Law Reform Commission of Canada

Commission de réforme du droit du Canada

the family court

Working Paper 1

Reform Commission of Canada

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the family court

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NOTICE

This *Working Paper* presents the views of the Commission at this time. The Commission's final views will be presented later in its Report to the Minister of Justice and Parliament, when the Commission has taken into account comments, criticisms and suggestions received in the meantime from the public.

The Commission would be grateful, therefore, if all comments could be sent in writing by June 1, 1974, to:

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Contents

Introduction

The Law Reform Commission of Canada has accepted family law into its research program in response to strong public concerns. These concerns range from individual dissatisfaction with the means by which family problems are presently handled to calls for changing the basic structure of the law so that it may reflect changing conceptions and realities of family life.

There are many aspects of substantive family law such as marriage, divorce, the support of family dependents and responsibility for the raising of children, to name only a few. These are embodied in a variety of laws under federal or provincial jurisdiction. The Commission recognizes that over the next few years there will be a great deal of reassessment and re-evaluation of the role the law plays in the making or breaking of family relationships. This will quite likely produce proposals for reform that will take the law in a different direction from that in which it is now moving. Such reform cannot be based on the law itself but must take into consideration the best available knowledge concerning the formation and development of the family in Canadian society.

The proposal for a unified Family Court is a logical first step to meet a pressing need which has long been recognized. It is also an important condition for further legal reform since many problems can only be properly assessed and understood once they are dealt with together in one court.

Many of the ideas and proposals in this Working Paper are not original but have been put forward over the years by members of the public, law reform commissions, and representatives of professional bodies. Action, however, has been impeded by the very nature of the problem itself--fragmentation of jurisdictions and responsibilities. It was, therefore, necessary that the national Law Reform Commission address itself to the problem, although it recognizes that the details with respect to the organization of family courts are of direct concern to the provinces, and that much of the responsibility for implementation would rest with the provinces. Reform or change in the judicial process can only be achieved through the cooperation of the appropriate federal and provincial authorities and finally with the agreement of the legislative bodies involved.

The Commission does not only intend to publish a Working Paper on the need for reform; it will actively embark upon a program of exploring ways of implementing its proposals.

This paper is intended as an information resource for distribution to interested members of the public and is not a technical document. However, our attempts to avoid "legal jargon" may have failed. The paper is primarily intended to provide an understanding of existing problems and to stimulate debate on possible solutions. The wide distribution of this Working Paper is designed to promote a response from interested members of the public and from the concerned professions.

To provide the Commission with sufficient background and information for this Working Paper, three major studies were undertaken:

- A conceptual analysis of unified Family Courts;
- An explanation of the philosophy, structure and operation of the courts in Canada presently exercising jurisdiction over family law matters;
- An attitudinal survey of Canadian judges concerning the manner in which family law matters are, and should be, disposed of by the courts.

These background materials, totalling over one thousand pages, have already been circulated on a limited basis.

The Working Paper directs itself to a simplified, but hopefully practical, approach to problems that exist across the country but which depend for their solution upon both federal and provincial action. Family matters have been too long ignored by the law and by the legal profession. Traditional procedures and practices are inadequate to deal with present problems. Immediate action is needed to ensure that resources are applied to provide assistance to family members in resolving their disputes in a dignified and inexpensive way. Appropriate legal representation and other support services should be made available to all whose interests may be affected by any dispute.

In arriving at its conclusions and proposals the Commission has attempted to maintain a flexible stance for two reasons. First, recognizing that local conditions may determine the implementation of its conclusions, the Commission declined to produce a detailed blueprint. Second, anticipating substantial proposals in the reform of family law, both at the federal and provincial level, the Commission has attempted to present models which can be readily implemented and adapted to the changes expected in the law in the next few years.

Successful implementation of what is now only a model may involve a variety of pilot projects to determine the needs of different regions and to test the most effective means of providing facilities and services. The Commission will encourage and support such pilot projects, especially their independent assessment and evaluation.

Unified Family Courts can not solve all family problems. They would initially however, facilitate the treatment of these problems as a whole and not as artifically divided issues.

Problems

1
Fragmentation of Jurisdiction

No Canadian province has a court with comprehensive jurisdiction in all areas of family law. This means that when problems arise in a family relationship, people have to seek solutions in more than one place and from more than one set of proceedings. Such a system — or lack of system — has many disadvantages.

Despair, confusion and frustration

The most distressing effect of the present state of affairs is the despair, confusion and frustration it causes to the participants. It should not be necessary nor even feasible to apply to one court for maintenance upon desertion, another for custody, a third for wardship or adoption, and yet another for divorce. As far as the general public is concerned there appears to be no reason why all legal matters arising from a matrimonial or family dispute should not be dealt with by a single court. Public expectations of a family court may far exceed the realistic potential of any court of law since there is no legal process which can solve all of the problems arising from marriage or family breakdown, but to circumvent the existing maze of jurisdictions seems a step in the right direction.

Overlapping jurisdiction

In some provinces as many as five different courts may handle family problems. Overlapping and fragmentation occurs in the areas of custody, wardship, adoption, maintenance and divorce. This not only leads to multiplication of effort, but can produce irreconcilable decisions.

"Forum-shopping" can also develop from the existing situation. Certain parties may prefer a court bound by formal rules and procedures to an informal, conciliatory chamber. This may affect the outcome of hearings and lead to results that are not in the best interests of all parties. There have been instances where actions commenced in a family court have been barred by the opposing party taking the same issue to a higher court.

Cost

Present systems cause duplication of effort by judges, lawyers, witnesses, court administrators and the parties themselves and this naturally leads to increased costs. Consolidation of family law jurisdiction in a single court would reduce the cost of legal services to the individuals, although an effective system of family courts with access to support services would not necessarily reduce the financial cost to the state.

Inability of courts to deal with the total problem

By forcing parties to go to different courts in relation to different facets of a single problem, the process denies any one court the opportunity to view the problem as a whole. As a result no one person sees all the evidence, and remedies may be granted which are not the best.

When juvenile and family courts of limited jurisdiction were created in some provinces, a major innovation was the inclusion of counselling and other support services. In the existing superior courts and, to a lesser extent, in most county and district courts, however, the rules of procedure are more rigid and based on the "adversary approach" of having opposing parties argue their case before a judge. Support services or access to them are conspicuous by their absence.

The Commission recognizes that differences in approach and procedures between the various levels of courts are not clear cut. The extent to which the process will be formal and adversarial will necessarily depend upon the personnel in the court and the particular issue under consideration, rather than the level of the court.

We consider that family conflicts require special procedures, designed to help individuals to reconcile or settle their differences and where necessary to obtain assistance. Therefore, the resolution of family conflicts, particularly those involving children, require some modification of the traditional adversary process. To leave reconciliation and settlement of issues exclusively in the hands of the lawyers is inadequate.

Lack of respect for the courts and the law

A system of law that prevents parties from finding simple, dignified means of solving their problems within a reasonable

time, often while they are under very great emotional strain, encourages distrust of the legal process as a means of solving family problems.

Conclusion

There is no logic in the assignment of jurisdictions in family law matters to a number of different courts. It has been proposed that "more serious" matters should be determined by judges of higher courts, since they are better qualified and more competent to decide difficult questions of law; more "mundane and routine" matters should be confined to the lower courts. But where does one draw the line between "serious" and "routine" matters in family law? To the participants everything is serious! Are the present judges in the higher courts qualified to deal with sensitive family matters? Are there available to those judges resources in the form of support services which should be regarded as essential elements in the solution of family problems?

We are aware that constitutional arguments can be raised against conferring comprehensive jurisdiction on a single court other than one of superior jurisdiction. But the Commission is of the opinion that constitutional barriers should not prevail against the establishment of a progressive and effective family court system. We conclude, therefore, that a unified court system should be established and that all appropriate steps — including constitutional amendment if necessary — be taken toward this end.

This is not to imply that all provinces would have to set up identical copies of a single model. Nor does it mean that piecemeal improvements should not be encouraged pending a complete reorganization of the judicial process in family law matters. The case for immediate improvement is self-evident in many areas, and cannot await the lapse of time that will prove inevitable in any major restructuring of our courts.

