



Experiences of Indigenous families in the family justice system: A literature review and perspectives from legal and frontline family justice professionals

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Section 1: Introduction

The United Nations' Declaration on the Rights of Indigenous Peoples (UNDRIP) asserts Indigenous peoples' "right to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes" with "due consideration to the customs, traditions, rules and legal systems of the Indigenous peoples concerned and international human rights" (United Nations, 2007, art. 40). Aligning the Canadian justice system with UNDRIP requires a comprehensive understanding of the material and cultural needs of distinct Indigenous groups in Canada (Status and Non-status First Nations, Métis and Inuit) as well as of the processes and programs that can uphold Indigenous laws, heritage, languages and traditions not only within the colonial legal system, but also in the outcomes of legal proceedings.

This report aims to contribute to the understanding of the experiences of Indigenous families (specifically, unmarried or married couples with children) dealing with separation and divorce, who are going through the family justice system (FJS). This includes both identifying needs specific to Indigenous people going through the mainstream FJS and developing a better understanding of Indigenous approaches to resolving family conflicts. This preliminary information will help to identify specific challenges faced by and opportunities available for Indigenous families going through separation and divorce, and those who work with them. The research can inform future efforts to respond more effectively to the needs of Indigenous families and communities, as well as opportunities to welcome more effectively the gifts of Indigenous Knowledge Keepers through subsequent policy development, consultation, and research activities in relation to family law and family justice.

There is a growing body of literature discussing barriers or inequities faced by Indigenous people in the broader justice system, in particular the criminal justice system and the child welfare system, where Indigenous people are greatly over-represented. However, there is less research on the experiences of Indigenous people in the family justice system. Out of over fifty sources from our literature review, only one offered substantive research focusing exclusively on Indigenous people's experiences in family law (McCallum & Hrymak, 2022). The gap in data is notable when we consider the prevalence of justiciable issues related to family breakdown. In 2021/2022, family law cases accounted for approximately one third of all civil court cases (Ciavaglia-Burns, et al., 2023); and family cases were more active in civil courts than non-family cases (Ciavaglia-Burns, 2021). Moreover, these statistics do not capture the families who do not turn to the FJS—or who abandon initial efforts to work within the FJS—to deal with issues arising out of separation or divorce due to barriers to accessibility. While some families settle matters independently, it is important that a wide range of family justice services—including legal supports as well as alternative dispute resolution services—be available and accessible to all people should they need support in resolving family law matters.

After a brief outline of our methodology, this report discusses various barriers to accessibility and justice that Indigenous families face in the FJS. We begin with barriers that impact all people in Canada, but which disproportionately affect Indigenous populations who face intersecting levels of oppression based on income, gender, education, disability, and Indigenous identity:

- Affordability and legal aid eligibility;
- Procedural complexities;
- Fear and distrust; and
- Legislative inequities.

Given the geographic distribution of Indigenous people in Canada, and the higher rates of intimate partner violence particularly against Indigenous women (Heidinger, 2022), we offer a deeper discussion on the challenges faced by individuals living in Northern, rural, remote and/or small communities, as well as by survivors of intimate partner violence. Further, we outline some culture-specific considerations and challenges Indigenous families can face when navigating the colonial FJS, including:

- Racism and cultural safety;
- Cultural perspectives on family;
- Culture and the best interests of the child;
- Language barriers; and
- Mobility between communities.

Finally, we outline promising models, recommendations and further research directions that can improve experiences and outcomes for Indigenous families dealing with separation and divorce.

Section 2: Approach

2.1 An Intersectional Approach

It is important to acknowledge from the outset that the systemic inequities Indigenous people face within the FJS are rooted in the historical and ongoing impacts of colonialism in Canada. A history of legislation, policies and practices aimed at genocide, dispossession, cultural assimilation, and social, political and economic marginalization have created many significant barriers for Indigenous people accessing services and seeking justice. Indigenous experiences within the FJS must be framed in relation to intersecting structures of oppression and adversity, including racism, poverty, ableism, violence against women, and intergenerational trauma. Any one of these barriers is important; in combination, these barriers have a compounding effect. Therefore, although this report presents its findings based on thematic areas, where possible we aim to bring attention to the unique, *intersecting* identities and circumstances that can impact Indigenous families' experiences in the FJS, including ethnicity, gender, socio-economic background, disability, and geographic location. This includes, where possible, identifying the distinct considerations of First Nations, Inuit and Métis Peoples; First Nations people with or without Indian status, and living on and off reserve; and Indigenous people living in different provinces and territories.

2.2 Terminology

In developing this report with care and respect, attention has been paid to terminology. Nevertheless, the authors acknowledge the inherent inadequacy of certain terms to represent the diversity of worldviews within Indigenous contexts and the complex and deeply personal nature of family dynamics. A few points of clarification:

- In our research questions and report, we use the term “family breakdown” to refer to the divorce or separation of a married or unmarried couple who have children together, not just during the point of breakup, but also before, during, and after this point, as their involvement in the FJS might have continued long after they had separated or divorced. The term “breakdown” is in the *Divorce Act* (R.S.C., 1985, c. 3 (2nd Supp.)); however, we recognize the emotional impact the term “breakdown” may have for individuals with lived experience, and we do not mean to suggest that separation or divorce necessarily entails a negative disintegration of parents’ and/or their children’s sense of being a family or the strength of their individual relationships.
- Throughout the report, family justice system, or FJS, refers to Canada’s colonial justice system, in which the relatively narrow conception of “family” to refer to the immediate, nuclear members (a married or unmarried couple and their children) has long been predominant. As we discuss below, the 2021 amendments to the *Divorce Act* incorporate considerations for extended family relationships in relation to the best interest of the child (Department of Justice Canada, 2022d). It is important to acknowledge that Indigenous Peoples have their own legal and cultural traditions for addressing family matters, and vast kinship networks and traditional family systems that are not captured within this report, except where otherwise noted. In Section 3.2.2 we address some important implications of different family structures undergoing separation and divorce.
- Indigenous Peoples have distinct constitutional and treaty rights as individuals and groups. For this reason, subsuming Indigenous identities within a multicultural umbrella is a category error. We refer as often as possible to distinct Indigenous identities; however, our use of the term “Indigenous” should not be read as a pan-Indigenous formulation that erases or suppresses distinctive group or individual

identities. The Government of Canada follows Section 35 of the *Constitution Act, 1982* in recognizing Indigenous peoples (or “Aboriginal peoples”), whether denoting First Nations, Métis Nation governments, or Inuit.

- We note significant scholarly debate regarding UNDRIP’s role in upholding the legitimacy of state sovereignty over Indigenous Peoples (Kuokkanen, 2019). Citing Patrick Macklem’s analysis, Kuokkanen notes that “because of the state-centred character of international law, Indigenous rights are always constructed through and in relation to that framework” yet “not all Indigenous people agree with conciliatory accounts of Indigenous self-determination remaining subordinate to the doctrine of state sovereignty” (2019, p. 32). Others advocate for restructuring existing nation-states in ways that are not necessarily incompatible with the legitimacy of state sovereignty. We are not taking a position here on this debate; rather, we wish to clarify that when we refer to articles within UNDRIP as a foundational document regarding the rights of Indigenous Peoples of Canada, we are aware that there is a scholarly debate about the role of UNDRIP and the United Nations framework.

2.3 Literature review

Our research team conducted a thorough literature review, including primary research, statistical data, academic articles, and public reports related to Indigenous people’s experiences within the FJS and the broader justice system. To support a more nuanced understanding of Indigenous people’s experiences, we also included research related to intersecting populations that experience heightened inequities within the justice system, including women, 2SLGBTQIA people, people in rural and remote communities, people living with disabilities, and victims of intimate partner violence.

2.4 Interviews

Alongside the literature review, interviews were conducted with four lawyers and three legal advocates/navigators who have firsthand experience working with Indigenous clients in the FJS. Of the four lawyers, one has practiced in Nunavut, and the other three have practiced in Manitoba. Two have worked for legal aid; two have worked in private practice. Two advocates and navigators have practiced in British Columbia, and one has practiced in Nunavut. Interviews encompassed experiences with Indigenous clients living in rural and urban settings, Northern and Southern Canada, and on-reserve and off-reserve.

