



BC Justice Review Task Force

Unified Family Court

Background and Discussion Paper #2:

Status Update

August 2003

www.bcjusticereview.org

1. Introduction

This is the second discussion paper published by the Justice Review Task Force¹ on the topic of Unified Family Court (“UFC”). This paper reports on the results of consultations conducted with the bench and the bar on UFC. It also reports on the current status of UFC research and planning in BC. This paper only reports on the comments made and the questions raised during the consultations, without trying to either fully explore or resolve these questions. This paper does however describe the next steps to be taken with respect to the issues raised.

The objective of the Justice Review Task Force is to identify a wide range of reform ideas and initiatives that may help to make the justice system more responsive, accessible and cost effective. To this end, the Task Force provides a forum for its participants to exchange information, engage in mutual consultation respecting proposed administrative, procedural or program changes, and coordinate initiatives where appropriate.

The Task Force has published a list of potential justice system reforms that may be worthy of further exploration.² From that list the Task Force has begun to identify projects which it wishes to explore as a matter of priority. One such possibility that it has been exploring is Unified Family Court (“UFC”).

On October 7, 2002, the JRTF released a background and discussion paper on the topic of Unified Family Court. The paper had the following purposes:

- to serve as a general orientation to the topic of Unified Family Court;
- to identify issues requiring consideration; and
- to begin to collect the information necessary to weigh the merits of having a Unified Family Court in British Columbia.

Upon releasing the paper, the JRTF consulted with various members of the judiciary and the family bar in order to begin to assess the advantages and disadvantages of implementing UFC and to measure the judiciary and the bar’s position on whether BC should proceed with implementing a UFC system.

¹ The representatives currently on the Justice Review Task Force are: BC Supreme Court – Chief Justice Donald Brenner, BC Provincial Court – Chief Judge Carol Baird Ellan, Law Society of BC – Richard Margetts, Q.C., Canadian Bar Association – Peter Leask, Q.C., Ministry of Attorney General – Deputy Attorney General Allan Seckel, Ministry of Attorney General – M. Jerry McHale, Q.C.

² See Exploring Fundamental Change, A Compendium of Potential Justice System Reforms at: http://www.bcjusticereview.org/recent_announcements/2002/potential_reforms_07_02.pdf).

On December 10, 2002, the Federal Minister of Justice announced a Child-Centered Family Justice Strategy. A key component of this strategy was a commitment to provide the provinces and territories with funding for family justice services and for the expansion of Unified Family Court. The Government of Canada committed to provide nation-wide funding of \$16.1 million a year for 62 new judges, 46 of whom will be promoted from the provincial court level. The expansion of Unified Family Court is to commence by 2005-2006.

The purpose of this paper is to provide an update on the Task Force's consideration of Unified Family Court. No conclusions have yet been reached. However, the Task Force feels it would be timely to provide all interested stakeholders with an overview of the results of the consultation so far, including comments from the Supreme and Provincial Courts, together with particulars of some of the issues presently under consideration.

2. Consultations

Task Force representatives met with all seven Canadian Bar Association Family Law Sections and with the Vancouver Alternative Dispute Resolution Section. All meetings occurred during the month of November 2002. The meetings were generally well attended. A few written commentaries have been received. Both the Supreme Court and the Provincial Court provided responses, which are now published on the JRTF website.

While the consultations were being conducted the Ministry of Attorney General simultaneously carried out considerable research into the UFC concept.

2.1 General Comments

The bar across the province expressed a diverse range of views, typically on all sides of the important questions. Generally however, the theoretical or potential benefits of UFC are widely acknowledged. For example:

- Single jurisdiction - There is broad support for the basic idea of eliminating the divided and overlapping jurisdictions which presently result in multiplicity of family proceedings³. The Provincial Court's inability to deal with some matters and the consequent duplication of proceedings in Supreme Court is regarded inefficient and inconvenient.
- Specialized judges - The bar is generally very enthusiastic about the idea of appearing before a bench specialized in and dedicated to family law.

³ For example, maintenance enforcement hearings for Supreme Court orders are held in Provincial Court. Enforcement related variation applications may therefore result in parties appearing in both levels of Court.

