

SUBMISSION OF THE ADR INSTITUTE OF ONTARIO

In consultation with

**Family lawyers, ADR practitioners, and St Stephen's
Community Mediation Service**

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**Memo re Meeting with Attorney General Chris Bentley
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Representatives of the ADR Institute of Ontario, in consultation with family lawyers, ADR practitioners and St. Stephen's Community Mediation Service appreciate the opportunity to discuss three important issues:

- 1. Family Law Reform in Ontario;**
- 2. The Civil Justice Review Project and specifically the November 22, 2007 summary of the Osborne Report; and**
- 3. Apology Legislation in Ontario.**

1. FAMILY LAW REFORM IN ONTARIO

Background Summary

For many years, there has been widespread agreement across Canada and internationally that Family Law requires a very different approach from other forms of civil litigation. This is a time of crisis and reorganization for families. They require support and services to ease the transition, encourage cooperation and focus on the best interests of children. We recommend a fundamental shift from funding an adversarial litigation system to funding a system focused on early intervention, education, mediation and cooperative settlements between parents.

The goal would be to encourage parental decision-making within a legal framework that emphasizes the best interests of children. We suggest that this shift can be accomplished by simplifying the Family Court structure, providing relevant information and appropriate referrals at the first opportunity, and ensuring that family laws are clear, easily understood and fair.

Families at a time of crisis, either due to separation and divorce or child welfare, would benefit from information about their rights and responsibilities, the needs of their children and the various services and professionals who could best meet these needs. Participants are often unaware of dispute resolution options other than traditional litigation. There are currently many non adversarial options, such as mediation, assessments, parent education, parenting coordination, circle processes, med-arb, arbitration and collaborative practice which should become the primary framework for resolving family matters. Early education and referral to appropriate dispute resolution options outside of the courts would greatly reduce the current overburdened court system.

Not all families are appropriate or ready for a cooperative approach. A small percentage (less than 5%), require a family court system with specialized resources. These high conflict cases or those involving family violence require

early identification, special procedures, and programs, and should be heard by judges specially trained in family law and domestic violence. Additional appropriately trained legal and other support staff should be put in place. We recommend more effective post trial systems to monitor the enforcement of court orders or agreements and to assist in the safe, timely and cost effective resolution of disputes.

SPECIFIC PROPOSALS:

i) Single Court for Family Matters: Unified Family Court

Constitutional issues have made the court system unnecessarily complex. In Ontario, there are three court systems hearing family matters (provincial court, superior court & Unified Family Court). In the 1970's the government created the first Unified Family Court in Hamilton, and if successful, had planned to expand this forum across the province. Several additional Unified Family Courts have been created, but without resolving the original issues: namely the appointment of judges and the provision of needed court based services. Unless family judges are appointed federally, couples must deal with a confusing mixture of family and superior courts to resolve their property, support and custody claims.

Seven provinces have Unified Family Courts and one is proposed in British Columbia. The B.C. Justice Review proposes one court with authority to deal with all family law issues AND adequate funding for the services needed to support families in a cooperative model of dispute resolution. This is the model we recommend provided there is adequate funding for the services that families need. Overall this proposal will result in a cost saving for families as well as the government, compared to the far more expensive litigation model.

ii) Family Intake, Information & Referral Service

Families need information about appropriate resources and family law requirements at a very early stage in their separation and reorganization. This information and referral to resources needs to be tailored to the particular needs of families. We propose a Family Intake Service that offers information through pamphlets, videos, a Family Information Session, the internet, telephone, resource packages relevant to specific needs, community based information kiosks, court-based professional consultants (including legal support services, mediators, and financial advisors).

The Family Support Intake service should include an early needs assessment and identification of high conflict or high risk couples (eg cases with restraining orders or allegations of family violence, substance abuse or serious mental illness). Guidelines for identifying and responding to domestic violence and high conflict should be developed to assist in making appropriate referrals to community resources and to earmark files for special court attention. Also each Court location should be associated with a Supervised Access and Exchange Centre.

iii) Family Information Session & Children of Divorce

The current Family Information Session should be introduced much earlier, prior to commencing litigation. Lawyers should be encouraged to refer clients to attend the FIS program at the first opportunity, when a client (or their spouse) decides to initiate a separation. Similarly mental health professionals and family doctors should be provided with referral information to discuss with their clients at an early stage, before family breakdowns become adversarial.

Any person who wishes to commence a family action should be required to attend a 3-hour FIS session before the first appearance, or as a pre condition to filing a court application. In cases where there is an urgent issue, such as a child kidnapping or an immediate need for support, the matter could be heard by a specially trained master, a supernumerary judge, or an experienced member of the Family bar. Currently couples who attend the FIS program are appreciative of the information, but express frustration that they are introduced to non adversarial options only after litigation has commenced. By this time considerable money has been spent to bring the court action and the parties are less receptive to cooperative options.