The interview questions (see Appendix A) focused on gathering information on experiences in the FJS for Indigenous families who have children of the relationship, going through relationship breakdown. The interview questions, and subsequent analysis, aimed to draw out facts and not subjective opinions on the FJS or other topics. The interview questions considered distinction-based¹ and intersectional approaches; a trauma- and violence-informed approach² was followed during the interviews.

¹ “A distinction-based approach means recognizes First Nations, the Métis Nation, and Inuit as the Indigenous peoples of Canada, consisting of distinct, rights-bearing communities with their own histories, including with the Crown. The work of forming renewed relationships based on the recognition of rights, respect, co-operation, and partnership must reflect the unique interests, priorities and circumstances of each People.” <https://www.justice.gc.ca/eng/csj-sjc/principles-principes.html> for more information.

² Trauma and violence-informed approaches focus on minimizing the potential for harm and re-traumatization, enhancing safety, control and resilience for all involved in research, systems or programs. <https://www.canada.ca/en/public-health/services/publications/health-risks-safety/trauma-violence-informed-approaches-policy-practice.html>

Section 3: Findings

The content below reflects the findings from the interviews, supported and complemented by data from the literature review.

3.1 Access to Justice

Many barriers to access and related challenges within the FJS are experienced by Indigenous and non-Indigenous people alike. However, given the profound social and economic impacts of colonialism, as well as intersecting factors such as geographic location, Indigenous people are at an increased likelihood of experiencing these barriers.

3.1.1 Affordability and Legal Aid Eligibility

The cost of legal representation was cited across all interviews and literature as one of the most significant barriers to accessing the FJS. Affordability disproportionately affects the Indigenous population in Canada, which faces higher rates of poverty and unemployment compared to non-Indigenous Canadians (Statistics Canada, 2022a). As noted by one private practice lawyer:

“Other people do not go ahead with the firm because they cannot afford a lawyer. This is another major reason that the firm does not have more Indigenous clients. The financial cost of seeking private counsel is a huge barrier to access owing to the costs of litigation.” (Interview notes)

Legal aid programs across the country offer free or reduced-cost family law services for low-income families. Overall, only 3% of applicants in family law cases in 2019/2020 were represented by legal aid lawyers in comparison with 44% represented by non-legal-aid lawyers (Ciavaglia-Burns, 2021).³ In 2020-21, 67% of family legal aid applications were approved (Department of Justice Canada, 2022c). Notably, civil legal aid applications from self-identified Indigenous applicants had a higher approval rate compared to the general population: 81% compared to 76% (Department of Justice Canada, 2022c).⁴ In particular, Indigenous women made up two-thirds (66%) of Indigenous civil legal aid clients (Department of Justice Canada, 2022c). However, various interviewees and reports described the barriers many individuals face when applying or receiving legal aid, including:

- Financial ineligibility for legal aid, yet still unable to afford private legal representation (Law Society of Saskatchewan, 2018; Link et al., 2018; Roil, 2014; Tsoukalas & Roberts, 2002; Birnbaum & Bala, 2019; Bertrand et al., 2002; Housefather, 2017);
- Little or no family legal aid coverage for certain matters (such as obtaining divorce decrees or property claims) as programs seek to prioritise cases involving serious threats to safety or parenting issues (such as parenting time, child support and spousal support) within limited legal aid budgets (Skinnider & Montgomery, 2017; Legal Aid BC, 2021; Rahman, 2010; Track et al., 2014; Birnbaum and Bala, 2019);

³ Note that the representation variable in the Civil Court survey is not consistently reported across participating courts so caution should be used in interpreting the findings.

⁴ There is no direct comparison between Indigenous and non-Indigenous applications for family matters specifically, only for civil applications in general. This data may also under-represent clients who did not choose to disclose their Indigenous identity in applications.

- Difficulty finding legal aid clinics or lawyers that take on legal aid cases, long waiting lists, and/or distance from services (Rahman, 2010; Roil, 2014; Rajan, 2021; Birnbaum & Bala, 2019);
- Barriers to providing documentation, such as language, literacy, or mental health; lack of accommodations for individuals with disabilities; or inability to access financial documents for victims of intimate partner violence who are fleeing unsafe situations (Rajan, 2021; Birnbaum & Bala, 2019);
- Insufficient time allotted for legal aid lawyers to understand clients' values, needs and cultural contexts or to address complex cases, and especially for clients facing litigation abuse, family violence, and literacy or other communication challenges (Hrymak & Hawkins, 2021; Roil, 2014; Rajan, 2021; Birnbaum & Bala, 2019);
- Inability to afford the associated costs of litigation, such as fees for required applications, or mandated mediation or courses; lost wages; childcare; and transportation or accommodations for individuals travelling from rural and remote communities (Skinnider & Montgomery, 2017; Hrymak & Hawkins, 2021); and,
- Lack of awareness of legal aid information (Birnbaum & Bala, 2019).

As noted in the 2017 report of the Standing Committee of the House of Commons on Justice and Human Rights the regional inconsistencies in legal aid services, eligibility guidelines, and coverage provisions both between and sometimes even within provinces, have raised questions about equal access to justice in Canada (Housefather, 2017). While most jurisdictions guarantee access to social assistance recipients and victims of family violence, determining eligibility for the broader population takes into consideration income, assets and liabilities, family size and the type of case. Financial eligibility criteria are typically at or below poverty levels⁵ and have not kept up with inflation (Birnbaum & Bala, 2019; Tsoukalas & Roberts, 2002; Bertrand et al., 2002; Housefather, 2017). Legal aid is also inaccessible for the “working poor” who may have moderate income, but are still unable to afford legal services, especially if their resources are required for other needs in a time of crisis (Law Society of Saskatchewan, 2018, Bertrand et al., 2002; Birnbaum & Bala, 2019; Housefather, 2017). Québec offers the highest financial eligibility threshold across Canada, and data from 2014-2015 indicates that family legal aid was granted to more than three times the number of applicants than Ontario, despite having a significantly smaller population, demonstrating the impact of eligibility criteria on access to legal services (Poitras et al., 2021; Birnbaum & Bala, 2019).

In some cases, financial eligibility assessments fail to account for contextual factors faced by Indigenous families. For instance, one interviewee noted that in cases of family breakdown, shared family assets can also impact financial eligibility, even though the distribution of property amongst the partners may be yet undetermined. Meanwhile, Roil's report describes how Inuit workers at a remote industrial site in Labrador earned higher than average incomes but were “unable to pay the huge cost of bringing independent legal counsel to their communities because of the high travel costs involved” (2014, p. 60).

Receiving approval for legal aid does not guarantee legal representation. Two interviewees described how some lawyers are hesitant to take on legal aid cases that they perceive to be overly complex, such as cases involving coordination with representatives from child welfare services. One interviewee listed five major urban centres across their province where their clients were unable to find a lawyer due to practices being “either full or too

⁵ Canada does not have a national poverty line, and instead uses three low-income lines, the Low-Income Measures, the Low-Income Cut-Off and the Market Basket Measure (Wright, 2017). Tsoukalas & Roberts (2002) compare financial eligibility for criminal legal aid with Statistics Canada's Low-Income Cut-Off.

selective about the files they take,” or practices being disincentivized from taking legal aid cases at a reduced fee. Québec’s 2019 Public Inquiry Commission on relations between Indigenous Peoples and certain public services noted that Indigenous clients face additional discrimination for criminal legal aid matters⁶:

Over half (58.3%) of the private practice lawyers who accept legal aid mandates believe that low compensation is an issue, since the cases are complex and require a great deal of involvement. Several of them were hesitant to take cases in which Indigenous people were accused. Stéphanie Quesnel, access to justice coordinator at the Centre d’amitié autochtone de Val-d’Or (CAAVD), told the Commission that she sometimes needs to devote “about fifty hours” to finding a lawyer interested in taking a case. (Gouvernement du Québec, 2019, p. 313)

Even when clients with complex cases obtain legal representation, the number of hours in the court case may exceed those covered by legal aid. This is a particular challenge for survivors of intimate partner violence, whose ex-partners may deliberately extend family law proceedings until their victims run out of finances and legal recourse (Hrymak & Hawkins, 2021), or who may need more time to feel safe enough to disclose abuse (Bala & Birnbaum, 2019). Time limitations can also impact individuals who face literacy, language or other communication challenges who may require increased face-to-face contact and time to process information (Bala & Birnbaum, 2019). Outcomes of legal action can be impacted by imbalances in financial resources or power (Rajan, 2021; Hébert et al., 2022)

Legal aid plan funding in each jurisdiction has a direct impact on access to justice, as budget fluctuations determine the eligibility criteria for applicants, the number of hours allotted per case, the competitiveness of compensation for legal aid lawyers, the scope of coverage (e.g. offering partial assistance or repayment requirements), and the reach of service delivery (Wright, 2017; Bala & Birnbaum, 2019). While in some jurisdictions legal aid funding has been stable or increased, others have seen budget cuts or have not kept up with inflation and/or increasing demand (Wright, 2017; Bala & Birnbaum, 2019; Manitoba Law Foundation, 2021; Hrymak & Hawkins, 2021; Rahman, 2010; Law Foundation of BC, 2005).

