# THE FAMILY COURT

*The Vanier Institute of the Family**

## I. INTRODUCTION

The Vanier Institute of the Family has long had an interest in coming to better understand the law and its place in our society with both its direct and indirect impact upon our primary relationships, *i.e.*, our family life. In this regard we have carried on research, both internally and externally, for several years. The present response, represented by this comment, expresses the views and considerations of the Institute as formulated by the Social Critique Committee, the work of which has been endorsed and approved by the Executive Committee of our Board of Directors. The work of the Social Critique Committee has been supplemented and helped by the deliberations of our on-going Task Force on the Law, composed largely of persons with legal understandings and backgrounds, established by the Institute last winter. The contribution of this group has been and continues to be of valuable assistance to us.

Among the difficult issues that we have been facing at the Institute, the most difficult has been to separate out and distinguish between short-term legal improvements and those on the longer-term, leading to the more fundamental and necessary reforms, which require new perceptions and new understandings of the law itself and its place in our society generally, with particular reference to its impact on our basic human relationships, especially those in respect to the family. With a longer view it also becomes more possible to judge which apparently desirable short-term measures would be likely to act to the detriment of or facilitate the longer-term goals.

## II. THE FAMILY ITSELF

The Working Paper is not explicit about what type of families the proposed unified family court proposes to deal with. It appears to us that the assumption underlying the Paper implicitly favors one family model, that is, the "urban nuclear family". Yet the life experience of all of us, in addition to the research carried out by the Institute and other organizations in Canada, as well as research in other Western countries, indicates that there is a wide spectrum of family lifestyles ranging all the way from tribal-communal families found amongst our native peoples, extended families found particularly in rural areas, urban nuclear families, one parent families, to

* 151 Slater St., Ottawa, Canada.

some of the new alternate urban and rural communal and/or cooperative family forms. Thus we question the capacity of the proposed courts *to understand and deal well explicitly* with the variety of actual and developing family lifestyles current in Canada, whether old or new.

Moreover, it is disturbing that the urban nuclear family is the implicit single model, inasmuch as there is growing evidence to indicate that the urban nuclear family form, so current in our industrialized societies, is a very vulnerable family form, whether considered psychologically, emotionally, financially, economically, politically, or spiritually. Some writers today go so far as to view it as an unstable phenomenon, virtually on the edge of a cultural aberration. They see it as another aspect of the societal breakdown that we in Canada and other countries are now experiencing, whether viewed from the symptoms of family breakdown, juvenile delinquency, mental illness, loss of parental role, inflation, terrorism, pollution and the like.

In light of the foregoing, we question another assumption expressed in the Paper: if the family (the urban nuclear form implicitly) is "in trouble", then all that we need to do, and such is the habit of our society, is to create and develop a new and further costly service system to deal with and remedy the trouble. From this point of view, one could ask whether a new service system, in this case a Canada-wide net of unified family courts, will only prolong the favored continuance and the agonies of the average nuclearized urban working family. Possibly the problem is not one of more so-called "improved service systems" but is the urban nuclear family itself. If the latter be the case, other understandings and approaches appear to be required.

At the same time, so that this view does not assume exaggerated proportions, it needs to be recognized that no family form can be idealized or generalized. Each family form has drawbacks and/or benefits for specific families or individual members of a family.

Thus, the basic problem we see in regard to the family itself in the Working Paper is the narrowness of the kind of family that the courts implicitly can handle and also whether the new system will reinforce the difficulties of many family situations over the long run rather than assist in resolving them.

As a general comment we would add that the legal issues faced by families go far beyond the terms of reference proposed for family courts. For example, there are many criminal and civil issues that touch family relationships intimately, now excluded from family courts. One such situation is, of course, the high proportion of violence and murders amongst family members. Many issues before such courts also contain a high degree of family components. Thus new approaches and methods to humanize the family court to better handle our primary relationships are equally applicable to other courts. An instance of this kind is the matter of adversary procedures. We therefore ask if the emphasis to revise such procedures is placed solely in family courts, will such a narrow application delay consid-

eration of the reduction of such procedures in other courts, where such a reduction can also be viewed as desirable.

## III. Adversary Procedures

The Institute very much welcomes a reduction of the adversary procedures as proposed. Yet a number of important points need to be considered.

