



Action Committee on Court Operations in Response to COVID-19

IMPROVING ACCESS AND OUTCOMES AND REDUCING DELAYS IN FAMILY AND CHILD PROTECTION MATTERS: A MANITOBA CASE STUDY

A Statement from the Action Committee

Our Committee exists to support Canada's courts as they work to protect the health and safety of all court users in the COVID-19 context while upholding the fundamental values of our justice system. These mutually-sustaining commitments guide all of our efforts.

As part of its mandate, the Committee facilitates information sharing amongst Canada's courts – which includes highlighting useful practices emanating from individual courts, as appropriate – in recognition that such efforts can serve to promote coordination and collaboration in key areas to help restore court operations across the country.

ISSUE AND CONTEXT

An unfortunate and widespread hallmark of the COVID-19 pandemic's effects on Canadian courts has been an increase in backlogs of cases and delays in adjudicating matters, which can impede access to justice. In many jurisdictions, the onset of the pandemic exacerbated pre-existing challenges.

Since the spring of 2020, the Action Committee has worked to provide courts with broad, non-prescriptive, and non-exhaustive strategies to avoid or mitigate the pandemic's backlogs and delays, drawing inspiration from best practices adopted by courts across Canada before and throughout the pandemic. Building upon its orienting principles on Leading and Managing Change in the Courts and Reducing Court Backlog and Delays, the Action Committee now focusses its attention on efforts in Manitoba to reduce backlogs and delays and improve access to fair, efficient and affordable justice for litigants in family and child protection matters.

Before COVID-19 imposed its own stresses on the system, the Manitoba Court of King's Bench, under the leadership of its Chief Justice, formulated two new efficient models of adjudication with the objective of maximizing access to justice in response to backlogs, delays and inefficiencies that existed. Likewise, the Government of Manitoba acknowledged that even beyond litigation, the family justice system bore systemic barriers to effective access to justice.

Both institutions took steps to tackle those inefficiencies and barriers. These interventions had specific, first-order effects: child protection and broader family justice matters were resolved in Manitoba within reasonable, finite and predictable periods of time.

The second-order effect was that when COVID-19 shut down court systems across the country in March 2020, the Court had already eliminated inefficiencies in its proceedings, leaving it well placed to manage pandemic delays without having to navigate pre-existing backlogs. The Court's success, as well as the success of the Family Resolution Service (FRS), in reforming Manitoba's family justice system more holistically, provides fertile ground for consideration.

OVERVIEW OF RELEVANT INITIATIVES

On March 11, 2022, the Action Committee heard from Chief Justice Glenn Joyal and Associate Chief Justice Gwen Hatch of the Manitoba Court of King's Bench, who outlined how the Court

had reformed its processes to improve access to justice in its Family Division. The Court titled its two approaches the “New Child Protection Model” and the “New Family Case Flow Model”. These innovations overcome delay and establish timely and cost-efficient means to resolve problems and to minimize family disharmony.

There has been ongoing statistical evaluation of the New Child Protection Model and the New Case Flow Model. Statistics have been a valuable tool for assessing their merits.

At that same meeting, the Action Committee also heard from Leita Kalinowsky, Executive Director of Manitoba’s FRS. Ms. Kalinowsky spoke about the Manitoba government’s independent, but complementary, overhaul of its family justice system. This publication will look at each of these initiatives in turn.

1. NEW CHILD PROTECTION MODEL

1.1 Issue

There were significant access to justice issues in child protection proceedings in Manitoba arising from lengthy delays in child protection proceedings in the Court of King’s Bench. From the moment children were removed from their homes, frequent adjournments, repeated pre-trial conferences and delays in scheduling trial dates weighed down proceedings. As a result, child protection matters often lingered before the Court for a year or more, to the detriment of the children who had been apprehended and their families.

The delays were not merely an inconvenience for the affected families but were an impediment that limited the nature of the orders that the Court could pronounce. *The Child and Family Services Act* of Manitoba specifies maximum total periods of temporary guardianship. They had often expired by the time a child protection matter had reached the pre-trial conference stage of proceedings. As a result, on finding that a child was in need of protection, the only option available to the Court was to make an order of permanent guardianship in favour of an Agency.