2
Conflicting Philosophies and Procedures of the Courts

Fragmentation of jurisdiction in the provinces is coupled with differences in the pleadings, procedure and philosophy adopted in the respective courts. These differences are accentuated in provinces that have established Family Courts with a specialized limited jurisdiction. It seems appropriate, therefore, to examine the approach of both the Superior Court and the Family Court to Family Law matters.

THE SUPERIOR COURT

Jurisdiction

The Superior Courts in all provinces deal with a large number of serious criminal and civil proceedings. Civil matters are those in which one individual seeks a remedy against another. They include torts, such as automobile accident claims, property disputes, claims for breach of contract and certain family disputes. The net result is that the Superior Court judge has to be concerned with a number of unrelated areas of which family law is just one.

Adversary Procedures

In seeking a solution to family problems, the pleadings and procedures of adversarial disputes in torts, property and contract actions, have been applied to family matters almost as a matter of course and without regard to possible consequences. The Commission admits that if all else fails a judge must be called upon to decide the issue between the parties, but it considers that in general the adversary approach promotes a ritualistic and unrealistic response to family problems. Considerable modification is needed, particularly where children are involved. The present system offers no legal protection to children: they are not represented by counsel, and the court is not given enough information to determine their best interests. As a consequence children get caught up in inter-spousal conflicts as pawns, weapons — and ultimately victims.

The disabilities of the adversary process may be partially due to the emphasis of the law on fault, which constitutes the basis for matrimonial and familial relief; but the Commission believes that abolition of the fault or offence concept, without concomitant changes in procedures and practices reflecting a less adversarial approach, cannot eradicate present problems.

Support services

Reliance on the adversary process precludes reconciliation or the conciliation of inter-spousal or inter-parental conflicts.

It is significant that the superior courts rarely invoke the assistance of agencies in the community in an attempt to reconcile the parties or to promote conciliation or amicable settlements. The courts seldom use conselling, investigative or other types of support services; they are used occasionally in contested custody matters, particularly in divorce proceedings, where special statutory provisions, rules of court or judicial practice require or permit independent investigations and reports for the judge's assistance.

Accessibility of the Court

In most provinces the administration of justice requires judges of the Superior Court to visit major cities and towns regularly for the purpose of trying cases and hearing applications. This is known as the circuit system. With respect to family disputes, the system causes two serious problems. First, in many instances the judge is faced with a long list of cases involving a variety of civil matters, some of which are family law problems. The judge has a limited amount of time to spend in the area and this may result in the adjournment of matters until a later visit, probably by another judge, or the disposition or settlement of cases without sufficient information.

Second, in family matters, accessibility to a judge on a continuing basis is a prerequisite to the effective resolution of disputes. When circumstances change, as they often do in a family situation, the parties should be able to apply without delay to a judge to consider the new circumstances and, where appropriate, vary the original order. It is obvious that such opportunities are not available where judges are on a circuit system.

Costs

Costs and legal fees involved in taking actions before the Superior Courts are substantial and much greater than those at the Family Court level. If legal aid is not available these costs may become prohibitive, especially in contested proceedings. As a result, many relevant and important issues will be passed over.

Qualifications and Training of Judges

Judges of the Superior Courts in all provinces are appointed by the Governor in Council. The appointees must have at least ten years' standing at the Bar. While most have had a broad experience in the practice of law, few have had much contact with family law matters. This is understandable since family law has only recently become a respectable area of specialization within the legal profession. In the past lawyers chose not to become involved with family law, for economic and other reasons including the emotionally charged nature of family conflicts. To be characterized as a "divorce lawyer" was not a compliment; the relatively recent change of language from "divorce lawyer" to "family lawyer" reflects a fundamental shift of opinion within the legal profession and also within the general public. Younger members of the profession have shown a growing realization and understanding of the important role of the lawyer in resolving family disputes. The existence of legal aid systems in some provinces has been a major factor in increasing the number of lawyers in this field, but awareness is growing even where no legal aid exists. Still, a great many lawyers lack knowledge and may be uncomfortable when faced with family law matters, and as a result most appointees to the superior court lack extensive experience and appreciation of many areas of family law.

The difficulties are compounded by the lack of adequate training programs for those appointed to the Superior Court. Apart from informal assistance rendered by their colleagues, newly appointed judges set about their tasks with little or no guidance. There is no organized program of continuing education for Superior Court judges.

THE FAMILY COURT

Philosophy

The Family Court is a product of the same philosophy that led to the creation of the Juvenile Court in the early years of the

twentieth century. The Family Courts were designed to promote preventive and therapeutic procedures in an attempt to resolve family problems constructively. The underlying philosophy was that in family matters the law should provide a process which included opportunities for counselling and other support services: a specialized staff was to be assigned to the court to undertake counselling, investigative and administrative functions.

Support services

The evolution of the Family Court in Canada has been marked by substantial difference in the various provinces and within individual provinces. In some provinces there is no Family Court, while in others it is severely restricted by lack of personnel and services. Only the larger urban centers have specialized staffs which are available to assist the judiciary in the resolution of disputes.

Jurisdiction

Family Courts in Canada are not part of the Superior Court and their jurisdiction, though extensive, is confined by constitutional limitations whereby certain family law matters fall within the exclusive competence of the Superior Court. In recent years in a number of provinces, there has been a gradual extension of jurisdiction in the Family Courts. The structure, organization and procedures of the respective Family Courts varies from province to province and, within some provinces, from court to court. Such variations render it difficult to define policies and standards applicable to all parts of the country.

There is no Family Court in Canada which exercises a comprehensive and integrated jurisdiction over all matrimonial and familial proceedings. Divorce, judicial separation, alimony, and property disposition all fall outside the Family Court. Basically, the jurisdiction of the Family Court extends to proceedings respecting inter-spousal maintenance, the custody and maintenance of children, neglected children and delinquency, and, in many cases, other courts exercise concurrent jurisdiction in some of these matters.

Informal procedures

The proceedings are as informal as circumstances permit and attempts are made to promote the resolution of disputes by

agreement between the parties rather than by judicial disposition at trial. Pleadings are informally drawn and rules of practice, where they exist, are simple and often vary from court to court. This situation, together with the fact that the parties are often not represented by counsel, creates the danger that the rights of the individual will be prejudiced before the Family Court. While there is a desirable de-emphasis on adversarial procedures, there is also a failure to provide adequate protection of the rights of individuals, particularly children. We believe that parties in paternity suits, custody matters, neglect and delinquency hearings, maintenance matters and related cases deserve at least as much protection under the law as the litigants in torts, contract and property disputes.

Qualifications and Training of Judges

The Family Court is presided over by a provincially appointed judge. It is unrealistic to assume that the quality of judicial appointments is uniform in all courts. With exceptions, the present courts are not able to attract the most qualified members of the legal profession.

In Family Courts there are a number of judges who did not possess formal training in law prior to their appointment, yet they are called upon to determine the legal rights and responsibilities of persons who appear before them. The Commission believes that legal training should be a prerequisite to the exercise of the judicial function, and that this reform should be instituted immediately. The expanding jurisdiction of family courts, the more frequent and attentive participation of lawyers, the increased concern with the importance of family matters make it imperative that the best legal minds be attracted to the positions on the bench.

While training programs for Family Court judges exist in some provinces, in most they are in the embryonic stage or simply do not exist.

Conclusion

The tempo and practice of superior court, as presently regulated by rules of law and procedure, are appropriate for deciding strictly legal questions, but do not permit the judges to deal effectively with family disputes. Inflexible rules of procedure prevent any effective treatment of such problems, and judges are denied

access to expert evidence and the resources of community agencies which might provide constructive assistance. There are superior court judges today who believe that the court should not become actively involved as an arm of the state in promoting the preservation of the family unit, and that it should retain its traditional role as a court of law rather than a social welfare agency.

On the other hand, family courts have failed to realize their full potential. The publicity surrounding their creation led to the belief that new approaches were being fashioned in the search for solutions to family problems, but there is a substantial gulf between the theory and the extent to which that theory has been implemented by positive action.

