

THE SAINT JOHN FAMILY LAW PILOT PROJECT

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INTRODUCTION

Timely and client-focused access to justice is crucial in all areas of law. It is especially so in the emotional family law setting. Delays in obtaining relief in family law matters can make a bad situation worse for all parties. The children of a relationship end up suffering the most when caught in the middle of escalating custody, access and support disputes between their parents.

As Case Management Master for the three-year Saint John Family Law Pilot Project, I was pleased to receive an invitation to make a submission to the UNB Law Journal's special access to justice edition. This article will provide background on the establishment of the pilot project, a summary of its objectives, goals and main elements, and a brief review of experience to date.

Background

In February of 2008, the then Minister of Justice and Consumer Affairs announced the appointment of a seven-member Access to Family Justice Task Force. The Task Force members were the Honourable Mr. Justice Raymond Guerette, Chair, and six family law lawyers from around the province: David Lutz, Q.C., Brenda Noble, Q.C., Michelle Boudreau-Dumas, Sheila Cameron, Jennifer Donovan, and Mary-Eileen Flanagan.² The Task Force was directed:

to undertake a review of the family court system, including the legislation, regulations and Rules of Court applicable thereto, and make recommendations to the Government of New Brunswick that will lead to:

- More timely access to justice in resolving family law disputes;
- Expanded use of alternatives to family courts to resolve family law issues; and
- Increased access to legal information and legal assistance in family law matters, especially for the poor, single parents and First Nations people.³

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² New Brunswick, Report of the Access to Family Justice Task Force (Fredericton: Province of New Brunswick, June 2009) at 3-5.

³ *Ibid.*, at 2.

The Task Force submitted its Report dated January 23, 2009, to the Government of New Brunswick. In summary the Report identified the following province-wide problems:

- Delays to get interim relief in private family law cases;
- Matters routinely taking the trial route; and
- The growing number of people representing themselves in family law proceedings.⁴

Among other things, the Report recommended a “new paradigm” based on the Ottawa case management model. As stated at page 10 of the Report:

In simple terms, we are recommending a system that utilizes dispute resolution approaches as early as possible in the majority of cases, reserving the adversarial model for cases that need to be fast-tracked to judicial hearing. i.e. cases involving parent or child safety and welfare concerns, urgency (such as child abduction) and/or non-routine questions of law, evidence or legal process.⁵

In June of 2009 the Government of New Brunswick announced that a pilot project in the Court of Queen’s Bench, Family Division would be established to implement recommendations of the Task Force, and in the following month the Judicial District of Saint John was announced as the site for the pilot.⁶ Further details of the pilot were announced in February of 2010.⁷ Between February and July 2010, required legislative changes and a new Rule of Court and Forms were drafted, renovations were made to the court facility, and supporting staff were hired.

In July 2010, the project was launched with the opening of a new Family Law Information Centre in the Court of Queen’s Bench facility, located at 110 Charlotte Street in Saint John. The Case Management Master and Triage Coordinator appointments were made,⁸ a meeting was held with the local family law bar, and the

⁴ *Ibid*, at 5-9.

⁵ *Ibid*, at 10.

⁶ Government of New Brunswick, News Release, NB 722, “Pilot project, committee established in response to family justice report” (2 June 2009) and Government of New Brunswick, News Release, “Saint John to be site of family justice pilot project” (14 July 2009).

⁷ Government of New Brunswick, News Release, “Details of family law pilot project” (10 February 2010).

⁸ OIC 2010-387, (2010) NB Gaz, 1692 and OIC 2010-549, (2010) NB Gaz, 2690. My appointment and that of David P. Léger, who was appointed to act in my place as required, were made for a term of three years by Order in Council 2010-387.

new operational model of case management fully commenced in late November 2010.

Goals and Objectives of the Pilot

The stated objectives of the pilot, similar to the mandate given to the Task Force, are:

to provide more timely resolution of family [law matters], to reserve court time for the most complex cases, and to provide self represented litigants with the necessary information to navigate the process.⁹

To these ends, the pilot provides for a “triage” of matters involving claims for custody, access and/or support. Where the parties have not been to Court before, they are assigned an expedited First Court Appearance case conference hearing date. Motions to change an existing order or agreement also receive a case conference date.