- Increased reliance on out-of-court family services - There is virtually universal support for the increased use of services such as mediation, custody and access reports, information and education programs, supervised access, duty counsel, etc.
- Simplified procedures - Again, the notion of simplified family law procedures is broadly supported, particularly for its potential to reduce cost and enhance access to the courts.

Ultimately however, where much of the consultation and discussion has quite properly focussed is on the question of how these potential advantages would actually play out on the ground. What would a specialized bench look like? What additional family services would BC actually have at the end of the day? What would UFC procedures actually look like and could they in fact be simpler?

In the context of practical questions such as these one Family Law Section warned against the hasty adoption of a UFC model. It noted that a number of very positive changes have recently been made to family law process and it urged caution about proceeding without taking the time necessary to thoroughly explore all options and better understand the consequences of adopting a UFC model.

The practical questions which emerged out of Ministry research and during the consultation included but were not limited to the following:

- How would UFC be implemented? Where would the Courts be located?
- What would the Court look like? Would it be a separate court or a separate division of the existing court? To what extent would it resemble either the existing Supreme or Provincial Courts, or would it resemble neither?
- What increase in family services would actually be seen and who would get them? Would the province be accountable to the federal government, on an ongoing basis, to apply funds to services?
- What would the simplified procedures look like? How will a single set of Unified Family Court rules accommodate both complex Supreme Court disputes and less complicated Provincial Court disputes?
- How would the different approaches to filing fees and costs now taken in the two courts be reconciled?

2.2 Implementation

In an exercise intended as a departure point for discussion, an example of one possible form of implementation was described in the October 7, 2002, background and discussion paper published by the JRTF. In order to begin to understand the potential fiscal and operational

consequences if a UFC were established in BC, seven locations were identified as potential UFC sites. These particular sites were selected because they are centrally located and have relatively high court sitting hours on family matters.⁴

Generally, the consultation disclosed a preference for province wide as opposed to partial or limited implementation. Concerns motivating this view included the need for equal access to the courts, possible disparity of services between UFC and non-UFC registries, and the potential complexity of having as many as three sets of family rules during transition phases – one for UFC and one for each of the remaining Provincial and Supreme Courts registries.

The Supreme Court expressed the view that province wide coverage would be one of the necessary elements of an effective UFC, and the Provincial Court said that UFC should be available not just to seven sites, but to all British Columbians within a reasonable time and distance.

Federal funding formulas both now and in the past in other provinces have always contemplated an initial round of funding sufficient only for partial implementation of UFC. It does not appear that there is sufficient funding available to allow BC anything more than partial implementation at this time.

2.3 What would the Court look like?

As indicated, both the Supreme Court and the Provincial Court stressed the need for UFC to be at least as physically accessible as the current system. This raises the question of how the new Court could service as many sites as are currently serviced by the two courts combined. On a related point, many lawyers expressed concern that if Unified Family Court simply became an expanded Supreme Court, then the greater expense and complexity of Supreme Court would inhibit access for the many litigants now successfully using the Provincial Court. The two Courts generally serve different constituencies and any move to Unified Family Court should ensure that each of these constituencies remains *at least* as well served in a new system as it is in the present system. At some meetings, this discussion was framed in terms of the “culture” of each of the Courts. It was suggested that the culture of Unified Family Court should not be like that of the existing Supreme Court, nor should it be like that of the existing Provincial Court, rather it

⁴ Surrey (includes New Westminster), Robson Square (includes Vancouver Law Courts and Burnaby), Victoria, Abbotsford, Kelowna (includes Penticton), Kamloops and Prince George

should a blend of both of the Courts. The UFC in BC would need to be a new entity which combines the benefits of both courts.