The family court is regarded by many as a "conveyor-belt" process for poor people. The emphasis is said to be on the collection of money, with little regard for the provision of support services. The lack of procedural guidelines, while promoting an informal atmosphere, fails to protect the rights of individuals who appear before the court. Those lawyers who go to family court are frustrated by the confusion, delays, and lack of organization.

We conclude that family law matters are not dealt with satisfactorily either at the superior court or the family court level. Substantial changes are required to attract well qualified judges and to provide simple, effective, inexpensive procedures in courts which are accessible and have the necessary auxiliary services available to those who need them.

3
Lack of Auxiliary Support Services

The lawyer, whether practitioner or judge, has no exclusive knowledge of family problems or prospective solutions thereto. Accordingly, the general resources of the community and the expertise available in non-legal professional disciplines, which define and endeavour to resolve marital conflict and family problems, should be part of the search for solutions to inter-spousal and familial conflicts. The successful operation of a Family Court, therefore, requires that administrative, counselling, conciliation, investigative, legal, and enforcement services be made available to promote reconciliation, and, where this is not possible, to promote pre-trial settlements of collateral issues, such as the maintenance of family dependents and the custody of children of the marriage, that necessarily arise for determination on the breakdown of marriage.

Current judicial procedures and practices militate against the optimum or even the effective use of non-legal resources. The superior courts, with few exceptions, seldom seek to invoke the aid of established agencies in the community and have no "in-house" facilities to offer advice or guidance to litigants or to determine whether the institution of proceedings constitutes the best or only solution to the marital or familial conflict. The Family Courts on the other hand, while established for the purpose of providing auxiliary non-legal assistance to the actual or prospective litigant, have failed to achieve that purpose, for reasons partly attributable to the courts themselves and partly attributable to the failure of governments to implement the philosophy underlying the establishment of Family Courts by securing the appointment of qualified auxiliary personnel. One example of the difficulties encountered is the lack of protection of the interests of children of broken homes. The parties to a broken marriage are frequently so emotionally charged that they cannot objectively provide for the best interests of their children, and, even worse, the children may be used as weapons in inter-spousal conflict. The fact that husbands and wives have lawyers does not give protection to their children. In addition, there are no adequate pre-trial procedures or support services to assist the court in the determination of the best interests of the child. Another example is the absence of enforcement personnel in the Courts coupled with the present legal procedures whereby the onus of enforcing maintenance orders

falls upon the person in whose favour the order is made. This leads to a high, if not astronomic, default rate. It has been estimated that no less than 80,000 families in Canada are not being maintained by the responsible spouse or parent.

In short, the lack of auxiliary services presently in or available to the courts is disgraceful, irrespective of the particular court that exercises jurisdiction over matrimonial and familial proceedings. It is difficult, if not impossible to measure the cost in terms of human misery.

With few exceptions, those responsible for the establishment and administration of the courts exercising jurisdiction in family law matters have totally failed to ensure the provision of adequate auxiliary services, whether one speaks in terms of their quality, quantity, or accessibility. In many courts even basic administrative services are lacking.

4
Statistical and Social Data — Collection and Evaluation

The collection and evaluation of relevant statistical and social data is essential for the efficient and effective operation of all courts. Data defining the activities of the support staff and dispositions at trial is necessary for a variety of reasons. First, it permits the court to discharge its obligation to keep the public informed and enables it to focus public attention on weaknesses or defects in the court or in the community at large, thus bringing pressure to provide more adequate resources to contribute to the constructive resolution of family problems. Second, relevant data is also required to promote more effective administrative procedures and to ensure that the manpower in the court is used to its fullest advantage. For example, the collection and evaluation of data on a continuing basis provides a means of estimating the future personnel and service needs of the court and facilitates the re-directing of staff assignments. Third, statistical and social data can provide a sound basis for assessing the effectiveness of auxiliary services and of dispositions made by the court.

There is reason to believe that, if jurisdiction over family law matters were consolidated in a unified family court, a centralized and, preferably computerized, data bank could be established. The family court could provide an ideal "laboratory" for the collection and analysis of statistical and social data relating to the causes and the efficacy of the treatment and disposition of family problems by the courts. Information would thus be available to promote the development of more effective programs and procedures for the prevention or treatment of family problems.

Unfortunately, the present fragmentation of jurisdiction over family law matters hinders the collection and analysis of statistical and social data. The information respecting family problems that is available in courts of general jurisdiction, such as the Superior Court, substantially reflects the formal procedures of those courts and provides little insight into the social or human problems underlying the legal issues. Accordingly, such data is of little value as a basis for developing new methods of treatment or disposition, although it may help in determining caseloads and the appropriate assignment of personnel. Even in the existing family courts, where the jurisdiction is specialized, efforts to accumulate, evaluate, and

utilize the available statistical and social data seem conspicuous by their absence.

The law and its processes must respond to the need for individualized justice when disputes among family members cannot be amicably resolved.

There must be a judge sitting in a court of law to determine rights and responsibilities but, in the view of the Commission, much more is needed. The Family Court should exercise a bi-partite function as follows:

1. a social function to promote reconciliation and, where this is impossible or undesirable, to promote the amicable and equitable settlement of issues, and to protect the interests of any children; and
2. an adjudicatory function to determine by judicial disposition any conflicting claims or issues which cannot be settled by the parties.

It is the view of the Commission that the Family Court must have not only qualified judges but also adequate support staff and facilities, as well as procedures which are designed to achieve the maximum use and effectiveness of the services.

Serious questions arise with respect to the future of the family and the function of the law in dealing with family relationships. With changing values and social attitudes the existence of the family in its present form is itself being challenged. These questions and problems are being considered by the Commission in its examination of various substantive areas of family law such as divorce, nullity, custody, matrimonial property, and maintenance rights and obligations.

But, there is an urgent need to reform the way in which the law deals with the resolution of family conflicts and it is with this in mind that the Commission has arrived at its conclusions on the structure and organization of a unified Family Court.

Proposals

1
Boundaries of Legal Jurisdiction

The Commission believes that jurisdiction over all "family law" matters should be vested in a single unified Family Court. To meet this objective would require action by both the federal and provincial legislatures.

The Commission specifically recommends that judicial proceedings involving the following matters should fall within the exclusive jurisdiction of a unified Family Court:

- Formation of marriage (e.g. judicial dispensation of parental consent to marry).
- Dissolution of marriage (divorce and nullity).
- Judicial separation and separation orders.
- Restitution of conjugal rights.
- Declarations of status (marriage, legitimacy, legitimation).
- Change of name.
- Alimony and maintenance (including enforcement).
- Maintenance and affiliation agreements.
- Inter-spousal actions respecting title to and possession of the matrimonial home and other matrimonial assets.
- Custody, access and upbringing of children.
- Adoptions.
- Guardianship of the person (minors).
- Affiliation.
- Child neglect.
- Inter-spousal or intra-familial assaults of a minor nature.

The Commission recognizes that there may be differences of opinion as to whether the Family Court should exercise jurisdiction over the following areas:

- Inter-spousal or intra-familial torts and contracts.
- Tort actions for invasion of matrimonial consortium, for example, actions for damages for adultery or for alienation of affections.

- Guardianship of the property of minors.
- Provision for family dependants on death.
- Inter-spousal or intra-familial offences of a criminal nature.

The Commission concludes that these matters should not fall within the exclusive competence of the unified Family Court but envisages that such proceedings could be entertained in the Family Court, where this is deemed appropriate, under a legislative formula regulating waiver and transfer of jurisdiction to and from the Family Court. It is essential, however, that the Family Court have comprehensive jurisdiction over proceedings that are predominantly familial in character.

The Commission has experienced serious difficulty in attempting to resolve whether matters arising under the Juvenile Delinquents Act, including charges of contributing to juvenile delinquency, should fall within the jurisdiction of a unified Family Court. There is a distinct possibility that the federal statute law relating to juvenile delinquency will be changed, perhaps radically, in the foreseeable future. Pending a decision of the federal government respecting changes, the Commission considers that it is premature to determine whether proceedings in this area should be conducted within the framework of a unified Family Court.