Also, there should be a second three-hour session for couples who are litigating custody or access issues. Several provinces require attendance at a “Parenting After Separation/Divorce” program that is well received by parents and increases the likelihood of a cooperative result. Litigants should appear at separate sessions. These sessions could be offered in the community provided there was oversight of the content by a recognized organization, such as the various Family Services Associations, the ADR Institute, OAFM or a professional body, such as the Ontario Psychological Association or the School of Social Work.

iv) Mediation Screening and Referral

While court based protections are needed for cases of violence and abuse, the focus of the system should be “front end loaded” for families to encourage cooperative problem solving. A key feature of such a system is a requirement that prior to litigating any family issue, particularly those involving children, both parents should be required to have one separate 2 hour meeting with the same mediator (court based or private) to discuss ADR options. The session would also be used to clarify the issues to be addressed and to screen for appropriateness for mediation or other non adversarial approaches (eg med-arb, circle process, arbitration or collaborative law). The result of this meeting should be a list of resources. This position should be staffed by a senior, experienced mediator.

The mediator would be required to submit a standardized form to the court verifying that the couple attended, indicating the options reviewed and any agreement as to the process the couple has chosen to resolve their issues. Clients should be encouraged to receive independent legal advice, with information about collaborative practice. In cases of domestic violence and fear

of violence, options such as legal advice, women's advocates, shelters, and judicial settlement conferences would be emphasized. Data could be compiled on the clients selecting various out of court options versus those being litigated.

A similar service is available in several provinces, including Quebec, New Brunswick, and recently in B.C. In each case this is considered to be such an important meeting, with the potential to divert thousands of cases from the court, that the province pays for several hours of this service. In Ontario, this could be created as a court-based service and/or the government could offer a financial voucher to both parties that they must use with a mediator of their choice. The mediator would see each party separately for the information/assessment session, applying the voucher toward the mediator's fees. Additional hours of mediation would be voluntary and with services provided for low income families using a sliding fee scale.

Mediators, arbitrators and collaborative lawyers should have to be members in good standing of a recognized organization with standards of training, a code of conduct and a complaints process. Examples are the ADR Institute, OAFM, Collaborative Practice Ontario, and Family Mediation Canada. These professionals should meet an agreed upon equivalent professional designation or credential within their respective organization. See attached designation chart as an example. Lists of credentialed Mediators, arbitrators etc. can be given to the parties at intake.

iv) Legal Aid

Legal aid for family cases also requires reform in light of the encouragement to resolve matters in a cooperative way. Instead of primarily funding litigation, legal aid should fund cooperation, in the form of collaboratively trained lawyers, mediators, family arbitrators, circle facilitators or parenting coordinators. The system could be altered to allow non adversarial professionals to receive certificates and report back to Legal Aid. For clients who fall within the financial guidelines set by legal aid, government funding for mediation should continue for 15 hours, with the ability to increase the number of hours upon a further application for those making constructive progress. Funds should be available for legal advice on a separate certificate, but the time required for legal involvement would be considerably reduced.

v) Specialized Judges & Continuity of Judge

Judges, especially in large urban centers are overwhelmed with cases, often brought by unrepresented litigants. Couples experience frustration and lost wages as their cases are repeatedly adjourned, often to a considerable variety of judges. We suggest that cases could be dealt with more efficiently and appropriately if the same judge heard the case at each appearance. This is especially helpful for high conflict and child protection cases. Data should be collected to determine if these high conflict cases require fewer court appearances with this approach.

vi) Simplified Forms

Court processes and filing forms are cumbersome, confusing to the large number of unrepresented litigants and those whose first language is not English or who have limited literacy. Forms should be designed to assist applicants in presenting the information necessary to clarify their claims. Checklists with clear explanations, guides on the internet, in booklets and in short video formats should be available in various languages. Staff should be available to answer questions in person, by telephone and on line to reduce the need for repetition and wasted court time.

vii) Costs & Filing Fees

In family cases, costs are not often awarded. We suggest costs be awarded in cases where participants bring unnecessary motions, or do not meet requirements such as financial disclosure, the prompt payment of support, etc in order to discourage adversarial approaches that are unwarranted. Also, court filing fees and marriage license fees should have a small increment added to finance the services needed for separating and divorcing families.

viii) Interpretation of Role of the Family Lawyer

Several sections of the Rules of Professional Conduct for Lawyers in the LSUC appear to establish conflicting principles that negatively impact family law practice. Specifically Rule 2.02 (2) and (3) encourages lawyers to resolve disputes and refer their clients to ADR options. However Rule 4.01 requires lawyers to “resolutely represent” their clients and establishes a duty to “raise fearlessly every issue”. It would be helpful to obtain an interpretation of the Role of the Lawyer as set out in these Rules as they ought to apply to Family Law. The goal should be to encourage family lawyers to adopt a collaborative approach unless this would not be appropriate.

ix) Clarify Regulations for Training of Family Arbitrators and Screeners of Domestic Violence

The Family Law Amendment Act Regulations do not clarify the training requirements for Family Arbitrators. The ADR Institute of Ontario has established the standard of an approved 40 hour Family Arbitration course in order to become a Certified Family Arbitrator. This is the standard we are recommending. The absence of a clear standard is creating confusion in the field.