The pilot project applies almost exclusively to “private” family law matters (matters not involving the Crown).¹⁰ The ordinary court process for child protection matters has not changed.

Main Components

The main components of the pilot project are:

- The Family Law Information Centre, its staff and its services;
- The Case Management Master position and case conferencing;
- Rule 81 and the new “triage” process for matters involving custody, access and support; and
- The Local Committee.

(A) Family Law Information Centre (“FLIC”)

The FLIC is a physical space in the Court of Queen’s Bench facility. It is managed by two full-time staff members, the Triage Coordinator and an assistant Triage Coordinator. They provide information and forms to clients and book appointments

⁹ Government of New Brunswick, News Release, “Details of family law pilot project” (10 February 2010).

¹⁰ The exception includes new Applications for child support brought by the Minister of Social Development on behalf of a custodial parent in receipt of income assistance.

for the free Mediation and Advice Lawyer Services. In addition, they manage the “triage” component of the First Court Appearance, and provide administrative support to the Case Management Master.

The FLIC is the first point of contact with the family justice system for members of the public who have not been to court before. The front office of Family Division in the Judicial District of Saint John continues to accept all documents for filing, open and maintain court files, and schedule matters before the Family Division Judges, among other duties.

Family law information, brochures and court forms are available at the FLIC. Clients wishing to meet with an advice lawyer for a one-hour consultation may book an appointment. They may also make an appointment to meet with a mediator. Both these free services may be accessed before or after an Application or Motion has been filed.

While the pilot is modeled on Ottawa’s case management model, there are some significant differences, one of which is the advice lawyer component. There are two advice lawyers affiliated with the FLIC, on contract through the New Brunswick Legal Aid Services Commission. This advice lawyer service is limited to the provision of general family law advice, and assistance with completing forms. The advice lawyers do not accompany parties to hearings, case conferences or negotiate with counsel for the other party. By contrast, duty counsel in Ottawa is available to qualifying clients for the first court appearance in private family law matters. Ottawa duty counsel may also negotiate with counsel for the other party and appear at a case conference with the client.

There are also two staff mediator positions in Saint John, one full-time and one part-time. Clients may access up to five sessions or ten hours of mediation for eligible issues, which include custody, access and child support. Financial documentation is required if child support is mediated, and an extensive pre-mediation screening is carried out to check for power imbalances and domestic violence.

(B) Case Management Master Position

The position of Case Management Master for the Court of Queen’s Bench, Family Division in the Judicial District of Saint John was created by amendments to the Judicature Act in 2010.¹¹

¹¹ *Judicature Act*, RSNB 1973, c J-2, s 56.1 and *Judicature Act*, RSNB 1973, Sched C [*Judicature Act*].

The Master conducts case conferences for all Applications and for most Motions.¹² The Master uses many of the principles of mediation to assist parties in coming to an agreement on an interim or final basis. In custody, access and support matters where there is no existing order of a Judge, the Master may make interim orders under both the Divorce Act and the Family Services Act on consent or on a contested matter. These orders have the same force and effect as an order of the Court of Queen's Bench, and may be appealed with leave of a Judge of the Family Division in the Judicial District of Saint John.¹³

With the exception of case conferences for Motions to Change child support, the Master does not have dedicated administrative support and case conferences are not recorded. This is another significant difference from the Ottawa model. Orders are prepared by the Master at the case conference or shortly afterward, unless one or both of the parties has legal representation and the Master requests counsel to prepare the order.

(C) Rule 81 – The Pilot Rule

In the Judicial District of Saint John, Rule 81 of the New Brunswick Rules of Court replaces Rule 72 in relation to a proceeding under the *Divorce Act*, except as Rule 72 relates to proof of facts by affidavit. It also replaces Rule 73 in relation to proceedings under Part VII of *Family Services Act* (custody, access and support matters) and claims for declaratory orders under Part VI of the *Family Services Act*.

New forms are also being piloted as part of the program. In this jurisdiction, an Application replaces the Petition for Divorce and Notice of Application under Rule 73, and a claim made in an Application includes a claim for interim relief. Therefore, because a separate Motion need not be filed with an Application when interim relief is sought, the process has been streamlined somewhat. An Answer is then filed in response to an Application. Where custody and access are in issue, an Affidavit in Support of a Claim for Custody and Access also must be completed.