Any decision taken with respect to designated areas of jurisdiction of the Family Court does not imply that all such areas involve similar procedures, or that independent proceedings must be instituted in respect of each designated area of jurisdiction.

2
Status of the Court

In its consideration of the status and place of the unified Family Court in the judicial hierarchy, the Commission has concluded that it should set out the various options that are available, indicating the strengths and weaknesses of the respective alternatives and pointing out the factors which may be influential in establishing Family Courts in the various provinces. The Commission wishes to stress that in setting out these options it is assumed that steps will be taken to overcome the problems referred to earlier in the paper and to provide well-qualified judges for unified Family Courts, sufficient support staff, new rules of procedure and practice, and good physical facilities.

The Commission emphasizes that, irrespective of the status of the court, an exclusive original trial jurisdiction should vest in the unified Family Court. The Commission recognizes, however, that constitutional provisions currently preclude vesting an exclusive original trial jurisdiction in any court other than a superior court.

It is the opinion of the Commission that the federal and provincial authorities must and can cooperate in the search for accommodation on constitutional issues and thus resolve current constitutional dilemmas. The failure to establish or permit the development of the unified Family Court cannot be justified on the basis of constitutional limitations.

Even apart from constitutional questions, there is a need for effective federal provincial cooperation in the establishment of unified Family Courts. The fact that federal and provincial laws would be administered by such courts and the need for joint federal and provincial funding necessarily involve a high degree of cooperation between the federal and provincial authorities if a viable system of Family Courts is to be achieved. Indeed, even if unified Family Courts are not established, much could be achieved by concerted federal-provincial action in promoting the development of new procedures and more effective support services in or accessible to the courts exercising jurisdiction over matrimonial, familial and juvenile proceedings.

In setting out a variety of options respecting the status of the unified Family Court the Commission has been extremely conscious of the fact that the development of an effective system of unified Family Courts cannot be divorced from a consideration of

the needs and resources of the individual provinces. Consequently the status of the unified Family Court would not necessarily be the same in each of the provinces. For example, in those provinces where Family Courts have been established with the status of a provincial or magistrate's court to exercise jurisdiction over certain major areas of family law, it may be desirable to expand their jurisdiction and auxiliary service rather than create an entirely new Family Court structure. On the other hand, in provinces where Family Courts have not been established or where they are in the initial stages of development, other factors may influence the decision respecting the status of the unified Family Court. For instance, the existing workload of the judges, the geographic area and the size of the population to be served, and the number and qualifications of the practicing bar from which judges for the Family Court are to be drawn, are important, if not decisive, factors in determining the appropriate status and place of the Family Court.

There are three basic alternatives respecting the status and place of a unified Family Court in the judicial structure:

- A unified Family Court may be set up as a separate court of superior jurisdiction, or as a part or division of the existing superior court.
- A unified Family Court may be created as a division of the existing county or district courts.
- A unified Family Court could be created as a division of the existing provincial court system.

Each of the above alternatives merits discussion and consideration.

A unified Family Court of superior jurisdiction

A substantial body of opinion favours the view that unified Family Courts should be established as courts of superior jurisdiction but there are diverse opinions respecting the place of such Family Courts in the existing superior court structure and the appointment of judges to such courts.

In the past, there has been a total failure to accept that family problems are of sufficient significance to merit the attention of the highest courts. Establishment of a unified family court at a superior court level would be a recognition of the importance of family law matters, and it would give the new court a respected status with the legal profession and the public.

Under the present Canadian constitution, a unified family court could only be given total jurisdiction over family law matters at the level of a superior court. Although federal and provincial action would still be required to transfer the necessary jurisdiction, no constitutional barriers would arise.

The Commission recognizes that in certain provinces the Superior Courts are heavily taxed by way of work-load and the addition of a comprehensive jurisdiction in family law would raise concern about the costs and practicality of such a move. Indeed, if all family matters were to be heard by Superior Court judges, there would probably be an unmanageable caseload unless a very substantial number of new appointments were made.

However, the Commission believes that a proper system of unified Family Courts would provide a number of ways in which issues might be determined without resort to trial, thus reducing the pressure on the judges. If an effective counselling and conciliation service were provided, a number of issues would be settled by agreement. Also, if special rules of procedure were devised relating to such matters as pre-trial hearings, further reduction of the judicial caseload might be expected. In other words, the focus of the auxiliary services and the rules of procedure could and should be directed to providing a means by which issues and disputes might be settled without the necessity of judicial disposition. Futhermore, the workload of the judges could be reduced by the appointment of masters, registrars, or referees to assist the superior court judges in the disposition of family law matters. The jurisdiction of these officers of the court would be determined to some extent by constitutional considerations, although the Commission envisages no difficulty in their having the power to deal with certain uncontested matters and certain motions and applications for interim relief.

A major concern of the Commission is that the unified Family Court should be accessible to those who require its services. In the smaller provinces the problem of inaccessibility may not be serious but difficulties would continue to arise in certain provinces if jurisdiction over family law matters were exclusively vested in superior court judges and these judges continued to operate on rotational assignments and under a circuit system whereby visits were made to centres outside the capital only on a limited basis and at certain times of the year. It is clear that the unified Family Court should be a much more flexible and mobile type of tribunal and that superior court judges should be resident in a number of provincial centres.

An appropriate solution might be to create a unified family court as a division of the Superior Court with the appointment of a senior judge to preside over the Family Division. One argument against this solution is that judges sitting in the Superior Court are unaccustomed to and may be averse to the use of support services in the resolution of family problems. The Commission appreciates this point of view but is of the opinion that a unified Family Court established as a Division of the Superior Court could develop its own philosophy and procedures unhampered by the traditional approaches which have been applied in the past.

Arguments have been made in favour of establishing a Family Court of superior jurisdiction as a separate and autonomous court but the Commission is of the opinion that jurisdictional and constitutional problems render such an approach inadvisable. Also, we feel that there is no justification for the proliferation of courts of superior jurisdiction, particularly when the objectives can be met by creating a division within an existing court.

Although the Commission subscribes to the view that the Family Court should be established as a Division of the existing Supreme Court, it is envisaged that the unified Family Court would be housed in a separate plant in order to accommodate its total resources, which should not be geographically fragmented.

In conclusion, the Commission inclines to the opinion that the ideal unified Family Court should be established as an integral part of the existing Superior Court. However, the Commission recognizes that many factors, some of which have been referred to in this paper, may militate against such a scheme and may result in the establishment of the Family Court at a different level in the judicial hierarchy.

A unified Family Court as a division of the existing County or District Court

The argument in favour of establishing a unified Family Court as a division of the existing County or District Court appears to rest upon three main factors. First, in certain jurisdictions, the present work-load of the judges of the county or district court is such that excessive burdens would not be imposed by the creation of a unified Family Court at the County or District Court level. Second, in most provinces the County or District Courts are more accessible to the public than the Superior Court since judges of the County or District Courts are located in various centres throughout

the province. Third, certain financial savings would be made in the event that jurisdiction over family law matters were vested in the County or District Courts.

It may be open to question whether the judges of the County or District Courts could be empowered to exercise a total jurisdiction over family law matters, having regard to the current provisions of the constitution. Jurisdictional problems including possible conflicts of jurisdiction with the superior courts, could also arise.

Although the Commission has previously expressed the opinion that a unified Family Court should ideally be a Division of the Superior Court, it recognizes that serious consideration should be given to the possibility of establishing the Family Court at a County or District Court level in any province urging such a course of action.

A unified Family Court as a division of the provincial court system

In a number of Canadian provinces, Juvenile and Family Courts have been established at the provincial court level to exercise a broad but not comprehensive jurisdiction over matrimonial, familial and juvenile proceedings. These courts are frequently presided over by judges whose jurisdiction is confined to family law matters and who have acquired considerable experience and expertise over the years. These are also the only courts that have been provided with any kind of support services to complement or supplement the role of the judge in the disposition of family problems. Consequently, there often exists a high degree of trust and cooperation between the judges of the Juvenile and Family Courts and the persons assigned to the various support services established in these courts.