Many lawyers noted, some quite emphatically, that there are procedures in each Court, such as the Family Case Conference in Provincial Court and Judicial Case Conference in Supreme Court, which they value and do not want to lose. The view was strongly expressed that the current strengths of each court should be retained. Some lawyers asserted that the Provincial Court system is slower and often more expensive for litigants who use lawyers, due to unproductive “fix date appearances”, time lost while waiting to appear in court and frequently interrupted trials. They feel that there will be reduced access to justice if the current Supreme Court family law process is replaced by a system modelled on the current Provincial Court. At the same time other lawyers expressed the view that the Provincial Court processes function more efficiently than the Supreme Court. Obviously, individual views are coloured by the experience of each lawyer and are related to factors, such as backlog, particular to the registry in which they practice. These variations in practice from registry to registry and variations in the nature of each lawyer’s practice could account for some of the differences in opinion that were expressed.

As noted elsewhere, serious consideration would need to be given to whether a single set of rules could meet the needs of the range of litigants now dealt with in the two courts. If implementation was partial or staged, as it has been in other provinces, the question arises as to how areas not serviced by a Unified Family Court would be managed.

Two general options were discussed. The first would see at least some areas serviced by Unified Family Court on a circuit model. A second alternative would be to implement Unified Family Court on a regionalized model and retain the existing split jurisdiction in regions not served by a Unified Family Court. With respect to this latter prospect, lawyers in at least one location expressed concern that they, and unrepresented litigants, might end up working with three sets of rules – one for each of Unified Family Court, Supreme Court and Provincial Court. Concerns have also been expressed respecting the potential cost of a circuit model.

2.4 Specialized bench

Lawyers are very receptive to the prospect of a specialized bench. The great majority appear to regard this as a desirable advantage for family lawyers. It is believed that a judge with a very high level of expertise in family law and intensive exposure to family law issues would be better to appear before. Lawyers with experience working in a UFC in other provinces generally confirm this assumption. On the other hand, the suggestion was made that specialization may result in longer, not shorter hearings, as is usually assumed, since the degree of scrutiny might be higher.

The suggestion was also made that Provincial Court judges would be disappointed by the reduction in variety of their work by the removal of family jurisdiction.

2.5 Family services

The traditional federal funding formula would allow the province to retain the savings realized from the appointment of provincial court judges to the UFC – because it is a federally appointed court, the cost of judicial salaries would shift permanently to the federal government. The provinces are usually allowed to retain the funds previously devoted to provincial court judges only *on the condition* that those funds are applied permanently to services in the UFC. The idea of new and additional services to assist family law litigants is very well received by the Bar. Many lawyers were interested in what form the services would take and would like to have further input into any decisions about services. Options discussed at the consultation meetings included mediation, section 15 custody and access reports, family advocate services, duty counsel and other legal assistance, supervised access, stand-down family justice counsellor services, and “triage” services to provide information and direction to unrepresented litigants. The value of duty counsel as an integral step for ensuring the smooth operation of the justice system was emphasized by some lawyers.

Other comments about services included the following:

- Concerns were raised by members of the bar regarding the availability of adequate legal services generally, including legal advice and representation.
- The question was raised as to whether or not additional services going into Unified Family Courts would risk creating a disparity between the level of urban and rural family law services.
- The concern was also raised that the costs for implementing Unified Family Court would significantly reduce the amount of money available for services. This concern however should be answered by the fact that any savings achieved through the appointment of existing Provincial Court judges to UFC must, by federal funding rules, be applied only to Unified Family Court services and cannot be applied to Unified Family Court implementation or administration costs. The one-time implementation costs and subsequent on-going administration costs for Unified Family Court must be carried by the Province.
- In addition to questions about the nature of the services, participants in the consultation also asked about the scope of the services that would be available.– how much new service would actually be available? Some suggested that \$2 million dollars worth of services, while welcome, would not have a large, or at least not a large enough, impact.

2.6 Rules and complexity

One question frequently raised during the consultation was: “how will a single set of Unified Family Court rules accommodate both complex Supreme Court disputes and less complicated Provincial Court disputes?” Lawyers are concerned not to lose some of the procedural alternatives needed in complex cases (examination for discovery, for example) but, at the same time, they would obviously not wish to encumber simple Provincial Court applications with complex procedures. This is clearly an issue to be explored, although it appears that other Canadian Unified Family Court jurisdictions have found a single set of rules workable.