The Regulations require a 14 hour course in screening for Domestic Violence to be attended by Family Arbitrators and those offering ILA to arbitration clients. This is appropriate. However the Regulations do not make it clear that those actually doing the screening have any training. This omission needs to be addressed.

2. CIVIL JUSTICE REFORM

Rule 77, Mandatory Mediation provides a cost effective and timely response for litigants in Ottawa and Windsor. In Toronto, changes made by Justice Winkler (as he then was) and incorporated into Rule 78 reduced the burden on Case Management in Toronto, largely created by requests for adjournments in personal injury and medical malpractice cases, which often do require longer timelines. However, the unintended consequence of the Rule was to decimate public access to quick, affordable, Mandatory Mediation for cases such as wrongful dismissal, contract disputes etc.

Recommendation 44 of the Osborne Report states as follows - The Civil Rules Committee should consider the future role of rule 77 in the province. Relevant to this investigation would be any plans to expand the operation of rule 77, an assessment of the current operation of rule 77 in Windsor and Ottawa as an effective time- and cost-savings mechanism, the evaluation of rule 78 in Toronto, and alternative case management and non-case management models that may possibly be used to replace rule 77 (e.g., the ordinary procedure, rule 78, other models)

We support the expansion of Rule 77 across the province and an evaluation of Rule 78 in Toronto. We agree that the timelines for personal injury and medical malpractice cases should be extended to reflect the realities of these cases.

In addition, we recommend that the financial limit for small claims court cases be raised to \$20,000 limit to encourage a less formal and less expensive access to justice.

3. APOLOGY LEGISLATION

We support the introduction of Apology Legislation in Ontario.

Legislation that protects apologies as privileged and thus not at risk of being used subsequently in court can make it safe to apologize thereby encouraging earlier and less costly resolution of some disputes. Across the globe the introduction of apology legislation has been a somewhat recent development. Since the late 1980's, the "Safe Harbour" Model of apology legislation has been implemented in several Australian and US states. In Massachusetts, California, Texas, Florida, and several Australian states, including Victoria and Queensland, an expression of sympathy or regret is not admissible as evidence in litigation. In this model protection is not accorded to an apology that includes an admission of liability or fault.

On a more personal note, June Callwood's son Casey was killed by a drunk driver. Before she died, June told me that what continued to cause her anguish was that the driver was not permitted to say "I am sorry for your loss". She could

not understand why our legislation would not allow an act of human kindness and acknowledgement of loss. In June's memory, it would be a fitting birthday memorial to announce this legislation in her honour. Her birthday is June 2nd.

The movement for Apology legislation has also taken hold in Canada with the province of British Columbia being the first Canadian jurisdiction to introduce a law. The BC Apology Act took effect on 18 May 2006. This legislation adopts the more "Comprehensive" Model of apology legislation, similar to jurisdictions including Arizona, Colorado, Oregon and New South Wales, where not only expressions of sympathy and benevolence are protected but also fault-admitting apologies.

An apology is defined in the Act as "an expression of sympathy or regret, a statement that one is sorry or any other words or actions indicating contrition or commiseration, whether or not the words or actions admit or imply an admission of fault in connection with the matter to which the words or actions relate". The Act provides that an apology made by or on behalf of a person in relation to any civil matter does not constitute an admission of fault or liability by the person. Nor does an apology extend a limitation period. The Act further provides that the apology must not be taken into account in a determination of liability and must not be referred to or disclosed to a court, tribunal or arbitration.

The second Canadian jurisdiction to take initiative in this area is Saskatchewan. The Evidence Amendment Act received first reading in early November 2006 in the Saskatchewan Legislature and on May 17, 2007 received Royal Assent. The wording of the Act is identical to the BC Apology Act.

In Whitehorse, Bill No. 103, introducing an Apology Act received first reading on April 24, 2007. On October 29, 2007 the Apology Act received second reading in the Yukon Legislative Assembly. This Bill is also modeled on the legislation passed in British Columbia. As such it will allow corporations, government and individuals to offer an apology without fear of legal liability.

On November 8, 2007 the Apology Act received royal assent in the Manitoba legislature. The British Columbia legislation is serving as the model across Canada. The removal of the legal barriers to an apology would be a significant change in the moral, social and legal fabric of Ontario.

Also, experience in the U.S. in medical malpractice cases shows that the number and size of lawsuits actually declines when doctors and hospitals apologize.

We respectfully submit these proposals and look forward to a response. We would like to work with your Ministry to more fully develop these proposals.