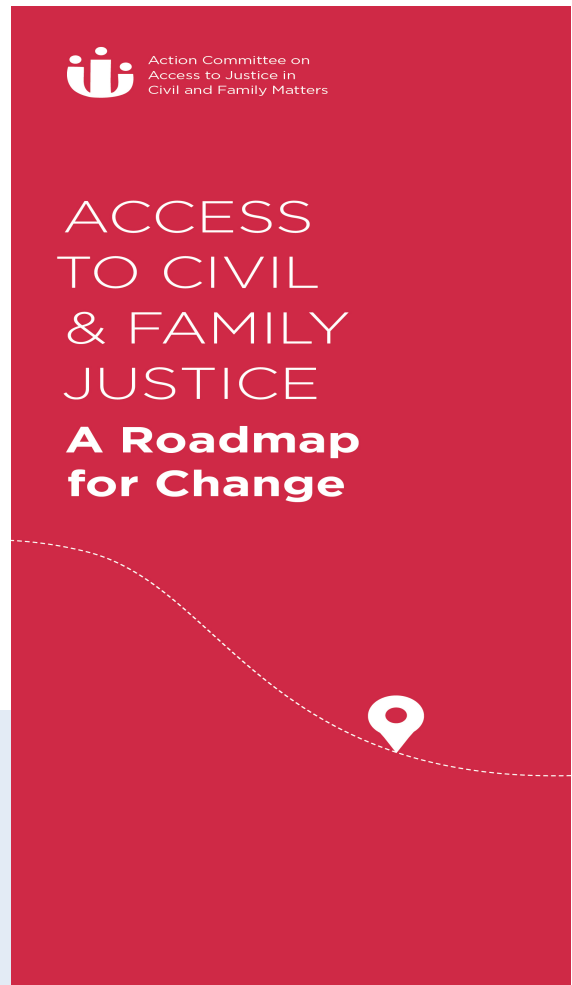


A New Approach to the Law on Domestic Relations: Social Responsibility & the Practice of Family Law

CALT 2014 Conference
University of Manitoba
Sunday June 8, 2014 **1:45 - 3:15**

Justice Thomas Cromwell, ^{...}Supreme Court of Canada
M. Jerry McHale QC, University of Victoria
John-Paul Boyd, Canadian Research Institute for Law and the Family

I. The A2J Overview



Access to Civil and Family Justice - Context

- The renewed focus on Access to Justice
- The Work of the Action Committee
- The Final Report
- Roll out and Reaction
- Where do we go from here?



Action Committee on Access to
Justice in Civil and Family Matters

Comité d'action sur l'accès à la
justice en matière civile et familiale

The renewed focus on A2J

- The renewed focus
 - Legal aid
 - Self-represented litigants
 - Cost of legal services
 - Research on unmet legal needs
- Attention from CJC; CBA; Self Represented Litigants Project

The Action Committee on Access to Justice in Civil and Family Matters

- Established in 2008 at the invitation of Chief Justice McLachlin
- High level, broadly representative membership
- Identified four priority areas and produced Working Group Reports: Court Processes Simplification; Family Justice; Access to Legal Services; Prevention Triage and Referral

Final Report - October 2013

The final report has three objectives:

- A. To promote a broad understanding of **what we mean by access to justice** and of the **access to justice problem** facing our civil and family justice system
- B. To identify and promote **a new way of thinking** to guide reform
- C. To provide a **roadmap for change**

What is *Access to Justice*?

- “We need a system that provides the necessary institutions, knowledge, resources and services to avoid, manage and resolve civil and family legal problems and disputes.”
- “The formal system is, of course, important. But a more expansive, user-centered vision of an accessible civil and family justice system is required.”