Another concern raised by some members of the bar is that simplifying the court system might encourage more unrepresented litigants to use the system, which in turn may create greater delays and reduce efficiencies. Others observed however that the majority of litigants in the Provincial Court have always been self represented, and that the number of self represented litigants has been increasing in both Courts in recent years. In fact, this is the trend in common law jurisdictions around the world and as such, efforts should be made to make procedures more user friendly.

2.7 Costs and fees

Questions were asked about how the issue of court costs and filing fees would be dealt with in Unified Family Court. Many observed that implementing court fees for all cases in all Unified Family Court matters would diminish access to justice for low-income litigants who now use the provincial court. Others expressed the caution that removing filing fees in Supreme Court would promote frivolous claims, which would create further burdens on the justice system.

2.8 The Experience in other provinces

One CBA subsection consulted with members of the National Family Law Section who have practiced in Unified Family Courts in other provinces. It reported that according to some, Unified Family Court has been introduced with varying levels of success. Some of the concerns expressed relate to court backlogs, staff shortages, the increased use of judges in more administrative capacities and a lack of uniform application of Unified Family Court rules. The positive aspects of Unified Family Court include the creation of an improved case management system, a more adaptable court, collegiality of the bench and bar, and better integration of the helping professions into the court process.

Research by the Ministry suggests that many judges and lawyers in these jurisdictions are happy with the move to UFC. It also appears that to the extent that the UFC format has resulted in delay and increased pressure on judges and staff, those problems flow largely from the transfer of child protection jurisdiction to the UFC and to changes in child protection legislation. In the report of the Ontario Superior Court of Justice for the Opening of Courts on January 6, 2003 Chief Justice Smith said, in reference to the family courts, “we could not have anticipated that the change in legislation and its application would so greatly increase the volume of child protection work...tremendous pressure has been placed on the superior court in order to deal with the increased workload generated by an increase in the child protection cases.” At the Continuing Legal Education 5th Biennial Family Law Conference in Vancouver in July 2003, Professor Rollie Thompson of Dalhousie University Law School, stated that delay and volume pressures in the UFC in Nova Scotia reflect a simple need for more judges, not a fundamental problem with the UFC concept.

In the course of consultations with the CBA subsections in British Columbia, lawyers who had previously practiced in a Unified Family Court in other provinces or had spoken with colleagues who practiced in a Unified Family Court, presented contrasting views on how successfully Unified Family Court has been implemented. While some expressed similar concerns to those presented above, others expressed very positive comments about the advantages of Unified Family Court.

2.9 Use of Technology

Support was evident for the use of video conferencing and other technological devices. It was suggested that such options could and should be tested immediately and in any event of a Unified Family Court initiative. It is generally agreed that the internet has the potential to enhance delivery of information to many litigants.

2.10 Time Frames

As noted earlier, some lawyers expressed concern respecting the relatively short amount of time available by the terms of the federal funding proposal to analyze, consult and develop plans for Unified Family Court. The Task Force concurs with the need for further research and consultation regarding Unified Family Court.

3. Response of the Supreme Court of British Columbia

It is essential to the Supreme Court that any changes to the family justice system have the effect of enhancing, not limiting access to justice. The Supreme Court has stated that a Unified Family Court model can provide an effective family law process for the people of British Columbia so long as there is a commitment to provide:

- sufficient judges and staff to ensure that cases can be heard in a just, timely, simple and cost-effective manner;
- sufficient court-attached support resources, including legal aid, duty counsel, legal information officers, family justice counsellors, child support guideline assistance and interpretation assistance; and
- province-wide coverage.

The Supreme Court would like to see a detailed analysis of the funding that would be required to meet those commitments and operate effectively and to have an assurance that the necessary funding will be made available before formally endorsing the idea of a Unified Family Court.

The Supreme Court views the following as benefits to the Unified Family Court model:

- The overlapping and divided jurisdiction that now exists between the Provincial Court and the Supreme Court can cause delay, extra expense, confusion and frustration. Those problems would be avoided by a Unified Family Court model.
- Litigants would benefit by having the judges who hear their cases to have experience in, knowledge of and an interest in family law.
- A Unified Family Court model has the potential to provide an effective, cost efficient, simple and just process for family law litigants.