The absence of family legal aid holds numerous judicial, financial, safety, health and emotional repercussions for applicants and their families. In the absence of legal aid, some individuals abandon their claims, potentially unjustly losing parenting time, spousal and child support, and/or rights to matrimonial property and pensions (Bala & Birnbaum, 2019). Others join the increasing number of self-represented litigants (SRLs) in family law—making up 58% of family case litigants in 2019/2020 (Ciavaglia-Burns, 2021). SRLs may face increased difficulty understanding court procedures, and more complex legal issues such as matrimonial real property on reserve. SRLs tend to require more assistance and court time and still may experience a notable disadvantage in outcomes (Department of Justice Canada, 2016; Roil 2014; Bala & Birnbaum, 2019). Meanwhile, if the other party is represented, their legal costs increase (Department of Justice Canada, 2016; Bala & Birnbaum, 2019). Only six provinces offer duty counsel to SRLs for civil matters (Department of Justice Canada, 2022b). Bala & Birnbaum (2019) note the lack of data on the complexities and challenges in seeking and obtaining family legal aid, and the consequences of receiving limited or no legal aid, for equity-seeking communities including Indigenous people.

⁶ This reference and quote were used because there was no similar information available for family law matters.

3.1.2 Procedural Complexities

Despite the predominance of affordability in discussions of justice system accessibility, the President of Québec’s 2019 Public Inquiry Commission on relations between Indigenous Peoples and certain public services noted that financial ineligibility is not the main reason for denying legal aid applications from Indigenous people, but rather “inability to provide some information,” which was corroborated by data from criminal legal aid applications (Gouvernement du Québec, 2019, p. 313). In the Commission’s survey of defence lawyers who work in Indigenous communities, 54.8% of respondents believed that “the process of obtaining legal aid is a problem for Indigenous peoples” due to “language, the distance that the potential beneficiary must travel for an eligibility appointment, the exhaustive and hard-to-collect documentation, and often non-existent proof of income” (Gouvernement du Québec, 2019, p. 313).⁷

Saskatchewan’s Legal Services Task Team describes how for self-represented litigants,

The legal system can be scary, intimidating, and full of complex and confusing procedures. The general public does not have the benefit of understanding ‘insider’ customs and procedures in the courtroom (language and terminology, where to stand, the order of proceedings, etc.). (Law Society of Saskatchewan, 2018, p. 39)

Some individuals struggle to access legal information and legal documents due to limited levels (or different kinds) of literacy, in particular legal literacy (Link, Mwunvaneza, & Schroh, 2019, p. 9). Additionally, individuals with cognitive disabilities or mental health challenges may have difficulty applying for benefits “due to difficulties such as gathering the necessary documentation, comprehension issues, sensory issues, and not being well enough psychologically to go through the application process” and may also struggle with “understanding the law, and the procedures and processes taking place” (Rajan, 2021, p. 26, 40). Individuals fleeing unsafe home situations may also have limited access to necessary documentation, such as proof of income (Bala & Birnbaum, 2019).

In some jurisdictions, family courts have introduced prerequisites for filing a legal claim, such as attempting alternative dispute resolution, completing detailed financial disclosures or completing parenting courses. While these models are intended to increase efficiency and reduce costs for clients by encouraging out-of-court resolution, some interviewees described how, paradoxically, prerequisites can increase barriers for Indigenous clients. For instance, completing online courses, as well as downloading or uploading necessary documentation requires stable Internet access, which some of their Indigenous clients in rural or remote communities do not have. Others struggle to provide necessary financial documentation if they do not have up-to-date tax returns or if they have multiple sources of income, receive social assistance, or other work such as trade and barter of trapline furs, fish catches, and other harvested items for money, goods, housing, or services such as childcare.

One interviewee described how procedural complexities are “out of touch” with the needs of their clients who are in crisis situations. While the lack of preparation or insufficient documentation can be perceived as an individual failure, it is important to consider the inherent pressures parents face in caring for children alongside other responsibilities such as work, caring for extended family, or other cultural or community obligations and roles. These pressures can also be compounded by the mental health impacts of family dissolutions,

⁷ This report was included even though it focusses on criminal law because there is no commensurate survey of legal aid for family law matters.

intergenerational trauma, and the intersecting systemic adversities some individuals face such as intimate partner violence, poverty, geographical barriers from services, lack of transportation, or legal illiteracy. All these factors can impede some individuals from preparing sufficiently for legal action. Interviewees stressed the importance of offering their clients holistic support, such as through integrated family services or the support of legal advocates (see Section 4.2 for more information).

Some interviewees and reports have also critiqued the length of time, including delays, in family law proceedings, which can increase costs, the stress and trauma of interpersonal conflicts, periods of separation from children, and time without equitable spousal or child support (Hébert et al., 2022; Law Commission of Ontario, 2012, Link et al., 2018; Roil 2014). One interviewee also noted that families experiencing high conflict disputes could benefit from more prompt access to judicial mediation support. If the hurdles seem insurmountable, or the associated costs become too great, some clients—particularly those most marginalized—may give up fighting for access to justice:

The system is not a barrier to access; it is actually a closed door. Maybe it is not to people who are more savvy, but people who are already disenfranchised from the system [...] get lost in the system or they won't finish the process. (Interview notes)

3.1.3 Fear & Distrust

While the justice system can be intimidating for many people who are not legal professionals, Indigenous people in Canada are victims of a long history of legislated colonial violence and discrimination in the justice system, including through the *Indian Act*, the Sixties Scoop, modern child welfare systems, residential schools, police violence, and ongoing racism and discrimination in the justice system (see Section 3.2.1). As a result of this, many Indigenous people experience a deep-seated fear and distrust of the justice system which discourages them from seeking legal support or increases the stress of legal proceedings (Law Society of Saskatchewan, 2018; McCallum & Hrymak, 2022; Skinnider & Montgomery, 2017). As described in a report from Rise Women's Legal Centre:

Notably, our interviewees often described Indigenous people's interactions with the family law system in terms that are very similar to those used to describe their interactions with the criminal law system, despite the fact that only one of these systems is designed to be punitive [...] Experts described that Indigenous people going to family court also experience a lack of trust, because they have no choice but to seek to resolve family law problems using the very same court system where they may be fighting for the return of their children or have interactions with the criminal justice system. (McCallum & Hrymak, 2022, p. 11)

The 2022 National Justice Survey found that only 10% of Indigenous respondents felt confident that the FJS was fair to all people, compared to 16% of white respondents, and 18% were confident that the FJS was accessible to all people, compared to 25% of white respondents (Department of Justice Canada, 2022a).

3.1.4 Legislative Inequities

In Canada, the federal *Divorce Act* governs divorces for individuals in legally recognized marriages. Provincial and territorial legislation governs separations for married and unmarried couples who are separating but not seeking a divorce, as well as issues related to property division, and protection orders.

