's Law Dictionary*, 7<sup>th</sup> Ed: "1. The management or performance of the executive duties of a government, institution, or business. 2. In public law, the practical management and direction of the executive department and its agencies." (Henry Campbell Black and Bryan A. Garner, *Black's law dictionary*, 7th ed. (St. Paul, MN: West Publishing, 1999) at 44. )

<sup>317</sup> Rogerson and Thompson, *Spousal Support Advisory Guidelines (Final Version)*, note 69.

<sup>318</sup> *Federal Child Support Guidelines*, P.C. 1997-469.

<sup>319</sup> *Federal Child Support Guidelines*, note 318 at s.9 and s.4.

<sup>320</sup> *Federal Child Support Guidelines*, note 318 at s. 7.

<sup>321</sup> *Federal Child Support Guidelines*, note 318 at ss. 16 to 19 and Schedule III.

<sup>322</sup> *Family Law Rules*, note 166, Rule 17(8)(b).

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- <sup>323</sup> Ontario Ministry of Community and Social Services, "About the Family Responsibility Office," online: <<http://www.mcscs.gov.on.ca/en/mcscs/programs/familyResponsibility/>> (last accessed: 20 June 2010).
- <sup>324</sup> Ontario Ministry of Community and Social Services, note 323.
- <sup>325</sup> *FLA*, note 23 s. 35
- <sup>326</sup> *Family Responsibility and Support Arrears Enforcement Act 1996 (Ontario)*, S.O. 1996, c. 31, ("FRSAEA"), s. 1(1): definition of "support order."
- <sup>327</sup> *FRSAEA*, note 326.
- <sup>328</sup> *FRSAEA*, note 326, Part V.
- <sup>329</sup> *FRSAEA*, note 326, Part VI.
- <sup>330</sup> Ministry of Community and Social Services (Ontario), "FRO Facts: How the Program Works," online: <<http://www.mcscs.gov.on.ca/en/mcscs/programs/familyResponsibility/factSheets/howProgramWorks.aspx>> (last accessed: 20 June 2010).
- <sup>331</sup> Ministry of Community and Social Services (Ontario), "Good Parents Pay," online: <[www.goodparentspay.com](http://www.goodparentspay.com)> (last accessed: 20 June 2010)
- <sup>332</sup> *FLA*, note 23, 33(3).
- <sup>333</sup> *FLA*, note 23, s. 39.1.
- <sup>334</sup> Robinson, note 106.
- <sup>335</sup> Statistics Canada, *Maintenance Enforcement Programs in Canada: Description of Operations, 1999/2000, Catalogue no. 85-552-X* (Ottawa: Statistics Canada, 2002), online: Statistics Canada <<http://dsp-psd.pwgsc.gc.ca/Collection-R/Statcan/85-552-XIE/0010085-552-XIE.pdf>> (last accessed: 20 June 2010).
- <sup>336</sup> Statistics Canada, note 335.
- <sup>337</sup> Paul Robinson, *Child and Spousal Support: Maintenance Enforcement Survey Statistics; Catalogue no. 85-228-X* (Ottawa: Statistics Canada, 2009), online: Statistics Canada <[http://dsp-psd.pwgsc.gc.ca/collection\\_2009/statcan/85-228-X/85-228-x2010000-eng.pdf](http://dsp-psd.pwgsc.gc.ca/collection_2009/statcan/85-228-X/85-228-x2010000-eng.pdf)> (last accessed: 20 June 2010) at 7.
- <sup>338</sup> *Divorce Act*, note 7 at 25.1 (1)(b).
- <sup>339</sup> Department of Justice (Canada), "Inventory of Government-based Family Justice Services: Support Recalculation Services," online: <<http://canada.justice.gc.ca/eng/pi/fcy-fea/lib-bib/tool-util/apps/fjis-rsgjf/sch-rch.asp?type=6>> (last accessed: 20 June 2010).
- <sup>340</sup> Justice and Attorney General (Alberta), "Child Support Recalculation Program," online: <[http://justice.alberta.ca/programs\\_services/families/recalculation/Pages/default.aspx](http://justice.alberta.ca/programs_services/families/recalculation/Pages/default.aspx)> (last accessed: 20 June 2010).
- <sup>341</sup> Dena Bonnet, "Recalculating D.B.S.: Envisioning a Child Support Recalculation Scheme for Ontario" (2007) 23 Can. J. Fam. L. 115; IHRD Group, *Research Report: Family Justice Services Western Final Evaluation*: Department of Justice Canada, online: Department of Justice Canada <[http://www.justice.gc.ca/eng/pi/fcy-fea/lib-bib/rep-rap/2005/2004\\_8/p1.html](http://www.justice.gc.ca/eng/pi/fcy-fea/lib-bib/rep-rap/2005/2004_8/p1.html)> (last accessed: 20 June 2010).