The Problem: *Gaps in Access to Justice*

- “There is a serious access to justice problem in Canada. The civil and family justice system is too complex, too slow and too expensive. It is too often incapable of producing just outcomes that are proportional to the problems brought to it or reflective of the needs of the people it is meant to serve.”
- Major change is needed

The “Why” Question - The “Implementation Gap”

- Recognition that change is needed?
- Culture shift
- “... [T]he system continues to lack coherent leadership, institutional structures that can design and implement change and appropriate coordination to ensure consistent and cost effective reform.”
- Innovation capacity
- Sustainable funding

Culture Shift - Principles to Guide Change

- Put the **Public First**
- **Collaborate** and **Coordinate**
- **Prevent** and **Educate**
- **Simplify**, **Make Coherent**, **Proportional** and **Sustainable**
- Take **Action**
- Focus on **Outcomes**

Nine Points on the Road Map Innovation Goals

- Refocus on everyday legal problems
- Access to essential legal services
- Multi-service centres
- Family services

Nine points on the Roadmap Institutional and Structural Goals

- Local and National Access to Justice
Implementation Mechanisms
- Legal Education
- Innovation Capacity

Nine Points on the Road Map Research and Funding Goals

- Research to support evidence-based policy making
- Coherent, Integrated and Sustained Funding Strategies

Roll Out and Reaction

- Meetings across Canada in October and November
- January 2014 Colloquium
- More meetings in March and April of 2014
- Reaction
- Successor to Action Committee

What is Happening? (1)

- The LSUC initiative – passed in February 2014
- Creates framework to ensure A2J objectives integrated into LSUC core business and planning
- Systematic and coordinated A2J objectives and work plans in regulatory context
- Standing forum for Ontario collaboration

What is Happening? (2)

- Nova Scotia – formation of A2J Coordinating Committee
- Barristers' Society – detailed A2J action plan with goals, timelines and responsibilities

What is Happening? (3)

- Manitoba – formation of A2J Coordinating Committee
- Alberta – “Reforming the Family Justice System in Alberta”
- adoption of the NAC PTR and Family Justice reports
- Saskatchewan – Dean’s Forum Process
- British Columbia – Justice Summit; West Coast LEAF, [Access to Justice Commission](#)
- Newfoundland and Labrador
- Quebec



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***Meaningful Change for Family
Justice:
Beyond Wise Words***

**Final Report of the Family Justice Working Group
of the
Action Committee on Access to Justice in Civil
and Family Matters**

April 2013

**II. Report of the NAC Family Justice
Working Group**

Problems

1. unmet family legal need

- **Scale**

- “Family Law is the most significant unmet legal need in BC” (BCLF)
- family relationship breakdown is primary reason most Canadians enter the justice system (NAC Report)
- divorce rate: 41% (70,000 / year)
- 35% of civil court filings
- 56% of final orders
- 56% involve dependent children

- **Self Represented Litigants:**

- unaffordable and inaccessible courts
- shrunken legal aid subsidies
- “the numbers are extraordinary” ... 57% (→ 80%?.,

- **Consequences**



2. unique nature of family disputes

- Not just another species of civil dispute
- Not legal problems with social aspects, but social problems with legal aspects
 - family conflict often driven by emotional not legal issues
 - legal contest becomes a proxy for unmanaged emotion
 - violence
 - children: vulnerable, unrepresented parties
 - need for viable, post-dispute working relationship
 - family issues ill-suited to polarizing tendencies of adversarial DR
 - parties deeply invested
 - “family problems are amongst the most difficult, complicated and time-consuming to resolve”

3. Structural challenges

- i.e. challenges embedded with the design, administration and operation of the justice system
- “If we were to the design of family justice system from scratch, it would look nothing like system we have”
 - adversarial values are deeply embedded making it hard for CDR to get traction at scale
 - complex procedures designed for experts, used by neophytes
 - fiscal austerity and funding shortfalls
 - family law is the poor cousin in the justice system
- “While hundreds of thousands of families are turning to the justice system to help them resolve these complex and important problems, there is almost universal recognition system is failing them.” (NAC FLWG)

Response: a mountain of family law reports

- multiple reports / 30 +years
- across jurisdictions
 - identical problems
 - consistent analysis
 - consistent recommendations
 - consistent results
- many proven innovations
- no shortage of good ideas
- we know what to do



