SPECIAL FEATURE

COMMENTS ON THE WORKING PAPERS OF THE LAW REFORM COMMISSION OF CANADA

WORKING PAPER 1

THE FAMILY COURT

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The Commission's Working Paper on the *Family Court* is only a sketch of the existing problems and extensive proposals for reform. It is nevertheless a well informed and accurate assessment of the very great difficulties existing in the present scheme of things. The proposals for reform embrace many of the suggestions that have been made for many years by lawyers practising in the field of family law. As recent as ten years ago, those members of the profession practising in "domestic relations" or appearing in divorce matters, were generally viewed as the bottom of the profession's ladder. In the course of the past ten years, with the more sensible approach to divorce and with the widespread change in the attitude of the profession and the public to family law problems, attention has been focused on the staggering inequities in the substantive law and the grossly inadequate facilities of the court and its procedures.

It is often an embarrassing and painful experience to explain to a client that he must seek his divorce in one court in one proceeding, have his property claims determined by the court (perhaps a different court) in another proceeding and yet might still be subject to proceedings instituted by the other spouse in yet another court. One simply cannot answer the criticisms of such a system. The confusion, the "forum shopping" and the high cost of the present procedures referred to by the Commission are real. Frequently one proceeding will have to be held up until another proceeding is completed because the result in one proceeding may affect the result in another.

It can no longer be the subject of debate that a single Family Court with all inclusive and exclusive jurisdiction is required in every province. The Canadian Bar Association, representing most of Canada's lawyers, has endorsed the principle and the public generally favours such reform.

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Only judges with special experience or training should properly deal with family law matters. Under the existing system, judges who have no background in family law and who are insensitive to the strain of such proceedings are nevertheless called upon to make what are, to the litigants, far reaching judgments which affect the lives of not only the litigants, but the families of the litigants, for many years.

The Commission recommends considerable modification of the adversary system procedures. This aspect of the Report must be cautiously regarded. There is no doubt that some aspects of the adversary procedure are grossly detrimental to the resolution of inter-spousal or inter-parental conflicts. However, there must ultimately be a procedure for determining the facts upon which a judgment can be made. In this respect, the adversary system must be retained. What is needed is an extensive system of pre-litigation conciliation procedures, post-litigation conciliation procedures and some form of pre-trial compulsory bargaining process. Some of the major injustices that occur in our present system come to pass by reason of the fact that an unreasonable spouse (in refusing to agree to appropriate custody or financial arrangements) can pursue litigious proceedings at great expense financially and emotionally, or defend at length such proceedings with similar expense. In addition, the oft-referred to inappropriateness of a judge deciding a custody issue must be cured. Such procedures would establish a great advance over the present system.

The Commission does not take a strong position one way or the other on the alternatives respecting the status of the Family Court in the judicial structure. Although inclining towards the view that the Family Court should be established as an integral part of the existing Superior Court, the Commission admits that some arguments may exist to support a different setting. It is the writer's opinion that there can be no doubt that the best scheme is one where the Family Court would be a division of the Supreme Court. The High Courts in England have operated on this basis for many, many years with apparent success. The inclusion of auxiliary services would not be hampered by having the court a division of the Superior Court, nor would the problem of accessibility be a real one provided that the court were established with this problem in mind.

The very nature of problems coming before the Family Court in many cases is of such magnitude as to warrant the attention of a Superior Court; but perhaps the most important factor is that the Family Court must not be seen in the eyes of the public as an inferior tribunal. This is the present public image of the Family Court in Ontario. For most members of our society who find themselves in the unfortunate position of having to conduct matters in the Family Courts, it is one of the most important and far-reaching experiences of their lifetime. They are entitled to feel that judgment is being made at the highest level.

The Commission recommends simplified procedures and pre-trial processes. Such reform is required; but again, perhaps a little more caution should be exercised than seems to exist in the tone of the Commission's

recommendations. For example, one of the recommendations is that "pleadings and procedures should stay away from the traditional adversary or fault oriented approach." [1] While this is desirable for many reasons, it would be unwise to water down the pleadings unless there were other procedural changes and needed reforms in the substantive law. If, as a last resort, there is to be an adversary trial, the parties to the proceedings should have the right to know what allegations are being made against them and the pleadings should accordingly be quite detailed in this respect.

The Commission's recommendation that, in appropriate circumstances counsel should be appointed to act as an advocate for the child, is another concept which has for several years attained widespread support and can hardly be the subject of debate.

The recommendation that lawyers be available on a full-time or part-time basis in the Family Court to advise on intake and provide emergency legal advice, is a good suggestion which would, if implemented, provide enormous assistance to uninformed members of the public; it would be unwise to have such personnel replace the role of the independent barrister. As a further arm of the support services of the court, the Commission recommends that conciliatory counselling on a short-term basis by the support staff of the Family Court be implemented. This kind of service is needed, and well-qualified personnel should be available to assist in solving many of the non-legal problems that arise in the course of a family law dispute and after its conclusion.

The Commission recommends that clinical services should not be attached to the court but should be available to it on demand in appropriate cases. It is the writer's view that a combination of services is the best solution. Frequently, a medical report, including a psychological or psychiatric report, is required quickly; a clinical facility attached to the court could best provide this service.

The concept that the court should have the power to order an independent investigation concerning the financial circumstances of the parties, the circumstances relevant to the question of custody, and the circumstances relevant to a disposition in delinquency proceedings, is welcome. It is the writer's view however, contrary to the view expressed by the Commission, that such investigative roles should be filled not by persons attached to the court but rather by independent personnel. It is submitted that the quality and thoroughness of the investigations would be enhanced by the use of private facilities.

In the concluding pages of its Report, the Commission recommends enforcement procedures to ensure compliance with the maintenance awards. These recommendations are also ones which have found widespread support. One would have thought that the Commission would direct its attention to the question of enforcement of custody orders and the problem of the cases

[1] LAW REFORM COMMISSION OF CANADA, THE FAMILY COURT, WORKING PAPER 1 at 11 (1974).

involving "kidnapping" by one spouse or the other. This is an area that has long needed reform. One would hope that, under the heading of enforcement, the Commission would make specific recommendations to ensure the immediate return of children who have been removed in the face of an existing order of agreement and for the enforcement of custody orders from "foreign" jurisdictions.

To a family law lawyer, the Commission's recommendations are "motherhood" recommendations. The general principles advanced will be criticized only by the uninformed. But the actual details required to implement such principles are much more difficult to resolve. While family law practitioners will universally endorse the Working Paper in its general principles, there will be required considerable debate over the method of implementing the recommendations and the solving of the extensive practical problems which will be met. One of the major difficulties will be the fact that much of the substantive law is also crying out for reform. Additionally, there will be regional variations which will require different procedures. Hopefully, these problems will not stand in the way of the Commission proceeding to the next step: the drafting of a comprehensive uniform statute which could be applied with slight modification in every province.