Regrettably, the Juvenile and Family Courts operating at the provincial court level have suffered from a lack of prestige among the legal profession and have been subjected to public criticism, in part unjustified because of the inherent limitations upon their jurisdiction which preclude any attempt to resolve all of the issues arising in a typical family conflict.

Appointments to these courts have not always been of top calibre, although recent years have seen substantial improvement in the qualifications and experience of persons appointed to the

Juvenile and Family Courts. Notwithstanding the deficiencies existing in the Juvenile and Family Courts at the present time it might well be contended that, in provinces where such courts exist, it would be unwise to create a new court structure and the better solution might be to consolidate and extend the jurisdiction of the Juvenile and Family Court, increase the prestige of the court by attracting well-qualified judges, and make every effort to supply adequate and effective support services where they are presently lacking. It must be recognized, however, that current constitutional provisions confer an exclusive jurisdiction over certain family law matters upon the Superior Courts and this precludes a total jurisdiction over all family law matters being vested in any court other than a Superior Court until such time as the Constitution is amended. Accordingly, under the present Constitution it would be impossible to confer a total jurisdiction in family law matters upon the existing Juvenile and Family Courts. Fragmentation of jurisdiction would necessarily ensue if the bulk of jurisdiction in family law matters were conferred upon Juvenile and Family Courts while a residual jurisdiction was reserved to courts of superior jurisdiction. This dilemma could conceivably be resolved by legislative provisions whereby the courts operating at the Superior Court level would be empowered to utilize the support services available in or to the Juvenile and Family Courts. Such a course of action would facilitate a more constructive approach to the resolution of familial conflicts but difficulties would continue due to the absence of a single court where a comprehensive solution might be sought.

Appointment of Judges

At present, the federal government has exclusive jurisdiction to appoint judges to the Superior Courts and, in the absence of constitutional amendment, it is impossible to confer a comprehensive jurisdiction over all family law matters in any court other than a Superior Court. In the event that a unified Family Court is established at the Superior Court level, it would appear desirable for the judges to be appointed after joint consultation between the federal and provincial authorities.

The Commission recommends that all Family Court judges should receive permanent appointments with security of tenure and should not be liable to dismissal except for just cause. The

Commission endorses the concept of specialization and recommends that steps be taken to ensure that judges of a unified Family Court deal exclusively with family law matters. The Commission recognizes that legislative action will be required at both the federal and provincial levels to accomplish this objective.

The Commission recommends that all judges appointed to the unified Family Court should be barristers or solicitors of not less than ten years standing and the Commission is of the firm opinion that these eligibility requirements should not be reduced, at least if the unified Family Court is established at a Superior Court level. In making appointments to the Family Court, the Commission strongly recommends that avenues for consultation be established among the concerned professions and quite possibly with members of the public. Family court judges should be drawn preferably from those in the legal profession who have had broad experience in family law matters.

The Commission further recommends that if masters, registrars or referees are appointed to assist the judges in the disposition of proceedings, they should be selected from the ranks of practising barristers or solicitors of not less than five years experience with some exposure to family law matters. Consideration might be given to their appointment as judges following a period of service as a master, registrar or referee.

If qualified persons are to be appointed to the Family Court bench, their salaries and other benefits, and the physical facilities must be attractive.

An essential part of a unified Family Court system is the existence of training programs and continuing education programs. The judges and senior support staff should be fully involved in the creation and maintenance of these programs.

It is the opinion of the Commission that at the time of appointment a judge should undergo a period of training before discharging judicial responsibilities. At regular intervals, all judges should participate in continuing education programs covering a wide range of subjects that will provide a better understanding of family conflicts and appropriate dispositions of such conflicts.

3
Procedures

Once a system of unified family courts is established, rules of practice and procedure will have to be developed to make it run effectively. The functions of support services and the means of having access to them must be regulated. So must the conduct of judicial proceedings and the method of pleading.

The Commission recognizes that each province has different needs and different resources. The status, composition and structure of unified family courts and the facilities available within them might vary considerably to reflect provincial or regional conditions. Consequently it is impossible and inadvisable to attempt to formulate a standard model or national prototype of procedural rules, even a model designed to be flexible. However, we feel that certain basic premises should be adhered to in the development of rules of practice and procedure for any unified family court. These are:

1) The rules should be worded simply and should indicate clearly the whole range of procedures from the commencement of an action to its conclusion, including the means of enforcing a judgment.
2) Procedures should be flexible and reflect the nature of the diverse problems covered by family law.
3) The rules should, where possible, provide standard forms for use in the various types of proceedings and these forms should be easily adaptable to the circumstances of each case.
4) Pleadings and procedures should stay away from the traditional adversary or fault-oriented approach.
5) Pre-trial processes should be included, designed to provide dignified means for the parties to reconcile their differences or reach amicable settlements without the need for trials.
6) Each litigant should be advised of any right to counsel and, where children are involved, an early opportunity should be provided to ensure that the child's rights are adequately protected.
7) Issues should be determined without any prejudicial delay. This is particularly significant with respect to

the placement of children, whether in custody, guardianship or adoption proceedings, or in proceedings involving child neglect or juvenile delinquency.

The Commission makes the following specific recommendations:

Pre-Trial Procedures

The rules should not be limited to traditional pre-trial procedures where the judge meets with the lawyers and attempts are made to identify and if possible reduce the areas where the issues are in dispute. While such a pre-trial conference should be part of the family court process in many cases, the Commission believes that the rules should also provide ways in which parties who have gone through the conciliation process can, having received proper legal advice, obtain a consent order from the judge without a formal hearing or trial of the issues.

Appeals

It is impossible to detail appropriate appeal procedures or structures without having first determined the status of the unified Family Court that will exercise a general original jurisdiction over family law matters. Since the status of the unified Family Court might vary from province to province, the Commission does not propose to formulate detailed recommendations respecting appeals from the unified Family Court. Certain general guidelines may, nevertheless, be endorsed.

The Commission is of the opinion that appeals from any specialized unified Family Court should lie to the appropriate appeal courts of the province and that no system of internal appeals or appeals to specially constituted appellate tribunals should be introduced.

The Commission is also of the opinion that irrespective of the status of the unified Family Court, appeals should not be by way of trial de novo (a retrial) regardless of whether the proceedings are civil, criminal or quasi-criminal in character.

The Commission believes that appeals by way of trial de novo cannot be reconciled with the concept of a unified Family Court. Their retention will increase costs, deprive the parties of

the benefits of procedures designed specifically for family matters, and undermine confidence in and respect for the Family Court. Accordingly, decisions of the unified Family Court should not involve a re-trial of the issues but should fall within the framework of general appellate procedures.

The Time Factor

The Commission is conscious of the length of time frequently involved in securing judgments from the courts with respect to many family law matters. This may indicate the careful consideration that goes into the decision-making process, whether judicial or non-judicial, but more often it reflects excessive caseloads or inadequate resources.

Cases involving child placement—custody, guardianship, wardship and adoption—reflect the worst instances of injustice and harm caused by delay. Judgments are often handed down after many months or even years, and no matter what causes the delay, a judgment ordering a change in placement can cause serious psychological injury to a child.

The placement of a child, whether with a parent, third party or institution should in our opinion be treated as an urgent matter. We therefore recommend that such proceedings receive priority, and that statutory provisions or rules of procedure be introduced to speed up dispositions, both at trial and on appeal.

Consolidation of Issues

The conferring of a comprehensive jurisdiction over family law matters on a unified Family Court will facilitate a total as distinct from a piecemeal approach to the resolution of familial problems. Rules of practice and procedure will, nevertheless, be required to promote the consolidation of issues.

The Commission recommends that rules of procedure be devised to enable all related matters to be consolidated for trial and heard by the same judge at one time. The rules should provide simple methods whereby all persons who would be affected by a total disposition of the issues may be made parties to the proceedings.

The rules should also give the court a wide discretion to admit amendments to the pleadings or supplemental pleadings or

to all parties to the proceedings where such a course of action is deemed appropriate by the court.