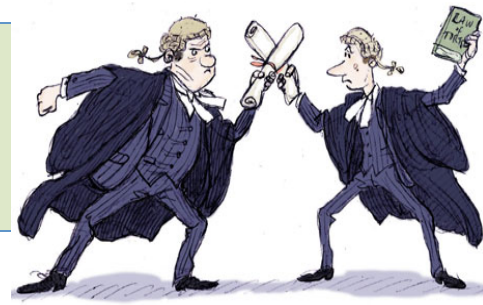
BUT... the implementation gap



MIND THE GAP

- = the gap between what we know and what we do
- “the fundamental systemic shifts that have been called for have not been achieved...” (Ont. Law Commission – 2012)
- “what are we to make of the fact that in spite of the many insightful recommendations, contemporary reports continue to express the emphatic concern about access to family justice and call for “drastic change”? (NAC FLWG)
- wise advice is not enough
 - under implementation: neither deep enough nor at scale
 - CDR, integrated front-end services, judicial processes and roles
 - resources
 - culture: inertia, resistance, self-interest

law school and culture change



- Adversarialism is deeply embedded
- *“...effective long term reform ... may rely as much on changing the culture of legal practice as it does on procedural or structural change to the litigation system.” Australian Law Reform Commission*
- FLWG Part 7: “Recommendations Related to Institutional Culture Change”
- Law school:
 - a primary site of acculturation and initiation
 - an indispensable role in change
- Integrating non-adversarial knowledge, skills and values deeply into the (entire) curriculum, into the pedagogy and into the school culture

curricula that prepare students for the realities of contemporary family law practice

Recommendation 2: That changes to the family law curriculum be accompanied by a greater emphasis on CDR skills and knowledge across the entire law school curriculum.

Students must learn to:

- conceive of the “family justice system” as including more than court
- see more than the presenting legal issues
- see and frame in terms of needs and interests, as well as rights
- be informed and skilled in both adversarial & collaborative DR theory and processes
- value problem solving and manage cases to resolution, not trial
- work skillfully and constructively in a multi-disciplinary environment
- understand dynamics of human and family behaviour
- be innovative about procedure

- (traditional emphasis on law and analytic rigor not displaced or diminished) → a more demanding path

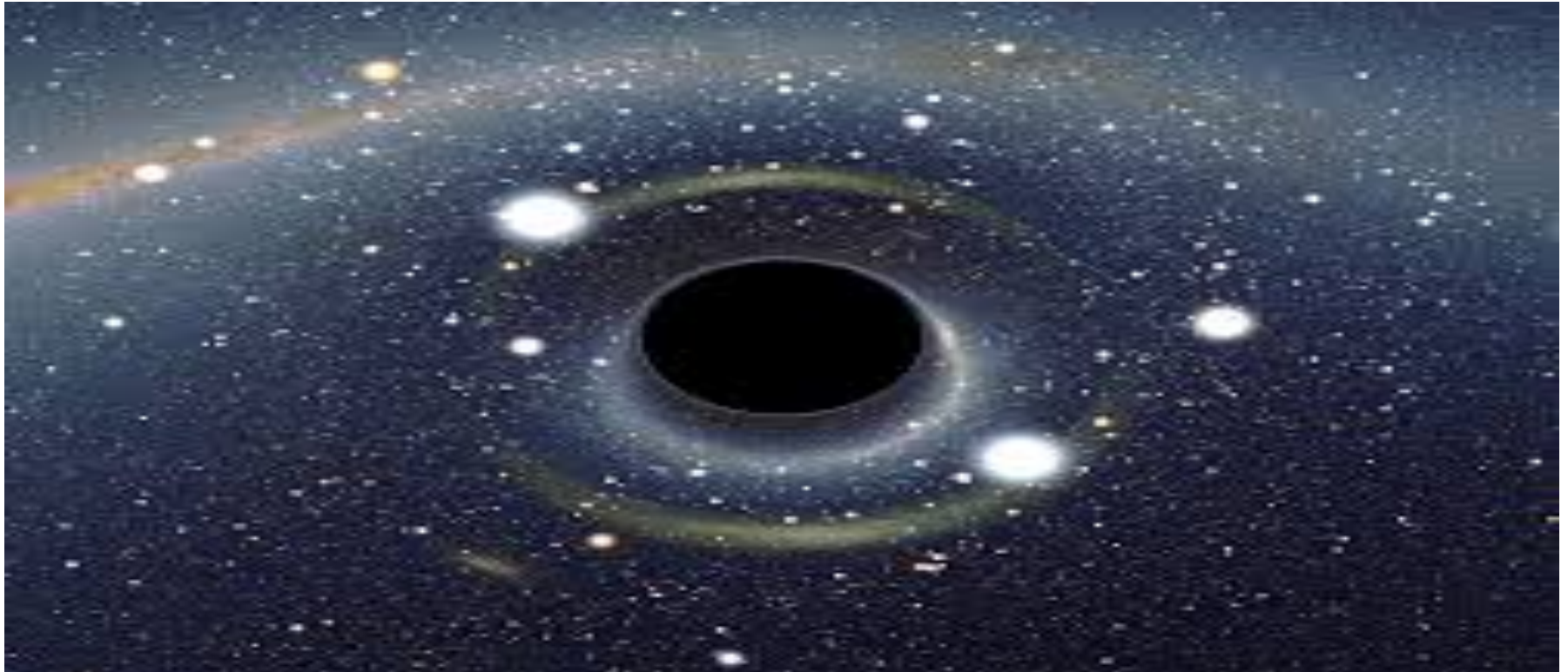
Recommendation 3: That Canadian law schools hire and develop more full-time professors with an interest in family law.