A Motion to Change, Change Information Form and Response to Motion to Change replace the Notice of Motion (37A) to vary, rescind or change a support or custody order and the Notice of Motion (72U) to vary rescind or suspend a child

¹² Case conferences are required under Rule 81 prior to a hearing of an Application or Motion, unless it is determined that there is a situation of urgency or hardship or that a case conference is not required for some other reason in the interest of justice. Rule 81 also sets out what the Master may do at a case conference.

¹³ *Judicature Act*, *supra* note 11, s 56.1

support order made under the *Divorce Act*. A Consent Motion to Change has also been introduced. The Task Force recommended the development of new forms as part of the new “paradigm” for Family Division, with an emphasis on plain language and simplicity of use by both the legal community and self-represented individuals. The new forms were modeled on the Ontario Family Court forms and use a “fill in the blanks” approach. Some concerns have been expressed by users that the forms are not as user-friendly as intended, and this is part of the pilot which will need to be reviewed.

(D) Triage Process for New Applications

As noted above, the pilot project involves a new “triage” process for Applications. Upon filing, an Application - which includes a claim for custody, access and/or child or spousal support, with or without a marital property claim - receives a First Court Appearance date on a Tuesday or Thursday.

A key objective of the process is to provide an early opportunity to mediate the issues, and to provide interim relief so that matters do not escalate. To this end, the First Court Appearance date for all new Applications is targeted to be within 40 days of filing.¹⁴ Matters may be brought in sooner if an abridgement of time for service or “ex parte” order is requested.

First Court Appearance Day has two parts. The first part is a “triage” component led by the Triage Coordinator. The parties view a video adopted from Ottawa family court about the process. Following this, the parties may choose to attempt mediation and divert from the court process.

The second part of First Court Appearance Day is a same-day case conference hearing to address interim and procedural matters, unless the parties choose to attempt mediation. This case conference hearing is usually held before the Case Management Master. Parties attend with their lawyers if they are represented. Unrepresented parties may access the free advice lawyer service prior to their case conference hearing.

If the parties come to an agreement on the relief sought at the case conference hearing, a final or interim Consent Order is prepared. If they are not in agreement, an Interim Order for custody, access, and/or support is normally made,

¹⁴ Some administrative challenges in the first year of operation created an average delay of two weeks from the date of filing to the setting of the First Court Appearance date, resulting in matters being set for a First Court Appearance date between 40 and 60 days of filing, on average. These challenges are being addressed.

along with procedural orders; typically, that an Answer must be filed and financial information produced within a certain time frame. The Master has no authority to make orders with respect to marital property, but may make procedural orders setting out a time line for the production of information or the exchange of affidavits of documents.

In some cases, where financial or other information is required to address interim relief, the matter may be set over for a continuation of the case conference. Usually, the time required for the hearing of the Application is determined and the matter is ordered to be set down before a Judge.

(E) Case Conferences for Motions to Change

Case Conferences for Motions to Change take place approximately 30 days from the date of filing of the motion, or sooner depending on the level or urgency. Lawyers attend with the parties when they are represented. There are two types of Motions to Change. The first are those involving issues of custody, access and/or spousal support, with or without a claim in relation to child support. The second are those seeking to change a child support order only.

Case conferences for Motions to Change existing custody and access or spousal support orders or agreements are normally scheduled for a case conference on Mondays. If the parties are able to resolve the matter by agreement at the case conference, a Consent Order is prepared and sent on to a Judge for signing. If the issues are not resolved at this stage, the time required for a hearing is determined and the matter is ordered to be set down before a Judge. Procedural orders may also be made at the case conference. For example, if the Respondent has not filed a Response to the Motion to Change, he or she will be ordered to do so within a certain time period.

Prior to the commencement of the pilot project, the Child Support Variation Service in the Judicial District of Saint John (CSVS) provided for a mandatory conciliation meeting in advance of a court hearing for all motions to vary existing child support orders. The CSVS has been incorporated into the pilot project, and the conciliation meeting has been replaced by a case conference for these Motions. The CSVS administrative support has been maintained.