Publicity

We believe that legislative provisions should prevent undue publicity and promote private hearings and the confidentiality of court records. The parties, the judge and auxiliary personnel should have every opportunity to examine the total situation with a view to achieving reconciliation, amicable settlement, or the most appropriate judicial disposition. Although this necessitates some degree of privacy and confidentiality, it should not be confused with total secrecy. The public is entitled to know the way justice is administered in the courts; no court should be permitted to operate in secrecy. Constructive criticism and proposals for reform can only come from knowledge and understanding of the operations of the courts.

There exists no uniform policy in Canada with respect to these matters. Both federal and provincial legislation touch upon certain aspects of the problem. Relevant federal legislation is found in the Juvenile Delinquents Act and in the Criminal Code. At the provincial level there has been, for the most part, a piecemeal approach to the problem with different policies emerging in individual statutes.

A coherent policy to promote privacy and confidentiality can only be accomplished through federal-provincial cooperation. The Commission believes that the following guidelines should be taken into consideration:

- Proceedings in a unified Family Court should be closed to the public, subject to a discretion in the court to admit persons with a bona fide public or private interest.
- Members of the press and other news media should be permitted to attend and report upon such proceedings but their reports should not include any particulars that could lead to identification of the parties.
- Steps should be taken to ensure the publication of judicial decisions in professional journals. Despite some progress in recent years, there is a widespread ignorance of judicial decisions within the concerned professions.
- Specific regulations should be introduced to guarantee the confidentiality of court files, whether legal or

social, while facilitating the collection of relevant data to promote the more efficient and effective operation of the court and to promote necessary reform of substantive family law. The Commission believes that evaluative research should be included in any system of unified family courts.

- The same restrictions should apply on appeals from decisions of the Family Court.

4
Support Services

LEGAL SERVICES

The Commission believes that certain legal services are essential to the operation of a unified Family Court system. The guidelines which are developed in this part of the Working Paper are of necessity general in nature, but are intended to define minimum standards with respect to the provision of legal services in a Family Court setting.

The Commission recognizes that in some jurisdictions a start has been made in some or all of these matters, normally through the initiative of the judges or concerned members of the Bar.

The Commission further recognizes that conditions prevailing in each community will dictate the organization and function of legal services in the Family Court. What is essential, in the view of the Commission, is that minimum standards be established to ensure that all Canadians receive due protection of their legal rights and interests.

Lawyers for Adults

Within a unified Family Court system there must be rules of procedure and support services designed to permit every opportunity for reconciliation, conciliation and the lessening of an adversarial atmosphere.

The Commission deplores the fact that at present the rights and responsibilities of many people involved in matrimonial, familial and juvenile proceedings are frequently determined without their receiving legal advice or legal representation.

It must be recognized that the nature of particular proceedings may render it unnecessary for the parties to be legally represented and that the responsibility for advising or even representing a party might sometimes be properly delegated to trained paralegal personnel or to the auxiliary staff attached to the Family Court. Care must be taken to ensure that costly legal services are not duplicated or wasted.

It is, however, the firm opinion of the Commission that, where an issue is likely to go to trial because conflicting or competing claims require judicial disposition, each party should have the right to secure a lawyer to offer legal advice before trial and to act on his or her behalf at trial. The Commission accordingly recommends that appropriate steps be taken to ensure a right to counsel in these circumstances.

The means by which legal advice and representation are to be provided must necessarily depend upon the financial circumstances of the parties and upon the available legal resources in the particular community. The form in which legal advice and representation is made available is less important than the fact of its availability. Most important is acceptance of the proposition that lawyers should be available for the specific purpose of providing legal advice and representation to persons having recourse to the Family Court. The Commission concludes that such lawyers should be independent of the Family Court and should not be appointed to its staff.

Lawyers for Children

Where the right or interest of a child will be directly or indirectly affected by a court proceeding, the Commission recommends that consideration be given to the appointment of independent legal counsel to represent the child. The Commission recognizes that, in many instances, there will be no conflict of interest among the parties or, on the other hand, the agreement between the adult parties will provide as adequately as is possible for the child's welfare. However, the interests of a child may require separate legal representation, particularly in matters of contested custody, contested adoption, and child neglect, and, occasionally, in maintenance proceedings. It is not good enough to rely upon the judge, the parents or the parents' counsel, to act as an advocate for the child in such matters.

The Commission envisages the development of rules of procedure under which, well in advance of the trial, there will be a review of the facts in issue and an opportunity for an appropriate officer of the court to exercise a discretionary power to appoint counsel to represent the interests of the child until the matter is concluded.

Counsel for the child should be independent of the court. He should be regarded as a full participant in all matters affecting

the child and should have the same rights and privileges as the lawyers repre- senting the adult parties. He should be able to call and cross-examine witnesses and, more importantly, should have direct access to the investigative services of the court in order to provide as much relevant evidence as is possible for a proper disposition of the proceedings.

The Commission believes that statutory provisions or rules of procedure should provide for a limitation on the number of expert witnesses and social investigations. Those making the reports and, in the discretion of the court, the sources upon which they rely, must be available for cross-examination by all parties to the dispute or their counsel.

In conclusion, the Commission observes that under federal-provincial legal aid agreements in force in most provinces, counsel may be provided for juveniles in certain criminal or delinquency proceedings. The Commission sees no reason why protection should not also be afforded every child whose interests so require in civil or quasi-criminal matters. The Commission stresses that it does not envisage counsel appearing for a child in all proceedings but underlines the importance of an investigation at an appropriate point to determine whether there is or may be a conflict of interest between the child and the adults in the proceedings and whether separate counsel should be appointed to protect the interests of the child.

A Family Court Lawyer

The Commission recommends that lawyers be available in or to the Family Court, on a full-time or part-time basis.

i) to advise personnel of the intake, counselling, investigative, and enforcement services with respect to any legal problems arising in the discharge of their respective functions.

ii) to provide legal advice to those who may require it and, where necessary, to refer prospective litigants to the appropriate legal resources in the community.

Other Legal Services

The Commission is concerned about the present practice of using police, court clerks, probation officers and other institutional personnel to conduct prosecutions in criminal or quasi-criminal proceedings, including juvenile delinquency.

The Commission recommends that the appropriate federal, provincial or municipal authorities designate lawyers or crown attorneys with special competence in this area, on a full-time or part-time basis to conduct the prosecution of proceedings under the Criminal Code, the Juvenile Delinquents Act, and under provincial statutes and municipal by-laws that involve a criminal or quasi-criminal sanction.

Lawyers responsible for the prosecution of such proceedings should under no circumstances be attached to or directly associated with the Family Court.

INFORMATION AND INTAKE SERVICE

The Commission considers an Information and Intake Service to be an essential element of the family court structure.

Personnel should be engaged to deal with inquiries from individuals coming to the family court for the first time or with new problems. Their functions would include determining the nature of the problems confronting the client, providing information as to the various support services available in the community and advising on the possible courses of action open to the individual. In many cases the contact might be brief and the action recommended would involve referral to an appropriate social, medical or legal agency or professional individual.

The Commission views as a major objective of the Information and Intake Service the promotion of the resolution of family conflicts without recourse to judicial disposition. It should encourage the effective use of community resources and, where possible, should deal informally and in a remedial way with family problems before they become formalized by the institution of legal proceedings. Use of the Information and Intake Service should be voluntary and its personnel should have no discretion to prevent the institution of legal proceedings.

The Commission recognizes that the detailed organization and size of the unit, its functions, and the qualifications of its personnel may vary from province to province or even from court to court.

FAMILY COUNSELLING AND CONCILIATION SERVICES

In determining the extent to which family counselling and conciliation services should be available in or to the Family Court,

a number of factors must be considered. In their broadest dimensions, counselling services should include (i) pre-marital counselling, (ii) conciliation counselling, and (iii) post-adjudicatory counselling.

The Commission has concluded that conciliation counselling directed towards the clarification and resolution of the problems of the parties whether or not the marriage survives, should be available on a voluntary basis. The same conclusion applies to post-adjudicatory counselling. However, the provision of pre-marital counselling and clinical services should not be the direct responsibility of a family court system. The location and detailed organization of such services must primarily be determined by local conditions.