The first is that the emphasis in the Working Paper is on the reduction of adversary procedures and such a reduction is highly desirable. But, in a number of instances, the laws that are employed to resolve human issues force the use of an adversarial approach either nullifying or greatly hindering a reduction of adversarial procedures. An example of this is the federal Divorce Act which makes it very difficult for those families who wish to avoid a battle, to do so. The law requires a winner and a loser. Thus a number of our fundamental laws will need to be rewritten in order that the legal procedures can be improved and, in fact, implemented.

A distinction to be made is that there is no doubt that people in conflict are adversaries and always will tend to be so. While this stance may or may not change during the course of settling the dispute, at least the judicial context within which the situation finds itself need not be adversarial. Contexts of negotiation, arbitration and the like, without additional legal contenders joining in, can embrace, calm and contain the dispute, rather than nourishing and exacerbating the conflictual situation.

A caution that we would also need to note is that in some instances the adversary system will either be preferred by certain families, or used as a means of last resort. Therefore the adversary system should not be excluded totally as a procedure within the legal system. While many people may prefer non-adversarial procedures, it is likely that some will either prefer or need adversarial methods. Thus the final approach in this respect should be a presentation of options with regard to the procedures that might be legitimately and legally employed.

While we fully recognize the theoretical, and in some instances the practical necessity, to develop a process of conciliation within the courts, in real life the large majority of persons seeking a divorce have spent months, if not years, arriving at their mutual conclusion. Thus conciliation methods, and major efforts to implement them towards the end of a dying relationship, are largely wasted. Rather "conciliation" as an important life process is a responsibility of the community that needs to be fostered long before the issues take on the form of legal matters. Thus, efforts by our society to promote conciliation, where it is appropriate, need to be fostered primarily under other aspects of our communal life that lie beyond, or before, the legal system.

One of the implications of the foregoing means that ways need to be found by which many family situations, where serious problems and difficul-

ties exist, can be handled before coming to the court. While law will always be required in any society, it still remains true that the less law there is the better. Similarly, while people with special knowledge and experience, whom we tend to call "professional people" with their concomitant professional structures, will also be needed, it is equally true that the more people can help themselves within the network of their family and friends and/or communal contacts, the better is the support and outcome. It is fundamental that such self-help should be encouraged also. On this particular issue in respect to professional persons, professionalized services and professionalism as found in our society, the Institute is also now at work.

In the Working Paper, which favors a reduction of the adversary system, we also find a contradiction when it proposes the introduction of yet further "adversarial" legal counsel for the children within a family seeking a divorce.

## IV. Auxiliary Services to the Court

In keeping with our remarks above regarding professionalized services, the Institute wishes to raise a number of matters for consideration.

There is an assumption in our society, also found in the Working Paper, that professional counselling really does "work". Research into the variety of counselling methods that now exist, whether in the fields of psychiatry, psychology, social casework, corrections, education and the like does not support this assumption. Evaluative research, a form of research though yet undeveloped, gives to date little clear support to the effectiveness of such services.

There is also some indication that advice and counsel sought from close trusted relatives, friends and colleagues, whether ordinary or professional persons, on the other hand does have some impact.

The Institute also wonders whether auxiliary services, now seen as needed by the courts, should be integrated into the courts. Since people with legal difficulties frequently face a wide variety of concurrent human difficulties, it would probably be better that such services be integrated, but kept at the local and neighborhood level, where they would be close to the people and available for collaborative use by other social institutions such as the courts, schools, and so on. In this sense we would put the primary emphasis on all services being closely related to people in their common lives rather than put the emphasis on the coordination and integration of such services within larger and more distant social structures such as the courts. In other words, people need to come first, not social institutions. We need more emphasis on "people efficiency", and less on organizational efficiency.

Also when auxiliary services are required, there is a tendency for an interrelated dynamic towards self-perpetuation to develop. There is also the danger of professional persons perceiving the needs for clients to prolong the use of their services, to seek and define new problems, and such similar unconscious activities, so that the person receiving their services receives too

much of them for too long a period, sometimes to the detriment of the person who is supposedly being helped. Thus the quantitative need for such services has to be continually monitored.