Our research indicated several discrepancies between the *Divorce Act* and the various provincial and territorial Acts that can inequitably affect outcomes for Indigenous families depending on their geographic location and marital status. Most notably, the 2021 amendments to the *Divorce Act* (Department of Justice Canada, 2022d) include changes that address some of the barriers identified in this report as impacting Indigenous families' experience in the FJS. These barriers include higher rates of interpersonal violence, the question of culture and extended family when establishing the best interests of the child, and financial challenges. Specifically, the changes include:

- An expansive definition of family violence that includes non-physical forms of abuse;
- Specific factors that judges must consider when determining the best interest of the child, including factors such as “the nature and strength of the child's relationships with parents, grandparents, and other important people in their life” and “the child’s linguistic, cultural and spiritual heritage and upbringing, including Indigenous heritage;” and,
- New tools to establish and enforce financial support.

While some of these amendments are mirrored in provincial legislation, they are not yet standardized. In her discussion on the importance of standardizing best practices in family law for survivors of intimate partner violence, Koshan argues:

The standards that apply to the resolution of disputes should not depend on whether the parties were married and are seeking a divorce. Indeed, we might argue that the different standards that currently exist violate the prohibition against discrimination in the Charter [Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act, 1982 (UK), 1982, c 11] on the basis of marital status, which has been recognized as an analogous ground under section 15 (see *Miron v Trudel*, [1995] 2 SCR 418, 1995 CanLII 97). (2021, p. 4)

The gaps between the new *Divorce Act* provisions and provincial and territorial legislation are significant considering the rapidly growing number of common-law families in Canada.⁸ Same-gender and non-binary couples are also more likely to be living common-law (Statistics Canada, 2022c). Data tables from the 2021 Census show that more than half (51%) of Inuit who live with a partner are in a common-law relationship while 49% are married (Statistics Canada 2022d). However, First Nations people (58%) and Métis (69%) were more likely to report being married than living with a common-law partner (42% and 31%, respectively) (Statistics Canada 2022d).

⁸ While marriages still make up 77% of unions, the number of common-law relationships has increased by 447% between 1981 and 2021, compared with a 26% increase of married couples. Since 2011 common-law couples in Québec were more likely to have children living at home than married couples (Statistics Canada, 2022c).

3.1.5 Northern, Rural and Remote Communities

Indigenous families' experiences with the FJS are significantly impacted by geographic location. Not only does the legislation governing separation and legal aid policies differ between provinces and territories, but public services in general are also limited in many northern, rural, small and/or remote communities which are home to a majority of the Indigenous population. While the Indigenous population has been growing in urban areas, 56% of Indigenous people lived outside of large urban centres according to the 2021 Census (Statistics Canada, 2022b).⁹ Geographic location differs amongst Indigenous groups: 45% of the Métis population live outside of large urban centres, compared to 67% of Status First Nations people and 85% of Inuit (Statistics Canada, 2022b). Two thirds (69%) of Inuit live in Inuit Nunangat (Statistics Canada, 2022b). Additionally, 44% of Status First Nations people lived on reserve¹⁰; while some reserve communities are close to urban centres, others are extremely remote, and the majority have less than 500 inhabitants (Statistics Canada, 2017; Indigenous Services Canada, 2020).¹¹

A review of legal aid service delivery in rural and remote communities found that "Indigenous people form the dominant clientele group (over three-quarters) in the three northern territories and a significant clientele group in northern and more rural parts of most provinces" while in several jurisdictions women with family law issues were the first or second most frequent category of applicant (Roberts, 2023, p. 163).

Indigenous people are therefore disproportionately affected by the many barriers to justice that impact Northern, small, rural, and/or remote communities, including:

- **Fewer resident lawyers and judges**, particularly those offering specialized services in family law, family violence, and/or accepting legal aid certificates. For example, in Saskatchewan, the average ratio of lawyers per resident is 1:818, whereas in rural Saskatchewan the ratio is 1:5,559 (Law Society of Saskatchewan, 2018). There is a greater risk of the available lawyers being "conflicted out" in a small community, and especially for victims of litigation abuse (Hrymak & Hawkins, 2021). Roberts (2023) notes that the lack of lawyers particularly impacts family law cases which are less remunerative, often require lawyers on both sides, and where lawyers in some cases are pulled away from family cases to attend criminal cases (p. 22).
- **Limited legal services and facilities**, including courts, court workers, interpreters, legal aid clinics, paralegal services, mediation services, notary publics, and alternative or Indigenous justice programs. Small and rural communities, especially in Northern regions, often rely on circuit courts which visit each community about 2-6 times a year.
- **Limited culturally responsive legal services**, including Indigenous lawyers and legal services in Indigenous languages, and general lack of Indigenous cultural competency from available lawyers.
- **Limited ancillary support services**, such as mediation programs, counsellors, social workers, police, victim centres, shelters, and housing that can support families with other needs related to a relationship

⁹ Large urban centres are defined as having at least 100,000 people (Statistics Canada, 2022b).

¹⁰ The term "on reserve" refers to lands legally affiliated with First Nations. However, this term does not apply to all First Nations, such as some First Nations that have signed a modern treaty or a self-government agreement. For example, most First Nations in the Northwest Territories and the Yukon have signed modern treaties, but their lands are not considered "on reserve."

¹¹ Data for First Nations people living on reserve in this report is taken from the 2016 census, which had the lowest rates of incompletely enumerated reserves and settlements in recent Census years. The COVID-19 pandemic and the confirmation of unmarked graves of children at residential school sites across Western Canada significantly impacted data collection for reserves and settlements in the 2021 Census (Statistics Canada, 2022b).

dissolution or family crisis. One report on family law in Nunavut contends: “Any reform that tends to mandate services as a prerequisite to divorce or court involvement is likely to create a major barrier for people from smaller communities in the North. From a northern perspective, any mandatory services would be impossible to provide on a routine basis. There is no mediation in place; parental education programs would have to be limited to a videotape presentation accessible to all; counselling is inconsistently available, and, in many cases, counsellors have limited expertise or a conflict of interest” (Gallagher-Mackay, 2003, p. 65).

- **Distance and lack of transportation.** For many small communities, family law services may only be reached by air, sea, or long overland travel. Individuals may be further affected by inaccessible or unreliable public and private transportation, weather, mobility issues or the associated costs of lost wages, childcare, transportation and accommodations (Roberts, 2023). Distances between communities can also complicate parenting arrangements as discussed in Section 3.2.5 (Gallagher-Mackay, 2003).
- **Limited access to technology,** due to poor access to strong Internet connection and cellular service, unaffordability of technology, a lack of technical skills to use technology, and/or a lack of privacy (Roberts, 2023). The lack of access to technology limits many people’s information about legal options, ability to compile and submit documentation, and/or access online or telephone services. Data from the Canadian Radio-Television and Telecommunications Commission (CRTC) indicates that in 2020 only 53% of rural households met their minimum recommended threshold for fixed broadband Internet access service¹² (compared to an average of 90% of households across Canada), while in 2019 only 35% of First Nations reserves have access to this level of service, with no such service available in reserves in Newfoundland and Labrador, Yukon and Northwest Territories (CRTC, 2021).
- **Concerns of confidentiality or social stigma** in small communities where accessing legal services is noticeable. This particularly increases vulnerability for victims of violence, which may further discourage them from seeking support or pursuing the dissolution of their relationship.
- **Higher rates of intersecting adversities,** such as poverty and family violence including police-reported intimate partner violence (Hrymak & Hawkins, 2021).
- **Increased stress on rural legal systems** following the COVID-19 pandemic, as a significant backlog of cases has developed after public health measures eased (Roberts, 2023).

3.1.6 Intimate Partner Violence (IPV)

IPV includes physical and sexual abuse as well as emotional, psychological, financial and other forms of abuse. Involvement in the FJS can result in new forms of abuse, intimidation, control and coercion through the many forms of litigation abuse (Hrymak & Hawkins, 2021). While people of all genders, social, and cultural backgrounds experience intimate partner violence, data from 2019 shows that rates of IPV are 3.5 times higher amongst women, and in particular Indigenous women are more likely to experience IPV than non-Indigenous women, with 1 in 6 Indigenous women experiencing at least one form of IPV in the previous year (Women and Gender Equality Canada, 2022). One interviewee noted that over the past three years, all their Indigenous clients had faced family violence.

¹² Defined as at least 50 Mbps download and 10 Mbps upload service with unlimited data options (CRTC, 2021).