The Supreme Court is firmly of the view that Unified Family Court must include court attached resources, preferably in Family Law Information Centres such as those in place in many Unified Family Court locations in Ontario. Support services, such as legal assistance and counselling, as well as resources to make recommendations to the court are essential if the court is to deal with these cases effectively.

It is the Supreme Court's view that the benefits of a Unified Family Court need to be available to all British Columbia family law litigants. There must be a commitment to provide a basic level of service that will allow all litigants to achieve a just result in a simple, effective, timely and cost efficient way.

The Supreme Court recognizes the need to review carefully what the jurisdiction of the court would include. Determinations are required regarding whether Unified Family Court would include child protection issues and young offender issues. In addition, an examination is required regarding whether the court would have the resources to have jurisdiction over child protection or young offender matters.

4. Response of the Provincial Court of British Columbia

The full text of the response of the Provincial Court to the UFC initiative is reproduced on the JRTF website at www.bcjusticereview.org.

The Provincial Court believes that the public interest favours the amalgamation of all family cases into one Court. It has concluded that in a general sense amalgamation will create efficiencies and avoid the undesirable duplication of proceedings.⁵

The Provincial Court supports the concept of one court to deal with all family law problems in a timely, cost-efficient manner with:

- simplified rules, procedures and forms;
- modest fees based on ability to pay;
- complementary family justice support services;
- assignment of judges who are interested and well educated in, as well as committed to, family law, and
- accessibility to all British Columbians.

Judges of the Provincial Court are committed to the delivery of accessible justice to family litigants and see this work as a vital and important part of their judicial duties. They recognize that accessible family justice support services are an essential element to any family justice court model. Judges are concerned that a move toward a Unified Family Court not reduce service and accessibility levels below those currently provided by the Provincial Court. The Provincial Court regards it as essential that any changes to the system have the effect of enhancing, not limiting access to justice.

The Provincial Court is prepared to endorse the concept of Unified Family Court, provided the following are provided:

- a commitment for adequate, permanent funding to support all aspects of a Unified Family Court; and
- a commitment that Unified Family Court will maintain or enhance levels of access to justice.

The Provincial Court identified the following concerns regarding the Background Report on Unified Family Court:

⁵ The full text of the Provincial Court's response can be found on the Provincial Court of BC's website:
<http://www.provincialcourt.bc.ca/downloads/pdf/provincialcourresponsetoJRTFpaperonUFC.pdf>

- The limitation of Unified Family Court to 7 sites. The Provincial Court recommends that the services of family law courts should be available to all British Columbians within a reasonable time and distance.
- The use of simplified forms, rules and procedures is essential. Complicated rules, procedures and forms consistent with the practice in superior courts should not be adopted by a Unified Family Court in British Columbia.
- Adequately funded family justice support services are required. The Provincial Court is deeply concerned about the lack of available support services, particularly in smaller centres throughout British Columbia.
- The cost-effectiveness of a Unified Family Court. If Unified Family Court is implemented province-wide, Unified Family Court judges would spend a considerable amount of time on circuit, sitting in locations where the Provincial Court now sits on circuit. It is not cost-effective to have two judges sitting in the same location, where one judge potentially could do all the work if that judge had s.96 powers. Additionally, specialization on the part of the Unified Family Court judges will significantly reduce flexibility in scheduling.

5. Funding and the Federal Government

The existence of federal funding is not in itself an adequate reason for BC to adopt a UFC model; it is just one of the elements BC would probably require *if* BC were to otherwise decide that UFC is a good idea. In other words, adequate federal financial support is a necessary but not sufficient element of the potential UFC package in BC.

A) The initial federal announcements

On December 10, 2002, as part of the Bill C-22 rollout, the Federal Minister of Justice announced a 'Child-Centred Family Justice Strategy'. A key component of this strategy is a commitment to provide the provinces and territories with funding for family justice services and for the expansion of Unified Family Court. The Government of Canada will provide nation-wide funding of \$16.1 million a year for 62 new judges, 46 of whom will be appointed from the provincial court level.