Pre-Marital Counselling

We feel that the State should encourage the establishment of adequate pre-marital counselling services. The provision of pre-marital counselling should be part of a comprehensive program of family life education. On occasion, the family court judge or another officer of the court may wish to refer a client for such counselling, for example, where an application is made for dispensing with parental consent to marry. But, in the opinion of the Commission, the Family Court should not assume a direct responsibility for providing pre-marital guidance and counselling.

Conciliation Counselling

Experience indicates that the role of the marraige counsellor must include the promotion of reconciliation between husband and wife, and where reconciliation is impossible or undesirable, counselling with a view to securing the amicable settlement of those collateral issues that must be decided when the marriage has broken down. The conciliatory role of the counsellor in attempting to resolve collateral issues is, of course, quite distinct from that of the lawyer who may be ultimately responsible for drafting a legal settlement.

The Commission is of the opinion that conciliation counselling services should be established in or made available to the Family Court. Their function should be to clarify and attempt to resolve the problems regardless of whether the marriage survives or disintegrates.

Post-adjudicatory Counselling

The Commission is of the opinion that the court counselling staff can play a useful role not only in conciliating differences between spouses before a divorce petition is referred to the judge, but also when further issues arise, as they often do, after the divorce has been granted.

Where Should Counselling and Conciliation Services be Established?

The question may be asked whether the Family Court proper is the place for the exercise of non-adjudicatory functions. The Commission is of the opinion that a Family Court is no less a court if it utilizes preventive, diagnostic and therapeutic services and procedures in the search for solutions to family problems. But the appropriate place for locating counselling nd conciliation services may and probably will vary substantially according to local conditions.

It is obvious that any court counselling and conciliation services must not duplicate existing community resources but rather complement them. The Commission concludes, however, that community services cannot be exclusively relied upon to satisfy the needs of persons who come to the Family Court. The Commission accordingly recommends that adequate counselling and conciliation services should be guaranteed to such persons, and that local conditions should determine whether these services are to be established within the court itself, or in special clinics or departments, or secured by a system of purchase of services.

Innovative procedures, such as the use of mobile clinics, regional health centres and volunteers, should be developed in order to provide a high quality of service accessible to rural as well as urban centres.

The Commission firmly believes that the Family Court should not become a "family clinic" with a judicial arm attached as the ultimate means of disposing of family problems. This would threaten the viability of such a court from the outset. The Commission nevertheless recognizes that conciliatory counselling on a short-term basis by the support staff of a Family Court may be necessary and desirable in the search for an alternative to judicial disposition of conflicting claims.

The Commission further recommends that consideration be given to establishing "community clinics" independent of the Family Court, to provide an inter-disciplinary therapeutic approach to the resolution of family and personal problems.

The Commission is of the opinion that any decision to use the counselling or conciliation services within or available to the Family Court should rest with the individuals concerned. The Commission opposes mandatory counselling. But, facilities should be available to interested persons when desired and their existence must be made known to actual and potential litigants by aggressive and imaginative means.

The Commission also believes that the availability of counselling and conciliation services must not be allowed to foster delay or prejudice the legal rights of any person. This does not mean, however, that rules of procedure should not be designed to encourage recourse to counselling or pre-trial confereces with a view to settling disputed issues.

There is little reliable information on the types, extent, cost and effect of family counselling and conciliation services. The Commission favours the provision of such services and recommends the institution of pilot projects to test the demand and need for these services and their effectiveness and cost.

CLINICAL SERVICES

The Commission has considered whether clinical services including physicians, psychologists, and psychiatrists should be attached to the court in order to undertake clinical examinations or advise the Information and Intake Services, other support staff, or ultimately the judge.

It is our opinion that clinical services should not be attached to the Family Court although it is vital to ensure that such facilities are available to the Court, on demand, in appropriate cases. For example, access to such facilities should be guaranteed to the court where a clinical diagnosis is required to assist in the judicial disposition of particular proceedings.

INVESTIGATIVE SERVICES

There are strong arguments in favour of providing investigative services designed to assist the judge in arriving at his decision.

These arguments raise the following questions:

1. Are investigative services desirable and, if so, in what circumstances should an investigation be undertaken? Should investigation be mandatory and universal in all or any types of proceedings or should it lie in the discretion of the court?
2. To what extent should investigative reports be made available to affected parties or their counsel? Should an opportunity for cross-examination of the investigator or of his sources of information be available?
3. To what extent should hearsay evidence be admissible by way of an investigative report?
4. Should an investigator have access to Family Court intake files or to the files of a counsellor who has attempted to reconcile the parties or conciliate their differences?
5. Should investigative services be attached to or separate from the court?

The use of the probation service to prepare pre-sentence reports in juvenile delinquency proceedings is already well established in Canadian courts and the use of investigative reports in custody, adoption, wardship and neglect proceedings is also a common practice in Juvenile and Family Courts and in County or District Courts.

In examining the prospective role of investigative services, it may be necessary to distinguish inter-spousal proceedings from those primarily confined to matters affecting children. In the former context, and more specifically in relation to divorce and nullity proceedings, the Commission concludes that investigative services should not be used to substantiate or vitiate allegations of either party respecting the grounds for relief, although such services could possibly be relied upon to expose fraud or an abuse of the judicial process.

There may be, however, a need for independent appraisal of the means and needs of the respective spouses where a claim for inter-spousal maintenance is included in divorce or nullity proceedings. The traditional use of adversary procedures to determine the means and needs of the parties in such proceedings is frequently time-consuming and, more importantly, may fail to indicate the true state of affairs. The court should be empowered to

order an independent investigation and report of the financial circumstances of the parties prior to disposition of the issue of maintenance or the enforcement of an existing order. Such a power would not be indiscriminately exercised; procedural amendments such as a revision of the form of the divorce petition could more appropriately go far in securing relevant financial information on maintenance. Substantial advantages could also be achieved by the passage of legislation empowering the court to require an employer to furnish a written certificate of wages or salary that would be admissible in evidence on the issue of maintenance. The court could also be empowered to require the disclosure of any relevant information contained in the records of the Unemployment Insurance Commission or any government agency. Such disclosures would be relevant not only in determining the financial circumstances of the parties but also in tracing a spouse who had abandoned family dependants.

It has already been observed that investigative services are presently relied upon to some extent in custody proceedings. There appears to be a consensus of opinion favouring the use of investigative services and reports in custody proceedings. Such reports provide objective information which should be of material assistance to the judge. It is not considered that the investigative services would prepare a report in all cases but, as is already the practice in certain jurisdictions, the judge should have discretion to request one.

The court should be statutorily empowered to order an investigation and report for the purpose of determining the custody of children in inter-spousal proceedings; the use of such investigative procedures should fall within the discretion of the Court and should not be mandatory or universal. Adequate personnel to make such investigations and reports must be available to the Family Court.

Although emphasis has been placed on the use of investigative services in matrimonial proceedings involving claims for maintenance or custody, it may well be that such services will be useful in the disposition of a wide range of other matters within the jurisdiction of the unified Family Court.

It is now appropriate to consider the role of investigative services in neglect or delinquency proceedings and intra-familial criminal proceedings. In recent years, a growing body of opinion in North America has favoured two separate hearings in such proceedings, the first being adjudicatory (to decide the issues) the second being dispositional (to decide how to deal with them). With

respect to such bi-partite proceedings, it is generally conceded that the court should not consider or examine investigative reports at the adjudicatory hearing but that such reports should be available to the court in any subsequent dispositional hearing. The Commission endorses the concept of separate adjudicatory and dispositional hearings in proceedings involving juvenile delinquency, neglect and intra-familial crimes and concludes that investigative reports should not be submitted to the court or be admissible in evidence at an adjudicatory hearing but should be available and admissible, if the court so orders, at a dispositional hearing.

Reliance upon investigative reports poses difficult problems in a search for a balance between the need for confidentiality and the rights of affected parties to have access to and question the validity of evidence. Practices respecting the confidentiality or disclosure of investigative reports vary considerably. They range from extending full rights to the parties to inspect the report and subject its authors to cross-examination, to the withholding of reports at the discretion of the judge. It is said that the latter practice enables judges to arrive at decisions on the basis of evidence never submitted to scrutiny and, if lawyers representing the parties are denied access to such reports, their capacity to effectively protect the interests of their clients is substantially reduced.