Today many people suggest that "families" in general are incapable, unresponsible and not prepared to assume their proper life functions. It is also suggested that families have delegated too much of their own responsibility to other outside persons, such as teachers, doctors, social workers, clergymen, lawyers and the like. There is perhaps some truth in these views, though we do not necessarily agree with the "average" or usual interpretation of them. We would now question the great reliance in our society on relatively anonymous "others", especially "service people" of many kinds, to assist us in carrying on our lives personally and within the family. It has created and daily feeds our growing dependency and reduces our capacity for self-reliance. In this sense today we are all less responsible persons than we might be. The specific point we wish to make here is that as the persons who are called upon to be judges more and more often delegate their tasks to myriad auxiliary persons, they too will put themselves in the same position as have families, *i.e.*, the position of no longer perceiving themselves as capable and competent. Unintentionally they too place themselves in the position of being unresponsible for their own actions and judgments. Hence the need for auxiliary service persons should not be exaggerated.

In keeping with this theme of increasing, rather than decreasing, the responsibility for one's own self, the courts might take into consideration that any person who presents himself as the representative of a dependent person, such as a child, or a person who is mentally infirm, should be made responsible in some continuing way for that person, so that the future of the dependent person be better assured. To give power to such representatives to decide who else should be made to carry the responsibility is too easy. Too frequently such representatives act only within the momentary situation and then sweep the basic on-going responsibility for caring for such a dependent person under a crowd of other professional persons and agencies. Too frequently is such behavior, common in our society, detrimental in the long-term to the dependent person. An example of this situation is that of children being legally removed from their family group by professional persons, and then being left to drift through a series of foster homes and/or institutions.

## V. The Unified Family Court as a Division of the Supreme Court

The Institute is not convinced that the ideal answer for improving family courts is necessarily to make them a division of the Supreme Court in their respective provinces. While this proposal is presented in the Working Paper as a short-term solution, in fact it is probably a very long-term one. When one considers both the constitutional and political problems that would have

to be dealt with to attain this end, it is not likely generally that the proposal will be implemented for years, if not decades.

Moreover, a serious effect of the continuing trend in our society to coordinate and centralize the organizational structures of our society for the sake of "efficiency", is that they become less and less humanly efficient or effective. The greater the physical and social distance, the less they seem able to meet people on their own terms in their own lives and conditions. Thus the Institute would prefer to see the direction reversed in favor of greater decentralizing down towards the local, suburban and neighborhood levels. The Supreme Court notion seems to be too far removed from people. The Institute believes that the law, where needed, needs to be taken back to the community and to people, not further away.

Much more emphasis needs to be placed on making the family court a neighborhood court, not one that is down-town, in a strange building with long cold corridors and waiting rooms, and held in a strange and forbidding set-up. More stress on having family courts held in familiar surroundings (community halls, school assembly halls, and so on) with at least some of the people employed in the running of the court being familiar or known in the neighborhood. This might also apply to the panel of judges, one or some of whom might also be known in the neighborhood. Some continuity of presence should be instituted so that the approach to the court can be simplified.

## VI. The Qualifications of Judges

The Institute is not convinced that all judges need be lawyers. While a good knowledge of the law is recognized as useful and desirable, other kinds of human knowledge and experiences are of equal, and occasionally greater, importance in helping people to resolve their interrelated human and legal problems. It would seem clear that we need judges, of whatever background, who are sensitive to new family forms, cultures, roles and environments and not just to family law and some single idealized form.

## VII. The Evaluation of "Successful" Family Courts

The Working Paper proposes that there be a variety of experiments to test and develop improved family courts. While the Institute would agree with this diverse and richer approach to learning how we might better carry out these activities, we would recommend in each case that an evaluation method be designed and brought in from the beginning.

Furthermore, a caution with regard to the evaluation is that success not be judged upon the number of cases processed. Quantitative measures can entrain many distorting effects, not the least of which is to unconsciously bring in more and more cases, thereby increasing "out-put" and "produc-

tion", a less than human norm, though one frequently used in our society. Rather the criterion of success might well be designed much more along the lines of how well the court deals with people, and perhaps more importantly, how many people can be deflected from the system.

## VIII. Conclusion

If all courts were "human", a family court probably would not be needed. Since courts are not yet so, the family court may become an example for other courts to follow. But if poorly handled, it could also become an excuse for the other kinds of courts not to change, when they need to change too.