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- <sup>342</sup> *Child Support Service Regulations (Newfoundland)*, N.L.R. 31/07, under the *Family Law Act*.
- <sup>343</sup> IHRD Group, note 341.
- <sup>344</sup> IHRD Group, note 341 at 33.
- <sup>345</sup> IHRD Group, note 341 at 54.
- <sup>346</sup> *Divorce Act*, note 7 at 25.1(1)(a).
- <sup>347</sup> Department of Justice (Canada), "Inventory of Government-based Family Justice Services: Support Establishment Services," online: <<http://canada.justice.gc.ca/eng/pi/fcy-fea/lib-bib/tool-util/apps/fjis-rsgjf/brows-fure.asp?type=5>> (last accessed: 20 June 2010).
- <sup>348</sup> *An Act To Facilitate The Payment Of Support*, R.S.Q., c. P-2.2, ss.2-3.
- <sup>349</sup> *An Act To Facilitate The Payment Of Support*, note 348 at s. 36.
- <sup>350</sup> The frequency with which family lawyers encounter enforcement issues is reflected in the practitioner-oriented scholarship, e.g. Ann C. Wilton and Judy S. Miyauchi, *Enforcement of family law orders and agreements : law and practice* (Agincourt, Ont.: Carswell, 1989+ (looseleaf)).
- <sup>351</sup> Law Reform Commission of Canada, *Working Paper 1, The Family Court* (Ottawa: Law Reform Commission of Canada, 1979) at 50-51.
- <sup>352</sup> Robinson, *Profile of Child Support Beneficiaries* note 106.
- <sup>353</sup> Robinson, *MEP Survey Statistics* note 337.
- <sup>354</sup> Office of the Auditor General of Ontario, *Family Responsibility Office: Follow-up* (Toronto: Auditor General of Ontario, 2005), online: Auditor General of Ontario <[http://www.auditor.on.ca/en/reports\\_en/en05/403en05.pdf](http://www.auditor.on.ca/en/reports_en/en05/403en05.pdf)> (last accessed: 20 June 2010) at 304.
- <sup>355</sup> Millar, note 79.
- <sup>356</sup> Millar, note 79, Chapter 5.
- <sup>357</sup> Statistics Canada, "Survey of Labour and Income Dynamics (SLID)," online: <<http://www.statcan.gc.ca/cgi-bin/imdb/p2SV.pl?Function=getSurvey&SDDS=3889&lang=en&db=imdb&adm=8&dis=2>> (last accessed: 20 June 2010).
- <sup>358</sup> Millar, note 79 at 104.
- <sup>359</sup> See IV. B. 3. Status Quo in Other Provinces, above.
- <sup>360</sup> Millar, note 79 at 119.
- <sup>361</sup> See above.
- <sup>362</sup> Shelley Kierstead, *Retroactive Child Support: Benefits and Burdens* (Ottawa: Children and Youth Section Department of Justice Canada Family, 2009), online: Department of Justice <<http://www.justice.gc.ca/eng/pi/fcy-fea/lib-bib/tool-util/topic-theme/rcs-par/pdf/rcs-par.pdf>> (last accessed: 20 June 2010).
- <sup>363</sup> See also Kierstead, *Retroactive Child Support: Benefits and Burdens*, note 362; Bonnet, note 341.

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<sup>364</sup> Andre Marin, *It's All in the Name* (Toronto: Ombudsman Ontario, 2006), online: Ombudsman Ontario <[http://www.ombudsman.on.ca/media/3286/its\\_all\\_in\\_the\\_name\\_20060809.pdf](http://www.ombudsman.on.ca/media/3286/its_all_in_the_name_20060809.pdf)> (last accessed: 20 June 2010).

<sup>365</sup> Marin, note 364 at para 28.

<sup>366</sup> Marin, note 364 at para 40.

<sup>367</sup> Marin, note 364 at paras 41-47.

<sup>368</sup> Marin, note 364 at para 5.

<sup>369</sup> For example, despite FRO's extensive powers, \$1.3 billion in Ontario family support arrears remained outstanding in 2005. (Office of the Auditor General of Ontario, at 304). See above, at page.

<sup>370</sup> Provincial Auditor, *3.03–Family Responsibility Office, in 2003 Annual Report*, note 234 at 70.

<sup>371</sup> Office of the Auditor General of Ontario, at 305.

<sup>372</sup> Trevor Farrow, "Public Justice, Private Dispute Resolution and Democracy " in Ronalda Murphy & Patrick A. Molinari eds., *Doing Justice: Dispute Resolution in the Courts and Beyond* (Ottawa: Canadian Institute for the Administration of Justice 2009) 301 at section IX.A; Fiss, note 287.

<sup>373</sup> 1985, c. 4 (2nd Supp.), at s. 15.

<sup>374</sup> See above, at footnotes 319 and 320.

<sup>375</sup> e.g. *Constitution Act, 1867* at s. 92(13): "In each Province the Legislature may exclusively make Laws in relation to ... Property and Civil Rights in the Province."