1.2 Objectives

Manitoba’s New Child Protection Model was introduced in the Winnipeg Centre of the Court of King’s Bench on March 6, 2017, and was implemented province-wide on February 1, 2019.

The aim of the New Child Protection Model is to reorient court procedures to ensure reasonable, finite and predictable access to justice. Three principles guide the Model:

The Constitutional and Moral Imperative

The apprehension of a child engages the section 7 Charter right to security of the person and the principles of fundamental justice. Beyond the letter of the law, the apprehension of a child is a grave event that requires urgent, humane attention.

The Culture Shift towards Proportional Procedures

The New Child Protection Model was developed in the context of the broadly applied dicta of the Supreme Court in *Hryniak v. Mauldin*, [2014] 1 S.C.R. 87, where the Court called

for a “culture shift” that entailed “moving the emphasis away from the conventional trial in favour of proportional procedures tailored to the needs of the particular case”.

The Calls to Action of the Truth and Reconciliation Commission

In Manitoba, the large majority of child apprehensions involve Indigenous children. As a result, the detrimental effects of delay in resolving post-apprehension proceedings disproportionately affect Indigenous children and their families. By centring this principle in its reform initiative, the Court acknowledges the “Calls to Action” of the *Truth and Reconciliation Commission of Canada* and the primacy of child welfare.

1.3 Key Elements

The aim of the New Child Protection Model is to resolve issues efficiently and effectively and above all, in a manner that is in the best interests of the children.

The New Child Protection Model

- sets specific timelines for both the Master and the Intake Judge that provide children and their families with a reasonable and predictable schedule of events, and
- reduces unnecessary pre-trial conferences while promoting advance planning and accountability of all parties.

Central to the New Child Protection Model is a strict and predictable timeline of case resolution. Within 60 days of child apprehension, the Master will consider and, if necessary:

- issue any orders concerning the service of materials
- order the provision of particulars, where required to allow a party to respond more effectively to the allegations of an Agency;
- appoint counsel for children;
- issue any orders on consent; and
- refer the matter to an Intake Judge.

The Intake Judge will endeavour to resolve the case. If a resolution is not reached at the Intake appearance, the Intake Judge will determine if there is a genuine issue that requires a trial. If there is no genuine issue requiring a trial, the Intake Judge will refer the matter to a summary judgment motion.

If there is a genuine issue, the Intake Judge will schedule a trial within 3 to 6 months and one pre-trial conference approximately 30 days before the trial date.

1.4 Evaluation

The New Child Protection Model has been very successful in Manitoba in prioritizing child protection proceedings and addressing unacceptable delay in court proceedings. Observations based on the statistical data for the first 12 months of the New Child Protection Model in Winnipeg Centre include:

- Approximately **80%** of the child protection matters that came before the Intake Judge were resolved at that one appearance;
- Only approximately **14%** of child protection matters proceeded to a pre-trial conference;
- Approximately **75%** of the child protection matters that proceeded to a pre-trial conference were resolved at that one pre-trial conference.

From the time that the New Child Protection Model was implemented in 2017 to date:

- Delays of up to 8 months of matters before the Master have been replaced by matters being completed before the Master within 60 days;
- The significant number of adjournments before the Master has been eliminated. The shorter 60-day mandatory timeline before the Master continues to help maintain the involvement of parents;
- There has been a culture change in child protection proceedings which has resulted from the implementation of the New Model. Parents are routinely present, most often with counsel, at the hearing before the Intake Judge and the pre-trial conference, with alternative plans that they have prepared with their counsel; and
- Trial dates under the New Child Protection Model are available within 3 to 6 months of the Intake appearance, replacing delays of approximately 12 months. Notably, as well, few matters proceed to trial.

2. NEW FAMILY CASE FLOW MODEL

2.1 Issue

While the Court was attempting to maximize access to justice in child protection proceedings, it also recognized systemic issues in other Family Division matters.