Such dilemmas are not easily resolved. The use of investigative reports brings before the judge information which may be of considerable assistance in deciding such questions as custody, access, or support rights and obligations. At the same time the content of these reports might inflict psychological harm on the parties if disclosed to them, or could discourage the giving of information by sources who might later be identified.

The Commission concludes that investigative reports should be made available to the lawyers of the parties or, if the parties are unrepresented by counsel, then to the parties themselves. The Commission further concludes that the authors of reports should always be available for cross-examination and that, in the discretion of the judge, persons constituting the primary sources of the information contained in the investigative reports should also be available for cross-examination.

The Commission has already emphasized the need to distinguish between the use of investigative reports in adjudicatory and in dispositional hearings. When reports are used in a dispositional hearing, it is generally conceded that the infringement

of the hearsay rule is legitimate provided the affected parties or their counsel have an opportunity to examine the report and cross-examine the investigator or his sources of information.

The Commission is of the opinion that if disclosures at intake and during counselling are to be full and frank, confidentiality must extend to all statements or communications made. The Commission accordingly concludes that investigative services should be denied access to intake files or to the files of counsellors who have attempted to reconcile the parties or conciliate their differences.

Diverse views have been expressed as to whether investigative services should be attached to, insulated from, or isolated from the Family Court. There appears to be general agreement, however, that a substantial measure of control over investigative services must vest in the court and that the immediate availability of investigative and diagnostic services to the Court must be guaranteed.

The Commission believes that there is no need to insulate or isolate investigative services from the court and concludes that the apparent objectivity of an investigation or investigative report is more effectively guaranteed by right of scrutiny and cross-examination being afforded to the parties or their counsel than by any physical segregation of investigative services from the court. It does not follow, however, that all investigative services, including diagnostic clinical services, should be attached to the court. In deed, investigations in proceedings involving adoption, wardship and neglect cases are currently undertaken by child welfare authorities within the various provinces and, there is probably little to be gained by centralizing such investigations in the Family Court.

YOUTH AND PROBATION SERVICES, INCLUDING AFTER CARE SERVICES AND DETENTION AND OBSERVATION HOMES

Judges who dispose of matrimonial, familial and juvenile proceedings have a narrow range of options from which to choose. This is due to the inadequacy of facilities and the lack of coordination between those responsible for the administration and development of youth and probation services, after care services, detention and observation homes, group homes and foster parent programs.

The Commission recognizes the financial costs involved in the development of these services and facilities but concludes that they must be available to the Family Court.

ENFORCEMENT SERVICES

A major problem facing the individual who receives a court order in his favour is how to enforce it. How does the wife who has gone to court and obtained a maintenance order against her husband actually get the money? What happens when a court has made a custody order but a parent disobeys the order and refuses to give up the child?

The law provides certain legal remedies including the forced sale of goods or land, the attachment of wages, and the threat of jail to enforce orders that are ignored. But the availability of these and other legal remedies does not necessarily resolve the practical problem of putting bread on the table and a roof over the head of family dependants, nor does it necessarily result in the surrender of a child who is being held by a parent in defiance of an order of the court. Often the person who has a court order is left to fend for himself or herself so far as enforcement of the order is concerned. This creates an impossible situation since he or she is usually ignorant of the diverse legal remedies available and of the means of invoking them. His or her problems are compounded not only by the diversity of remedies but also by the fact that different remedies cannot be invoked in any one court. The type of remedy relied upon may itself determine which of several courts must be resorted to in order to secure enforcement of the order.

It is well known that many court orders regulating family matters, and particularly orders for maintenance, go unheeded. It

is estimated that some degree of default with respect to obligations arising under maintenance orders occurs in as many as 75 per cent of all orders. Such a high rate of default results in considerable public expenditures by way of welfare assistance.

Lawyers are frequently unable or unwilling to institute enforcement proceedings, particularly where difficulties are encountered in tracing the whereabouts of the missing spouse or parent or where the legitimate cost of legal services is disproportionate to the amount that will be realized by enforcement of a maintenance order. In most jurisdictions, the courts themselves assume no primary responsibility for ensuring that their orders are complied with. Accordingly, for all practical purposes, a court order is often worth no more that the paper it is written on.

The Commission has examined the various options available to it for solving these problems. We are not content to leave the resolution of enforcement problems to the traditional means provided by the law. It is obvious that unless concrete steps are taken to provide services for enforcing court orders in matrimonial or familial proceedings, the obligations arising under such orders will not be fully discharged and the intent of the law will be frustrated.

The Commission is of the opinion that a unified Family Court should assume a more substantial responsibility for securing the enforcement of orders of the court. This could be done through auxiliary services. Certain procedures could be quickly implemented in the Canadian provinces and territories, without any undue imposition of strain on the existing judicial and legal process or on existing welfare services. These procedures would include the establishment of enforcement services as an integral part of the Family Court system.

Details with respect to the operation of enforcement services and the qualification of personnel must be worked out according to local conditions. However, the Commission stresses that such services must be included if the family court system is to operate effectively. It is envisaged that the functions of enforcement services would include:

- Receipt and disbursement of moneys paid under court orders;
- Maintenance of records and accounting systems to ensure an up-to-date picture of the status of court orders;
- Appropriate action to ensure that any default is explained, and where necessary, to ensure that the default is made good;

- Development of an effective system of tracing the spouse or parent who has disappeared.

Although special attention has been directed to the enforcement of maintenance orders, the Commission wishes to make it clear that the jurisdiction of any enforcement services established in a Family Court could and presumably would extend to the enforcement of other types of orders.

The Commission recommends that enforcement personnel attached to the Family Court assume the primary responsibility for ensuring due compliance with court orders.

In the event that enforcement services are established in the Family Court, consideration must be given to the qualification of the personnel. Much of the responsibility for securing the enforcement of maintenance obligations should be assumed by trained para-professionals and the enforcement role should not fall upon the professional counsellor or legal staff except in circumstances where their respective professional skills or advice are essential to the resolution of the issue.

We envisage that the investigative services might assist the court in its determination of the appropriate amount of maintenance and that the enforcement services should assume some responsibility for ensuring due compliance with any maintenance order granted. The respective roles of the investigative and enforcement services must not be unduly compartmentalized and a high degree of cooperation between these services must be established in order to avoid conflict of jurisdiction or duplication of effort.

For example, if a maintenance order is in default, it may be necessary to "investigate" in order to determine whether the order should be "enforced" or whether variation of the order is warranted by the circumstances of the particular case. The need for effective cooperation between the two units is self-evident.

Effective cooperation and lines of communication must also be established between the enforcement services on the one hand and the administrative, accounting, and legal services on the other.

FUNDING OF SUPPORT SERVICES

The Commission recognizes that the provision of support services referred to in this Working Paper is essentially a matter of provincial concern.

At present, there are cost-sharing arrangements between the federal and provincial authorities whereby many services are provided by the provinces with the assistance of federal financial contributions.

To provide adequate support services in a system of unified Family Courts will require considerable expenditure of public funds for salaries, training programs, and facilities. The Commission urges the federal government to accept a substantial responsibility in the financing of such services. Only with substantial federal financial support can a reasonable standard of service be made available to all Canadians regardless of geographic location. The Commission recommends that the federal government initiate discussions with the provinces with a view to developing appropriate cost-sharing arrangements at the earliest possible time.

Concluding Note

It is customary, in papers such as this, to provide a summary of conclusions and recommendations. This Working Paper, however, must be seen as a summary in itself, with conclusions and recommendations expressed or implied throughout. It represents only an outline and guideline to specific action. It is directed to the public, the professions, government bodies and interested groups, in an effort to secure comments that will influence the Law Reform Commission in its ultimate course of action.

With the benefit of a positive public response the Commission will be in a position to embark upon a program of seeking implementation of the concept of unified Family Courts.

We reiterate that unified Family Courts will not be a panacea for all family problems. They will contribute, however, to the constructive resolution of family conflicts in treating them comprehensively and not on a piecemeal basis.

It is probable that any system of unified Family Courts would evolve over a substantial period of time but this evolution must not forestall immediate action in areas of urgent concern.