IPV not only can contribute to family breakdowns, it also often continues or intensifies following separation (Department of Justice Canada, 2022b). Numerous complicating factors impact safety and access to justice for victims of IPV when seeking separation or divorce, including:

- **Claims of violence being dismissed, minimized or not believed.** Some survivors are also counselled to not disclose violence to avoid accusations of “alienating” their children from their ex-partner (Hrymak & Hawkins, 2021; Koshan, 2021).
- **Narrow definitions of IPV** limiting legal recourses or eligibility for legal aid (Hrymak & Hawkins, 2021; Koshan, 2021; Rahman, 2010);
- **IPV not always being considered as a factor for parenting arrangements**, which are often designed to facilitate maximum contact with both parents, despite the increased risk of violence against children (Hrymak & Hawkins, 2021; Koshan, 2021¹³);
- **Financial abuse** limiting survivor’s available resources and contributing to housing insecurity (Hrymak & Hawkins, 2021; Hébert et al., 2022);
- **Litigation abuse**, including leveraging legitimate legal processes to control or exhaust the opposing party, such as by initiating multiple proceedings, using parenting time and decision-making as a means of intimidation or coercion, self-representing in order to have direct contact with the survivor, or “conflicting out” all local lawyers by sharing confidential information about the case. Litigation abuse can also exhaust the survivor’s financial resources or legal aid hours, impeding them from pursuing further legal action. Litigation abuse can be difficult to detect or mitigate (Hrymak & Hawkins, 2021);
- **Lack of victim services**, particularly in small, rural and remote communities (Rahman, 2010).

3.2 Indigenous Cultural Considerations

Alongside the barriers that impact the general population, our literature review and interviews found several cultural-specific considerations that Indigenous families often navigate when seeking a separation or divorce.

3.2.1 Racism and Cultural Safety

One interviewee stated that they have witnessed almost all their clients experiencing “extreme and overt racism” or differential treatment based on their Indigenous identity, both in court and in court registries, and that they have helped to file complaints about racism reported by community partners in other areas of their province, with little follow-up. Rise Women’s Legal Centre asserts that “both Indigenous lawyers and Indigenous parents face racism in the legal system” (McCallum & Hrymak, 2022, p. 14), while Quebec’s 2019 Public Inquiry Commission found that:

¹³ It should be noted that changes to the *Divorce Act* came into force in 2021 that:

- Provide a broad definition of family violence;
- Require courts to consider the impact of family violence on post-divorce parenting arrangements; and
- Require courts to consider whether there are any current or pending civil protection, child protection or criminal proceedings or orders relating to the parties, where there is a request for a parenting order, or a child or spousal support order.

Several provinces and territories have provisions in their family law legislation.

The evidence contains relatively few signs of direct discrimination against First Nations members and Inuit in the justice system. The data and testimonies collected, however, clearly demonstrate the adverse side effects caused by certain laws, policies, standards and institutional practices rampant within the justice system. This discrimination, which is widespread enough to be termed systemic, is reflected in various stages of criminal proceedings, as the evidence has shown. (Gouvernement du Québec, 2019)

While the commission's focus was on the criminal justice system, a similar pattern of systemic discrimination has resulted in the disproportionately high rates of child welfare apprehensions of Indigenous children, which further impacts Indigenous people's sense of trust and safety in family courts (McCallum & Hrymak, 2022).

Some specific examples of racism in family law that were described in our research include the favourable treatment of non-Indigenous parents in relation to parenting arrangements based on "real or perceived higher socio-economic standing" (McCallum & Hrymak, 2022) or biases against Indigenous parents' alcohol or cannabis use (Interview notes); Indigenous survivors of IPV facing discrimination from police (Hrymak & Hawkins, 2021); ethnic biases in parenting assessments (Interview notes, Hrymak & Hawkins, 2020), and explicitly racist commentary in court documents (Boyd & Dhaliwal, 2015). One interviewee noted that some Indigenous clients prefer not to self-identify as Indigenous out of fear that it will prejudice them in court.

Our interviews and literature review identified a lack of cultural competence amongst justice system professionals (including court officials, mediators, lawyers, judges, jury members) as a core source of racism and discrimination in the FJS. Indigenous people are underrepresented in legal professions, and non-Indigenous legal professionals often lack an understanding of the history of colonialism in Canada, Indigenous Peoples' cultural practices and obligations, social contexts and barriers, trauma-informed practices, and best practices for working with equity-deserving people (Law Society of Saskatchewan, 2018; Manitoba Law Foundation, 2021; McCallum & Hrymak, 2022). This lack of cultural awareness can lead to disrespectful or offensive statements and unfair assessments of Indigenous people's parenting decisions and capacity (McCallum & Hrymak, 2022). For instance, in BC s.211 reports are sometimes ordered to provide judges with further information about a child's needs, opinions, the family home and parenting styles to help determine parenting arrangements. While the reports are intended to be written by a neutral professional, Rise Women's Legal Centre's guide on s.211 reports specifically warns that:

It may be particularly challenging as an Indigenous person to have a s.211 report written about you as assessors are not required to have knowledge about the impacts of colonization or to have completed training about their own biases or systemic racism. (Hrymak & Hawkins, 2020, p. 3)

The FJS process can also be culturally insensitive or alienating to Indigenous clients. For instance, Roil (2014) notes that "the timing of court circuits does not always allow sufficient time for aboriginal people to leave their local homes and their native activities to attend at the court's more formal and time-structured events" (p. 60). Such "native activities" can have important cultural and tangible significance—for instance, times of the year when harvesting or hunting occurs to provide food for up to a year; missing such a critical window can have a disastrous effect on food security for a family or community. One interviewee described how a mandated parenting course in their jurisdiction lacked any content reflecting Indigenous knowledge around parenting, and

similarly, McCallum & Hrymak describe how “the colonial framework manifests in both substantive law, which excludes Indigenous worldviews and values, and in court processes that are inaccessible, rely heavily on European ways of communicating information, and are individualized rather than relational” (2022, p. 11). For example, one interviewee described how some clients find the framing of parenting arrangements in terms of “custody” and “access” to be overly “proprietary” and in opposition to Indigenous worldviews for family. These terms are no longer used in the *Divorce Act*. Since 2021, more child-focused terminology was adopted. The new approach uses “parenting orders” to replace orders for custody and access. These orders set out “decision-making responsibilities” and “parenting time”. The terms “custody” and “access” are still used in some provincial and territorial legislation and used colloquially.

Several reports describe how these cultural barriers and disconnections can lead to poorer outcomes or outright harm for Indigenous clients or discourage some Indigenous people from turning to the FJS entirely (Manitoba Law Foundation, 2021; McCallum & Hrymak, 2022; Gallagher-Mackay, 2003; Law Commission of Ontario, 2012; Law Society of Saskatchewan, 2018; Roil, 2014).

3.2.2 Cultural Perspectives on Family

One of the most significant areas of cultural disconnection and misunderstanding impacting Indigenous families in the FJS is around the definition of family. Whereas family law is typically framed in terms of the immediate, nuclear family (two parents and their children), from an Indigenous perspective the definition of family extends to include relatives, chosen families, and/or the broader community (NIMMIWG, 2019; Guay et al., 2019). In 2021, 17% of First Nations children and 17% of Inuit children lived with a grandparent— almost twice the proportion of non-Indigenous children (9%) (Statistics Canada 2022e). The embeddedness of extended family is reflected in some Indigenous languages; for instance in Inuktitut, the term *qatangutigiit*, or “immediate families” includes grandparents (Gallagher-Mackay, 2003, p. 23-4). Guay et al. (2019) also note that co-habitation with extended family reflects not only cultural contexts, but also in some cases the lack of safe and adequate housing in some Indigenous communities.