Families in dispute were facing delays in securing dates for case conferences and trials, experiencing inconsistent case conference processes, and labouring under a culture of “urgent motions” that delayed final resolution of important matters that were in issue. This added legal expense for litigants and made it more difficult for a self-represented litigant (SRL) to navigate the court system – a significant issue considering that, in Canada’s family justice system, as many as half of all litigants are self-represented. The high collapse rate of scheduled family justice trials further strained the efficiency of the Court.

On February 1, 2019, the Chief Justice introduced the New Family Case Flow Model for family law proceedings with practices and procedures that promote outcomes which are fair, timely and

affordable. The new initiatives for resolving family disputes use judicial resources at an early stage in proceedings.

2.2 Objectives

By adopting its New Family Case Flow Model, the Court sought to streamline procedures in family justice proceedings, with the aim of producing outcomes that eliminate delay and establish timely and cost-efficient means to resolve problems and to minimize family disharmony.

2.3 Key Elements

The central premise of the New Family Case Flow Model is to better utilize judicial resources at the earliest stages of specified, contested family justice proceedings,¹ rather than primarily at trial.

The goals of early, regular judicial intervention are:

- to ensure that all reasonable efforts are made to resolve and/or dispose of family cases at the earliest opportunity
- to ensure that greater judicial resources are available at the “front end” or “intake stage”
- to provide early and active judicial intervention in order to resolve cases at the early stage
- where cases cannot be resolved, to ensure that they flow through the court system within a reasonable, predictable and finite time period.

To achieve these goals, the Model focusses on five “meaningful events” that guide the case flow, and contribute substantially to the resolution of a dispute or the narrowing of issues.

The Meaningful Events are:

- obtaining a date for a Triage Conference
- the Triage Conference
- the First Case Conference
- Certificate of Trial Readiness
- the Trial

Each event entails clearly-communicated prerequisites and timelines informing the parties what they need to do, when they need to do it and why they need to do it.

Once the parties complete the initial prerequisites, the Court schedules a Triage Conference relatively quickly, with the intention of resolving issues early. If the parties cannot resolve all issues at the Triage Conference, the presiding judge will schedule the parties to reappear within 30 days for the First Case Conference, again with the intention of resolving many, if not all, issues,

¹ For a list of proceedings that do not enter the Case Flow Model, see Practice Directions dated December 14, 2020 and February 12, 2021

and ideally avoiding the time and cost of a trial. The Court amended its *Rules* to reflect that, under the Model, the Case Conference Judge will adjudicate any interim motions that arise between the First Case Conference and the Trial Date.

If the parties remain unable to resolve all issues, the judge will schedule a trial within 12-15 months of the First Case Conference. The parties may not adjourn the trial date without the express permission of the Chief Justice.

For the parties and the Court, the Five Meaningful Events, with their strict timelines and obligations, create predictability, consistency and a shared sense of responsibility for an efficient resolution of family justice matters.

2.4 Evaluation

Ongoing statistical data for the New Case Flow Model confirms that there continues to be a high-resolution rate for family matters at appearances before the Triage and Case Conference judges.

Since the introduction of the Model, the vast majority of family justice matters have been either partially or fully resolved at the Triage Conference. As a result, the Family Division in Winnipeg Centre has seen a substantial decrease in the number of Case Management Conferences, with very few matters proceeding to trial.

In 2021:

- Approximately **70%** of matters at the Triage Conference were either completely or partially resolved at that one appearance.
- The number of case conferences significantly decreased from 1,980 in 2018 to 632 in 2021, a decrease of **68%**.
- Only **16** matters proceeded to trial.

Accordingly, family justice litigants spend less time and money on litigation as the parties, with the assistance of the Court, quickly and efficiently resolve disputes that do not require a trial.

When considering its success in reducing the number and duration of trials, the Court acknowledges the impact of two concurrent initiatives. First, Legal Aid Manitoba provided guidance on “Limited Scope Representation” (sometimes called “unbundling”), to more-easily allow counsel to assist family justice clients with specific portions of their proceeding. The Court recognized that unbundling would perhaps better prepare lawyers for the coming changes in family justice proceedings and the need for flexibility. More broadly, unbundling can be particularly important for family law litigants who might not be able to afford full representation but can now afford to hire counsel for a portion of their dispute.