- Over the past twenty years, family law has lost its place in most Canadian law schools



We need to fill the Data Black Hole

Recommendation 33: That universities, ministries of justice, judicial and bar organizations, and non-government organizations cooperate in generating more and better empirical research into the operation and administration of the family justice system, particularly with respect to access to family justice.





III. Social responsibility, family law and the academy

Family Law and Society

- Basic socioeconomic unit, fundamental social building block
- Nuclear family protected by the laws of most major Western religions and governments
 - Code of Ur-Nammu, Mesopotamia, 2100 BCE
 - Code of Hammurabi, Babylon, 1800 BCE
 - Mishnah, Galilee, 190 CE
 - Codex Canonum, Rome, 525 CE
 - Corpus Juris Civilis, Rome, 535 CE

Family Law and Society

- Family, children critical to economic success in pre-industrial agrarian society
- Matrimonial torts largely designed to protect family unit from interference
 - Jactitation of marriage
 - Breach of promise to marry
 - Ravishment of a spouse
 - Harboring a spouse
 - Loss of consortium
 - Criminal conversation

Family Life in Canada

- Canadian family types according to 2011 census
 - 39.7% married
 - 8.6% unmarried partners
 - 39.5% single
- Canadian divorce rate 40.7% in 2008
- In 2011, 21.5% of children lived in lone-parent families, majority lived with a parent who was divorced, separated or abandoned



Family Breakdown in Canada's Courts

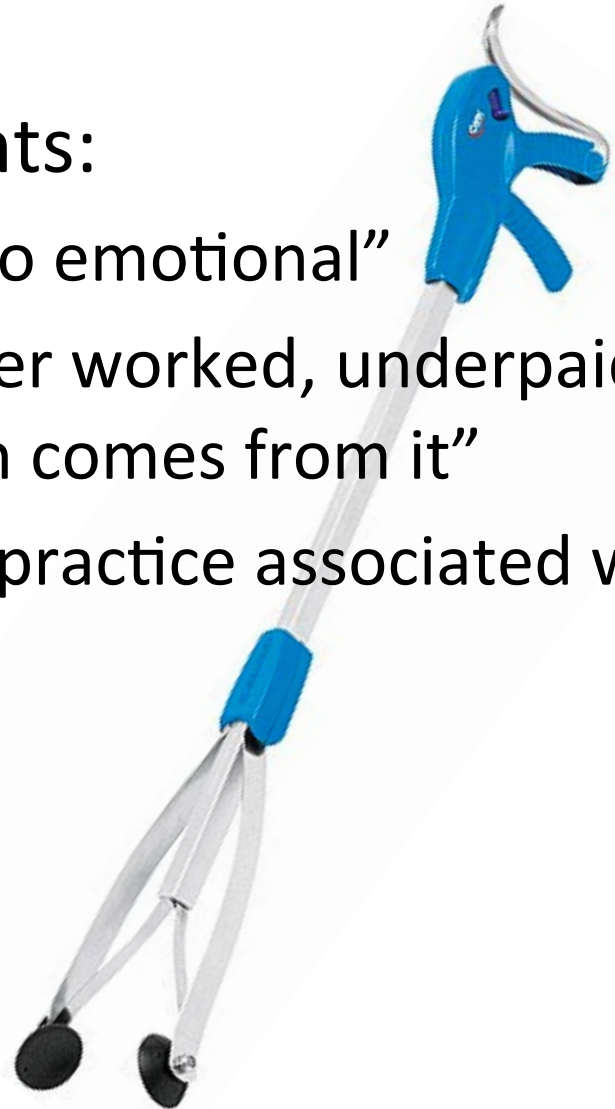
- Family law matters make up 34% of all civil court cases in 2012/2013, twice as many as personal injury claims in second place
- Family law matters accounted for more than half of all court events; 11.1 events per family file versus 6.4 court events per general civil file
- Family law matters accounted for 56% of all civil judgments