Despite the potential benefits of living with extended family, such as the opportunity for parents to learn parenting strategies and skills, and greater practical and emotional support for parents and children (Guay et al., 2019; McCallum & Hrymak, 2022), several interviewees described how differing cultural perspectives on family can lead to biased and discriminatory rulings and parenting assessments. Under family law, time spent with parents does not extend to time spent with a parent’s extended family, thus living with extended family who are actively involved with raising the child(ren) can become a factor that detracts from claims for increased parenting time. As one interviewee described,

It is difficult to convey to the court that even if the child is not with the primary parent, there is a strong family connection to the paternal side, however that looks. If dad’s time with the child is spent with [the paternal grandmother] that should be recognized. (Interview notes)

Similarly, an interviewee for Rise Women’s Legal Centre’s analysis on decolonizing family law, states that:

For a child to be living with their grandparents, this isn't necessarily a breakdown in the relationship between the parent and the child. It's perfectly normal to be quite actively raised by grandparents or quite actively raised by an aunt. And that's not necessarily due to any kind of shortcoming of that child's parent. (McCallum & Hrymak, 2022, p. 13)

Incorporating a broader, more culturally informed definition of family raises several considerations for the FJS. For instance, extended family members are not always aware they can make a legal claim for time with children, or financial support for children they are helping to raise (Gallagher-Mackay, 2003). Generally little to no legal assistance is available to them should they want to pursue such a claim (McCallum & Hrymak, 2022), and one interviewee described how in one case, while the grandparents were successful in their claim for time with their grandchild, they only received two nights out of the month. A larger family circle means that there is increased support when families separate, but also that more people are affected when a family separates, and that more people may be interested in maintaining relationships with the children (McCallum & Hrymak, 2022). A weakened relationship with the family of one parent can be a significant loss for children who lived in a home with extended family (Bates, 2021); however, this connection is not typically considered a factor when considering the best interest of the child or the emotional support offered to a family. There are also increased complexities for the division of the family home when more members of the family live on the property.

3.2.3 Culture and the Best Interests of the Child

Several reports and interviewees discussed the importance of considering a child's Indigenous cultures, languages, and ties to community and land when considering the best interests of the child for parenting arrangements and matters of relocation. This approach aligns with UNDRIP's assertion of Indigenous Peoples' right "to revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures" (United Nations, 2007, art. 13.1), as well as the Truth and Reconciliation Commission's call for Indigenous children to reside in "culturally appropriate environments" (2015, art. 1.ii).

In practice, race and culture can have either a favourable or unfavourable influence on parenting arrangement decisions, depending on the judge's discretion. While Indigenous heritage plays a more significant role in child welfare proceedings, interviewees highlighted the growing recognition of the importance of cultural heritage in family law as well. However, in their case law analysis on the impact of race and culture on determining the best interests of the child among Canadian mixed-race couples, Boyd and Dhaliwal (2015) found that "race is rarely found to be the key factor and the racialized parent is not favoured in custody cases involving mixed race children," as race and culture are often outweighed by factors such as financial means, stability, attachment, family support, mental state, or history of caregiving (p. 371).

Further, Rise Women's Legal Centre found that biases may play into rulings, noting that:

Low socio-economic status is frequently seen as an individual failure, and there can be ignorance or misunderstanding about how Indigenous families have been intentionally and systemically disadvantaged by colonial processes. As a result, non-Indigenous parents and families may be given preference in court because of their access to resources or a real or perceived higher socio-economic standing. (McCallum & Hrymak, 2022, p. 14)

One interviewee noted that they have seen clients who chose not to disclose their Indigenous identity for fear of prejudice, limiting their access to the consideration of Indigenous heritage when considering the best interests of the child.

While Boyd and Dhaliwal (2015) warn against a reductive practice of “race-matching,” they instead suggest “that it is key for any parent seeking custody to be able to demonstrate their ability to foster the healthy development of a child’s multifaceted identity [including] multiple racial and cultural backgrounds.” One interviewee reported a recent shift where courts may extend increased parenting time to the parent who is closer to their First Nations community. However, another interviewee described how rulings can be biased towards the parent whose Indigenous community is closer to the location of the court. In some cases, time with children can be offered to family who are able to provide access to cultural heritage (Boyd, 2019; Boyd & Dhaliwal, 2015).

Rather than leaving consideration of race and culture entirely up to the discretion of a judge, Boyd and Dhaliwal (2016) also recommend legislation that provides explicit guidelines on how to factor in race and culture. As of 2021, Indigenous heritage is specifically outlined as a factor to consider in the federal *Divorce Act*; however, such framing is inconsistent across provincial and territorial legislation.

3.2.4 Language Barriers

UNDRIP asserts the right for Indigenous Peoples to use their traditional languages, and the responsibility of states to “ensure that Indigenous peoples can understand and be understood in political, legal and administrative proceedings, where necessary through the provision of interpretation or by other appropriate means.” (United Nations, 2007, art. 13.2). While the majority of Indigenous people in Canada speak English or French, Indigenous people often face difficulties accessing legal information and services if those individuals exclusively or primarily speak an Indigenous language, English but not French, or French but not English, or if they speak different dialects than available legal staff and interpreters.

Language barriers can pose a particularly significant barrier to Inuit; in 2003, 14.8% percent of Nunavut’s population was unilingual in Inuktitut, and in 2016, 5.9% of the Nunavut population was unable to conduct a conversation in English (Gallagher-Mackay, 2003; Statistics Canada, 2019). Roberts’ (2023) research into legal aid delivery in rural and remote communities surfaced the following trends on translation and interpretation needs and services for Indigenous-language speakers across Canada:

- Translation needs are uncommon on the West coast, with some translation of legal aid pamphlets available;
- Speakers of Cree in Alberta or Ojibway in Ontario often seek assistance from family or community members;
- At the time of Roberts’ research, there were no lawyers speaking Inuktitut in Northern Quebec, although translators are available when required; similarly, there were no Indigenous court workers or navigators in the Epsipqtoq community of New Brunswick, and further gaps in Nova Scotia;
- There is a significant need for interpreters for speakers of Inuktitut or Innu-aimun in Labrador, where family court applicants often need to bring their own interpreter;
- An estimated less than one tenth of clients in the Northwest Territories presented with a language barrier, with court workers available to those who required assistance; and
- Knowledge of legal terminology is low among community-based translators for speakers of Inuktitut or Innuinaqtun in Nunavut.

Providing consistent access to family law information and services for Indigenous language speakers through translations, interpretation, and/or multilingual staff is imperative to the alignment of the FJS with Indigenous human rights. It is also important to take a nuanced, distinctions-based approach to language services, to identify and address differences in dialect.

3.2.5 Mobility Between Communities

Band membership and geographic location are additional factors that can impact Indigenous families’ parenting arrangements and family unity. For instance, following a separation, ex-partners who are not members of a First Nations band cannot remain living on the reserve, as they may have done while in a relationship. Parenting arrangements must stipulate pick-up and drop-off points that are accessible to both parents, as the band may restrict non-band members from entering a reserve (Boyd, 2019.; Legal Aid BC, 2021). In one case in Ontario (*Neshkiwe v Hare* 2019), when one parent took the family’s children to reserve land that the other non-member parent could not access, police on the First Nation initially refused to enforce an ex-parte order for the children to be returned to their original city, and the First Nation challenged the Ontario Court’s jurisdiction over custody and access (Cross, 2021). While the case was eventually resolved, it brought up significant questions that are yet to be resolved about First Nations jurisdiction in family law cases.

In cases where one parent lives in a remote reserve or community, or when parents live far away from each other, it can also be difficult—if not impossible—to afford or arrange transportation between parents, particularly in the winter months or if one parent faces financial difficulties or physical disabilities. One survey conducted in Nunavut indicated that about half of respondents could only reach their children’s primary residence by airplane (Gallagher-Mackay, 2003), limiting contact to telephone and letter. As one interviewee described:

This can result in a mother having no access to her daughter for three-quarters of the year. Her daughter resides somewhere that appears physically on a map as if it is located not that far away, but in reality, it is impossible without significant expense to connect with her daughter three-quarters of the time. [...] A Court cannot mandate away poverty or provide airplanes for parents to reach remote communities for visitations by family members. The only option is to carve out as much time as possible when the roads are good, which requires working together to manage the pickup points. This is very difficult to achieve when the parents are in conflict. (Interview notes)

Questions of relocation can be additionally fraught when it would result in the loss of cultural connection to the land or community (Gallagher-Mackay, 2003) or alternately when non-removal orders limit a child’s ability to have access to land, ceremony, community and family in a distant community (McCallum & Hrymak, 2022).

Section 4: Promising Ideas, Models and Recommendations

Our interviews and literature review surfaced several preliminary recommendations, as well as promising models and ideas to address some of the barriers, inequities and challenges presented in the findings. It is important to note that there were several calls for increased consultation with Indigenous communities to co-create more comprehensive, distinctions-based and nuanced solutions.