Case conferences for Motions to Change child support are scheduled on Wednesdays each week, approximately 30 days from the date of filing. Roughly 90% of the parties are unrepresented in these matters. If the parties come to an agreement, a Consent Order is prepared under the direction of the Master and sent to a Judge for signing. If the parties do not reach an agreement, the Master will make the necessary

procedural orders to ensure the motion is ready for a hearing before a Judge, typically for the production of income and special expense information. The matter may be set for a further case conference, or the Master may determine the amount of time required for a hearing by a Judge and order the motion to be set down for a hearing.

Experience to Date¹⁵

(A) Utilization of FLIC Services

Since opening in July 2010, the Family Law Information Centre has been extremely busy. Staff of the FLIC has addressed over 5000 requests for information, from walk-in clients and telephone inquiries. The Advice Lawyer service also has been heavily utilized. Over 1000 appointments have been made since inception.

There have been 247 initial mediation assessments of individual clients since the service commenced in July 2010 until the end of September 2011. In 57 matters, full or partial agreements were reached through mediation. Thirty-nine of these agreements were reached pre-filing (without court documents having been filed) and eighteen were reached post-filing.

(B) First Court Appearances

From January 2011 until September 30, 2011, 273 First Court Appearances were scheduled for Applications with claims for custody, access, child support and/or spousal support. Six matters proceeded to mediation directly following the Triage Event. Of the matters which proceeded to a same-day First Court Appearance case conference hearing, approximately 20% settled on a final or interim basis. Interim and procedural orders were made at the case conference in the majority of the remaining matters.

In summary, when parties proceed to court, they are now obtaining interim relief or a resolution of their issues within 40 to 60 days of filing an Application. When required, a hearing before a Judge is normally scheduled within 2 to 5 months of the First Court Appearance day, depending on the hearing time required and the level of urgency of the matter.

¹⁵ All statistical information provided in this section comes from internal data compiled by staff and does not form part of a formal evaluation framework and reflect experience to the Fall of 2011 when this article was written.

Although no formal evaluation has been done after the first year of operation of the pilot project, it appears that parties now are more prepared when they appear before a Judge at the hearing of their matter. Preliminary procedural issues such as financial disclosure have been addressed at the First Court Appearance case conference hearing.

(C) Case Conferences for Motions

Between January 1, 2011 and September 30, 2011, there were approximately 95 case conferences for Motions to Change custody, access or spousal support orders or agreements. Of these motions, approximately 30% settled at the case conference stage.

From January 2011 to October 19, 2011 case conferences were held for 129 Motions to Change child support only. Of these, approximately 50% fully or partially settled at the case conference. The rate of settlement under the former Child Support Variation Service was similar. However the lawyers conducting the conciliation meetings were not able to make procedural orders for such things as financial disclosure and itemization of special expense claims.

Motions which do not resolve at the case conference are scheduled for a hearing before a Judge between 2 and 5 months from the case conference date, again depending on the urgency level and amount of time required. The new process and the authorities granted to the Master are helping unrepresented parties be more prepared for the hearings of their motions, as most of the procedural matters have been addressed by an order made at the case conference.

(D) Local Committee

The pilot includes a Local Committee comprised of the Regional Director of Court Services, the Supervisor of Client Services, the Triage Coordinator, the Case Management Master, a representative from the Family Crown, a representative of Legal Aid, members of the local family law bar and officials from the Department of Justice and Consumer Affairs. The Honourable Mr. Justice Raymond French of the Court of Queen's Bench, Family Division, Judicial District of Saint John, is the pilot project's liaison with the judiciary. The Committee attempts to meet regularly to review issues and progress.

WHAT DOES THE FUTURE HOLD FOR THE PILOT?

Experience to date indicates that the pilot model is resulting in more timely access to interim relief, increased access to legal information and access to mediation as an

alternative to court proceedings. However, a full evaluation of the pilot will need to be completed to measure its success in quantitative and qualitative terms. Such an evaluation also will provide the necessary information to make improvements to the process, Rule 81 and the court forms. The work of evaluating the pilot is being led by the Department of Justice and Consumer Affairs.

The budgetary situation of the Province and the competing demands for scarce resources in this time of economic restraint will undoubtedly have a significant impact on how Government proceeds following an evaluation of the pilot. It is my hope that a high priority will continue to be placed on improving access to family justice across New Brunswick, and that we will see a favourable result at the end of the three-year pilot period.