Family Law in Practice

- Fairly common area of practice
- 15.9% of 8,905 practicing members in Alberta in 2013 practiced at least some family law; of those people:
 - 14.8% did nothing but family law
 - 20.7% spent 90%+ of their time on family law
 - 28.5% spent 80%+ of their time on family law
 - 31.9% spent 75%+ of their time on family law

Family Law at Law School

- Views of individual students:
 - “messy,” “depressing,” “too emotional”
 - “an area where you are over worked, underpaid and little or no gratification comes from it”
 - “an ugly and nasty area of practice associated with a great deal of stress”
 - “worse than criminal law”
 - “emotionally draining”
 - “overly litigious”



Family Law at Law School

- Popular opinion of practice:
 - “not highly regarded, probably because of the pay... business law people don’t seem to respect it”
 - “peers think I’m crazy for wanting to go into this area”
 - “generally seen as not financially rewarding or prestigious”
 - “it’s not really even on the radar, it’s a field we don’t even talk about”



Family Law at Law School

- Popular opinion of practice and family law counsel:
 - “family law is not ‘black letter’ enough to be included in UBC law school’s core mandatory first year courses ... curious that real property is one of those mandatory courses”
 - Family practitioners are “bottom feeders” who choose their practice area “because their grades and intellects do not meet the standards of other practice areas”

Family Law at Law School

- Why?
 - Rarely a core course
 - Lack of exposure to practice
 - Lack of exposure to practitioners
 - Lack of articling, mentoring and jobs
 - Not promoted as worthwhile area of endeavour



Family Law in Practice

- Commonly complained about area of practice
 - 17% of complaints to LSUC in 2012
 - 24.4% of complaints to LSBC in 2007, 25.7% in 2006 and 29.7% in 2005
 - 40% of complaints to LSS in 2006
 - 22.2% of complaints to NSBS
- Practice area with most complaints in BC, Saskatchewan and Nova Scotia

Changing How We Teach Family Law

- Important area of practice; addresses critical and widespread social need and vulnerability
- Common practice area for graduates; even non-practitioners will have family law questions to answer
- Law schools' obligation to their communities
- Promotes social justice
- Aids court administration



Changing How We Teach Family Law

- Interdisciplinary nature of practice
 - Sequelae of separation
 - Developmental psychology
 - Age-appropriate parenting plans
- Importance of listening skills, empathy
- Non-adversarial dispute resolution processes; a rehabilitative, problem-solving role
- Communicate enthusiasm

IV. The role of the academy

Access to Justice: the Role of the Academy

- Teaching
 - Access to justice as a topic
 - Consensual dispute resolution and related skills
 - Substantive knowledge matched to legal needs
 - Innovation in legal services