4.1 Enhancing Accessibility

Cost, availability and proximity of legal services are all major obstacles to equitable access to the FJS for Indigenous people. Our interviews and the literature review outlined several potential approaches to increasing affordability and availability of legal services including:

- **Increased funding for legal aid** to provide access to more applicants, increase time allotted to Indigenous cases to support cultural awareness, and address geographical gaps in services. Roil (2014) and one interviewee suggested that separate financial means testing should be considered for Indigenous people, particularly those who live in remote communities to account for increased associated costs such as transportation and accommodations. The NIMMIWG specifically calls for increased funding of legal aid to support all Indigenous women, girls and 2SLGBTQQA persons, and guaranteed access to free legal counsel for those who report an offence, including spousal violence (2019, art. 5.6, 5.13).
- **Expanding legal education** through public awareness campaigns and resources. These should leverage multiple modes of communication, including online, hard-copy and face-to-face consultations (Roberts, 2023). Some models include PEI's toll-free legal information inquiry line¹⁴ and Manitoba's Family Law Client Guide services (Manitoba Law Foundation, 2021), Ontario's Family Law Information Centres, which offer information about court procedures and family law in courthouses (Link et al. 2018), and New Brunswick's Family Advice Lawyer service,¹⁵ which offers up to two-hour consultations (Roberts, 2023).
- **Decentralized or mobile services** offering legal information or family law clinics in community-based spaces such as libraries, which can be more accessible and increase trust, particularly for equity-deserving populations. Partnerships with other agencies can also help to address transportation barriers (Roberts, 2023).
- **Incentive programs or core funding for regional clinics.** To address gaps in services and increase cultural safety for Indigenous clients, and in particular for Indigenous women, there is a need to attract and retain family lawyers in small, rural and remote communities, Indigenous lawyers and legal staff, and female lawyers and legal staff. Potential approaches include adjusted tariffs for legal aid work (Roil, 2014), place-based education, succession planning and recruitment tools, networking opportunities, incentives to relocate (Skinnider & Montgomery, 2017), retention bonuses, core funding for regional clinics, or recruiting law school applicants from rural backgrounds who intend to practice in their communities (Roberts, 2023). Some promising models from BC include the Rural Education and Access to Lawyers

¹⁴ <https://fcj-fcj.org/inventory-of-reforms/prince-edward-island-inquiry-line/>

¹⁵ <http://www.legalaid-aidejuridique-nb.ca/family-law-services/family-advice-lawyer/>

Initiative,¹⁶ the Mapping Her Path project¹⁷ and the Women Lawyers Forum.¹⁸ This responds to the NIMMIWG's call to increase Indigenous representation in all Canadian courts (2019, art. 5.12).

- **Translation and interpretation services**, or increased Indigenous-language-speaking staff, with an attention to distinct dialect needs, particularly to address language gaps in Labrador and parts of Nunavut (Roberts, 2023).
- **Integrated family services**. In recognition that legal services are only one of many needs families face when experiencing relationship breakdown, there are recommendations and promising models of programs that are co-located with additional services, such as mental health, housing, financial supports, victim services, and other social supports (Law Commission of Ontario, 2012; Skinnider & Montgomery, 2017). Examples of community-based organizations offering Indigenous-based support for parents and families in conflict include Fearless R2W in Manitoba¹⁹ and the Ma Mawi Wi Chi Itata Centre in Winnipeg.²⁰
- **Accessible service options** that are designed by and for Indigenous people living with various disabilities.
- **Improved infrastructure** for itinerant courts in remote and rural communities (Department of Justice Canada, 2022e; Gouvernement du Québec, 2019; Roberts, 2021).

4.2 Alternative Legal Models

The research surfaced promising models for legal services that can help to reduce costs, increase service reach, improve efficiency, and provide more culturally responsive services to Indigenous people. These included:

- **Telejustice services**. As described in Section 3.1.5, in some cases, online and telephone services can present a barrier to access for individuals with limited access to computers and Internet, limited literacy, and/or who feel more comfortable speaking in person. It is important that services be available through multiple avenues, including in-person, to meet diverse client needs. However, multiple jurisdictions are successfully improving access by offering legal information, services and court proceedings via telephone or online. In particular, telejustice services can increase access in rural and remote communities, or for families seeking support from an Indigenous lawyer where there is none practicing locally. As reported by Butler (2022), the expansion of telejustice services during the COVID-19 pandemic helped to reduce the time lawyers needed to allocate to each case, lowering costs for clients while allowing lawyers to take on more cases. One example of this model is the Ontario Telejustice project,²¹ which delivers pro-bono services to the Nishnawbe Aski First Nations in order to improve access without competing with local practitioners (Link et al. 2018).
- **Support from non-lawyer professionals** offering limited legal services, advice and referrals to address service gaps and offer reduced-cost services. These include paralegals, trained family law advocates (such as through BC's Family Law Advocate Program, working under the supervision of lawyers), and other non-regulated legal professionals (such as staff operating services through navigator programs). These services can support families who are seeking increased information for non-judicial separation

¹⁶ <https://www.cbabc.org/Our-Work/REAL>

¹⁷ <https://justiceeducation.ca/mapping-her-path>

¹⁸ <https://www.cbabc.org/Sections-and-Community/Women-Lawyers-Forum>

¹⁹ <https://fearlessr2w.ca/>

²⁰ <https://www.mamawi.com/>

²¹ <https://cfci-fcjc.org/inventory-of-reforms/ontario-telejustice-project/>

agreements, self-represented litigants, as well as families who are represented by a lawyer by reducing lawyer fees and protecting limited legal aid hours. Services offered include drafting court documents, accompaniment to mediations and court sessions, referrals, support applying for and appealing decisions regarding legal aid, translating legal terminology, providing emotional support, and preparing clients for what to expect throughout the process. Additional services offered by navigator programs include advocacy with court officials (including counsel and judges), restorative and culturally relevant justice, trauma informed services, etc.) (Department of Justice Canada, 2022e). Link et al. (2018) discuss the value of “legal incubator” models, where law students work under the supervision of a principal lawyer, mentoring into a law firm practice while offering more reduced-cost services. Furthermore, an evaluation of navigator programs found that while the minority of service users reported a resolution to their legal issues as a result of the program, the majority reported that information provided improved their understanding of laws (71%), legal options (65%), and their responsibilities (66%) (Department of Justice Canada, 2022e - MyLawBC Evaluation). The evaluation concluded that navigator programs in Canada are advancing the effectiveness of courts and increasing trust in, and the accessibility of the justice system (Department of Justice Canada, 2022e).

- **Non-judicial dispute resolution processes** such as negotiation, mediation, court-assisted dispute resolution, settlement conferences, family group conferencing, collaborative family law, or arbitration. In low-conflict separations, where both parties are open to a non-judicial settlement, these alternative dispute resolution processes can be faster, more confidential, and less adversarial than in-court settlements. At the same time, however, they can also be more expensive (Law Commission of Ontario, 2012; Manitoba Law Foundation 2021). Some interviewees reported that clients were interested in more non-judicial support.
- **Indigenous processes and services.** For Indigenous families, alternative dispute resolution processes that are based in cultural knowledge can further offer a culturally responsive approach to addressing family breakdown. Indeed, the 2013 federal *Family Homes on Reserves and Matrimonial Interests or Rights Act* opened an avenue for First Nations to develop their own laws and dispute resolution processes to govern on-reserve matrimonial real property (Friedland et al., 2015). Indigenous families in BC are advised that they can seek professional mediation from an Elder, community leader, band, or another Indigenous family (Legal Aid BC, 2021), or legal support from the Indigenous Community Legal Clinic.²² One interviewee reported that there is interest in seeing more Inuit Elders serving as advisors in the court system and family services.

Several sources noted the need to increase availability and awareness of alternative processes, particularly in Northern and rural communities, as well as to develop more Indigenous-specific legal services, such as extending the Indigenous Courtwork Program to provide more support to those involved family law matters. The TRC includes a call for “recognition and implementation of Aboriginal justice systems” (2015, art. 42), while the NIMMIWG called for “accessibility to meaningful and culturally appropriate justice practices” (2019, art. 5.11).