In February 2003, as part of the federal budget package, the Department of Justice issued a formal request to the provinces and territories for Unified Family Court proposals. It was anticipated that negotiations between interested provinces and the federal government respecting the number of federal appointments available to each province would take place over the next year. BC does not yet know how many of the 62 federal appointments it would be able to secure if it were to proceed with UFC. We do know that BC would be vying with other provinces for

appointments⁶ and that there is virtually no prospect that BC would secure enough judicial appointments to enable province-wide implementation of UFC.

Provinces that receive judicial appointments for Unified Family Court would commence implementation or expansion of Unified Family Court in 2005-06. In other words, any province deciding to proceed after determining how many judicial appointments it could secure, would have about two years to plan and implement UFC.

B) The ultimate funding realities

Unfortunately, as negotiations with the federal government proceeded after the February announcements, it became clear that there is much less to the federal funding package than meets the eye.

The February announcements indicated that two funding pots were available to the province. The first, the 'family justice services fund', is worth about \$2 million to BC per year, over this and the next four years, to BC. This is the successor to a fund which BC has received from the federal government for the last 7 years and which has been used to support a wide range of innovative family court services such as the Rule 5 Registry Project under the Provincial Court (Family Relations Act) Rules.

It eventually became clear that the federal UFC funding formula links savings from provincial court judge elevations to family justice services funding. Specifically, for every dollar saved from provincial court judge elevations and targeted to UFC services, a dollar would be lost from the family justice services fund. In other words, the province's family justice funding would be reduced by an amount equivalent to the UFC funding, with the result that there is no net gain for implementing UFC. As noted above, without federal financial support BC's incentive and capacity to implement UFC is substantially undermined.

BC has observed that a similar rule was not in force the last time federal funding was made available for UFC expansion. The federal response however is that the terms of the funding remain firm, and there is no prospect that the provinces will be allowed to draw from both funds.

Thus, three factors argue against proceeding with UFC in BC at this time:

- there is, effectively, no federal financial support to do so;

⁶ Alberta has indicated that it will be submitting a proposal for UFC funding. Ontario, Nova Scotia, and Newfoundland have indicated an interest in receiving funding for UFC. Quebec has also recently expressed an interest in UFC funding.

- the courts are expressing a preference for province-wide implementation, and even if federal funding were available there would not be enough to accomplish universal implementation in one step; and
- it would be preferable to have more time to study the UFC option so that we could better understand what UFC might look like in BC and whether the UFC format is the best option for BC.

6. Next steps: the Family Justice Review Working Group

The Justice Review Task Force sees possible merit in many aspects of UFC. The consultation and research suggest that the UFC approach is clearly the national direction in family law. The Task Force however wishes to better understand what UFC might look like in BC and to know how some of the questions and issues raised in the consultations and discussed in this paper might be resolved.

Accordingly, the Justice Review Task Force has decided to create the “Family Justice Reform Working Group” to explore these matters further. The Working Group will be asked to consider the feasibility of UFC in some detail and to report and make recommendations to the JRTF. The Working Group will be composed of members nominated by each of the JRTF representatives. This will include judges from each court, family law lawyers, and Ministry staff with expertise in family law and family law policy. The Group’s mandate will be to investigate, report and recommend to JRTF on two tracks:

- to look at the unanswered questions about UFC and advise on whether UFC is it a good idea for BC or not; and if it is a good idea, to say what would it look like in BC.
- even more fundamentally, the Working Group will be asked, if not UFC, then what? Is the current system as good as its going to get? If we were able to stand back and reinvent the system from start, what would it look like?

The Working Group will commence immediately with a reporting date of September 2004. The Ministry is very enthusiastic about this review and has agreed to provide resources, including a full time Project Manager, to support the Working Group.

A full description of the Family Justice Reform Working Group, its mandate and its terms of reference can be found at the JRTF website at www.bcjusticereview.org.

7. Feedback

The Task Force welcomes further advice and comment. Please direct your comments to:

BC Justice Review Task Force
c/o The Law Society of British Columbia
845 Cambie Street,
Vancouver, BC V6B 4Z9

Vancouver Facsimile: 604.646.5919

Toll Free Facsimile: 1.877.669.9601

Email comments to: info@bcjusticereview.org