Access to Justice: the Role of the Academy

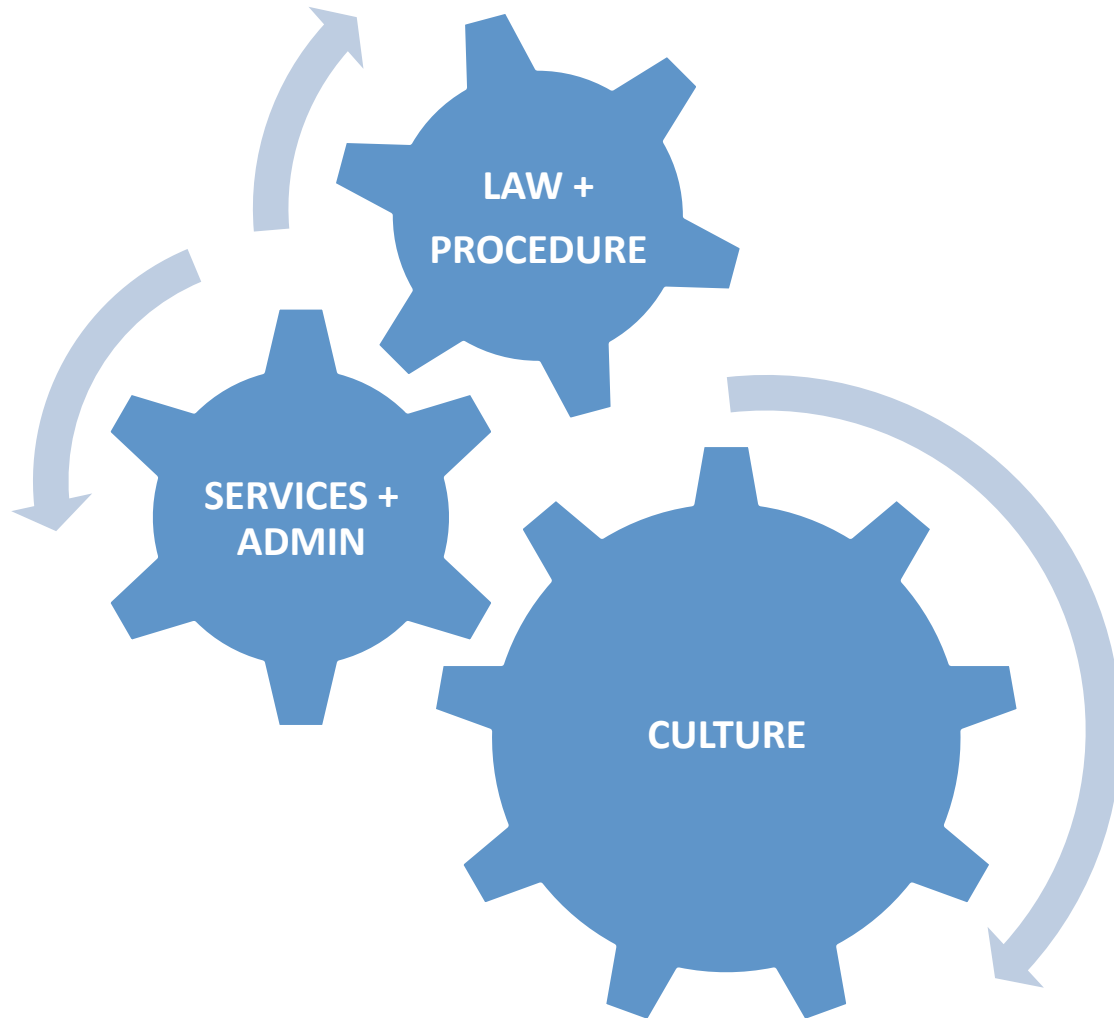
- Research
 - National access to justice research agenda
 - Metrics – evaluation
- Service
 - Legal advice and assistance
 - Pro bono

questions and discussion



EXTRA SLIDES

33 FJWG recommendations in 3 general areas



1. Institutional Culture Change

- changes to law school curricula
- better align codes of conduct and best practices with unique demands of family law
- enhanced public education about CDR
- offer families an array of DR processes
- require participation in a single non-judicial CDR session

2. Services and Administration

- Allocate the resources or re-balance existing resources to expand early, front-end, coordinated information, assistance and triage services
- Mandatory information sessions for parents and SRLs
- Increased legal aid funding
- Expand reliance upon properly trained and supervised paralegals, law students, articling students and non-lawyer experts
- Significantly enhance funding for all family justice programs and services

3. Court Organization, Procedures & Substantive Law

- Unified family courts for all of Canada
- Simplified procedures and forms
- Specialized family court judges
- One family, one judge
- Enhanced pre-trial case management
- Explore less adversarial /inquisitorial hearing models
- Explore access enhancing potential of technology
- Statutory support for CDR
- Simplified substantive law – more guidance by way of rules and presumptions, where appropriate
- More empirical research

reference materials



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- ***Meaningful Change for Family Justice: Beyond Wise Words***
Final Report of the Family Justice Working Group (April 2013)
- ***Access to Civil & Family Justice: A Roadmap for Change***
Final Report of the Action Committee (October 2013)
- ***Family Justice Reform: A Review of Reports and Initiatives***
Background Report Prepared by Erin Shaw (April 15, 2012)
- link from <http://www.cfcj-fcjc.org/collaborations>