Alternative and/or Indigenous dispute resolution processes cannot, however, fully address the need for accessible and culturally safe family justice services for Indigenous people. As stated in UNDRIP, Indigenous Peoples “have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State” (United Nations, 2007, art. 5). It is imperative that Indigenous people be free to make

²² <https://allard.ubc.ca/community-clinics/indigenous-community-legal-clinic>

an informed decision about the approach to justice that is most favourable for their family instead of being forced into a given process by necessity.

4.3 Cultural Sensitivity, Safety and Equity

There is a need for increased cultural safety, protection for survivors of IPV, and establishment of practices that better serve equity-deserving communities. Recommendations include:

- **Cultural competency training.** The Truth and Reconciliation Commission (TRC)'s Calls to Action (2015, art. 27, 28, and 57) and the National Inquiry into Missing and Murdered Indigenous Women & Girls [NIMMIWG]'s Calls for Justice (2019, art. 10.1) both underscore the need to establish mandatory cultural competency training for professionals in all public services, including the justice system. In keeping with the TRC and NIMMIWG's calls for action and justice, such training should include the history and legacy of residential schools, UNDRIP, Treaties and Aboriginal rights in Canada, Indigenous law, Aboriginal-Crown relations, Indigenous cultures and histories, intercultural competency, conflict resolution, human rights, anti-racism, and distinctions-based training. Training would have to be embedded in law schools, but also offered in the form of "intensive, periodic training" for existing practitioners in a model that supports accountability through standards of practice (NIMMIWG, 2019, p. 193).
- **Embedding Indigenous cultural support in courts**, such as by funding a staff position for Indigenous courtroom liaison workers, as recommended by the NIMMIWG (2019, art. 10.1);
- **Increased hours in Indigenous legal aid cases** to support lawyers in understanding the cultural and social context, as well as more time in court to address social contexts (McCallum & Hrymak, 2022);
- **A trauma-informed approach** to family justice, which Rise Women's Legal Centre's analysis puts at the heart of decolonizing the family justice system to better serve Indigenous families (McCallum & Hrymak, 2022). Such an approach incorporates a thorough and compassionate understanding of the manifestation of trauma, abuse and crisis situations, and offers supports that address instead of exacerbating root causes (McCallum & Hrymak, 2022). Trauma-informed training is important for all legal staff, but can also be paired with outreach workers, counsellor or coordinator services for victims of violence.
- **Aligning provincial and federal family laws** to address gaps in equity for common-law partners, and Indigenous children (as discussed in Section 3.1.4)
- **Embedding protections against IPV** into legislation and the FJS (Koshan, 2021; Bates, 2021; Hrymak & Hawkins, 2021; Skinnider & Montgomery, 2017; NIMMIWG, 2019, art. 5.5), including:
 - Broadening the definition of abuse across all family law legislation;
 - Increasing screening for IPV in all family law cases; the use of Conduct Orders²³ to limit abuse following separation;
 - Specialized family courts or specialized judges;
 - Appointing a single judge for each client to help identify patterns of litigation abuse;

²³ In BC, the Provincial Court or Supreme Court can issue Conduct Orders that mandate or restrict the actions and behaviours of either partner or their children to manage behaviours that are making settlement difficult or that constitute misuse of the court. Examples of such orders include limiting or setting conditions for communication, mandating that one or both parties pay the rent and bills for the family residence, or prohibiting the cancelling of utilities. (Johnston, 2013).

- Setting up offsite remote witness facilities or protected persons spaces;
- Providing dedicated lawyers specializing in family violence to exclusively serve women experiencing IPV who would be protected from lawyer conflicts; and
- Increasing education about IPV and available supports for both legal staff and the general public, including around conduct orders, signs of abuse, litigation abuse, trauma-informed practices, and available supports.

These measures are in alignment with UNDRIP’s assertion of the rights of Indigenous women and children to full protection against violence (2017, art. 22).

4.4 Further Research Directions

While this report offers a significant picture of the multiple, compounding factors that can impact Indigenous peoples’ experiences within the FJS, there are several gaps in the available knowledge and data that could contribute to robust and effective solutions. Areas for further research or consultation could include:

- **Maintaining a consolidated database of family legal aid eligibility guidelines and coverage provisions** across Canada. Birnbaum & Bala (2019) offer the most recent overview of family legal aid plans across the country, however the data points presented varies between provinces and does not provide detailed information about financial eligibility criteria. Bertrand et al. (2002) provides a much more detailed inventory of service delivery, coverage provisions, financial eligibility and issues faced by family legal aid plans in each province and territory, however it is significantly outdated. An updated inventory, ideally including regional variations within provinces and territories, could provide a more current picture of gaps or inequities in terms of coverage and financial eligibility and accessibility.
- **Conducting an intersectional impact analysis on family law**, specifically comparing provisions in provincial and territorial legislation with the federal *Divorce Act*. An intersectional analysis would consider the needs of Indigenous Peoples, as well as common-law partnerships, women, 2SLGBTQQIA people, victims of violence, people in rural and remote communities and other equity-seeking communities. The analysis would articulate amendments needed to ensure equal treatment for all Canadians, as well as alignments with the UNDRIP (McCallum & Hrymak, 2022, p. 20).
- **Developing an inventory of alternative justice programs**, including Indigenous justice programs, mapped by geographic region. Such an inventory could support an understanding of gaps in services and could also be made public to support families in locating relevant services.
- **A comprehensive study on Indigenous laws and perspectives** on marriage, families and the dissolution of families, and the impact of colonialism on family matters. Such a study would need to take a distinctions-based approach to acknowledge the unique cultures and histories of different First Nations, as well as Métis and Inuit peoples. Findings could enrich cultural competency training for legal professionals to better understand the perspectives and realities of Indigenous families and provide more culturally responsive services. This is in alignment with the TRC’s call for “the federal government, in collaboration with Aboriginal organizations, to fund the establishment of Indigenous law institutes for the development, use, and understanding of Indigenous laws and access to justice in accordance with the unique cultures of Aboriginal peoples in Canada” (2015, art. 50).
- **Further consultation** with First Nations, Inuit, and Métis families who are experiencing or have experienced the dissolution of their relationships, as well as frontline legal staff supporting Indigenous clients in family law. Such a consultation would benefit from a trauma-informed and multi-pronged

approach, including both individual interviews and larger group dialogues in consideration of both the sensitive nature of the topic, as well as the need for greater knowledge sharing. In alignment with UNDRIP, the NIMMIWG, the TRC and international principles and standards, it is important that the FJS remain accountable and responsive to the recommendations emerging from such consultations.

- **Collecting and publishing data on family violence** victimization of Indigenous people (as stated in the NIMMWG's Calls for Justice, art. 9 and 55).

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Appendix A: Research Questions

Research interviews for this report followed a semi-structured format, guided by the following themes and questions:

1. Whether and how Indigenous families/communities are accessing the FJS
 - a) What proportion of your Indigenous clients use the family justice system? Are there elements of the system they use most often? In what cases are your clients more or less likely to use the FJS?
 - b) What challenges have your clients encountered as Indigenous persons accessing the FJS?
 - c) Have you found specific ways to support your Indigenous families who are going through family breakdown and using the FJS to make the system more accessible to them?
2. How are those who are not accessing the FJS resolving their family law issues?
 - a) When your clients do not go through the FJS, how do they resolve matters around family breakdown (i.e., parenting time, child support, etc.)?
 - b) What challenges have your clients encountered as Indigenous persons undergoing family breakdown and not accessing the FJS?
 - c) What alternatives have your clients used in place of the mainstream FJS to deal with family breakdown including separation, parenting, spousal support, and child support arrangements?
 - d) Have you found specific ways to support your Indigenous clients experiencing family breakdown outside of the FJS?
3. In your experience, in what ways is a child's Indigenous upbringing and heritage considered when determining what is in the best interests of the child when making parenting arrangements within or outside of the FJS?
 - a) What challenges have you faced when these factors are considered under the best interests of the child?
 - b) Have you found specific ways to support your Indigenous clients to consider the best interests of the child when making arrangements for children after family breakdown?
4. Are there any other challenges that you have encountered with Indigenous clients who have experienced family breakdown that have not been covered in the previous questions?