Second, the Court acknowledges that Manitoba’s *The Family Law Modernization Act*, and amendments to the *Divorce Act* that require parties to attempt alternate dispute resolution, to act in the child’s best interests, and to provide accurate information, have contributed to the success of the New Family Case Flow Model, as did the FRS’s efforts to improve access to justice beyond the scope of the court process.

3. FAMILY RESOLUTION SERVICE

3.1 Issue

As the Manitoba Court of King's Bench addressed the issue of maximizing access to justice and to eliminate delays and backlogs within family justice litigation, the Manitoba government recognized that the province's family justice system more broadly created barriers to access to justice.

Specifically, many people seeking to resolve their family disputes could neither afford legal representation nor effectively represent themselves, given the complexity of the system. Moreover, the existing family justice resources were insufficient to help marginalized individuals, like those with limited understanding of the justice system, those with limited literacy or language skills or those caught in a significant power imbalance. Simply put, Manitoba recognized that its family justice system required a more people-centered approach.

3.2 Objectives

The Government's commitment to this people-centered approach led to the release of *Modernizing Our Family Law System: A Report from Manitoba's Family Law Reform Committee*. This report advocated for an out-of-court model that would feature an administrative office to quickly triage child access, child/spousal support, and division of property disputes and expand the quantity and quality of plain-language, family law information. Notably, the report recommended reducing the number of family disputes that make it into the court system in the first place.

Putting the report into practice, the FRS led with Human-Centered Design, an iterative, solutions-based approach to solving problems while addressing human biases. To achieve this, the FRS pursued ethnographic research,² challenged the status quo, experimented with different approaches and put together diverse teams to develop and implement its reform.

The FRS consulted widely, bringing together a broad cross-section of people who have varying connections to family law: lawyers and mediators; shelters for victims of intimate-partner violence, and law enforcement; academia; the judiciary; parents and adult children of separation and divorce; and Indigenous, Francophone and cultural communities.

Additionally, the FRS sat down with hundreds of Manitoba families and asked, "What will it look like when we get family justice right?" Those responses yielded a new out-of-court model that is family- and child-centric, empowers families to better resolve conflict and recognizes how personal attributes, like culture, class, and trauma, interplay with justice.

3.3 Key Elements

Today, the FRS is a digital-first, but not digital-only, single-window system that provides a variety of services, including

² Research conducted through observations and interviews, which can be used to draw conclusions about how individuals or communities function.

- information, tools and resources accessible through the Family Law Manitoba website
- early Resolution Support Services delivered by Family Guides, who are professionals with expertise in domestic violence and safety planning, conflict resolution and mediation, family law and court processes
- triage and referrals to culturally and linguistically appropriate specialized services, which could include the new Child Support Service, Legal Aid or other private and community financial, legal or health and social services
- support to complete any pre-requisites for Court, like those the Court outlined for “meaningful events” in the New Family Case Flow Model
- referral to alternate dispute resolution services such as arbitration, mediation, and collaborative family law and legal services
- referral to the Child Support Service or Court for final decisions and court orders in cases where resolution cannot be reached
- referral to childcare options on a short-term and emergent basis when needed to access safety support and services or attend Court in person.

3.4 Preliminary Outcomes

During the pandemic, the modernized FRS brought together seven program areas from two different government departments and aligned the efforts of some 20 different family justice service providers to deliver a range of out-of-court resolution services.

While the FRS continues to monitor the effect of its modernization initiative, early reports indicate a substantial increase in the number of families it has served with no increase in financial resources. In fact, the FRS has already realized savings of over \$40 million.

The practical result is that the FRS helps the vast majority of its users resolve their family justice matters, on mutual consent, without ever going to court. For those families who do rely on the Court to resolve their issues, the FRS continues to assist them by narrowing the issues in dispute, supporting families in meeting court pre-requisites, and providing the Court with information that will aid in pre-trial resolution – all of which reinforce and serve the goals of the Court’s New Family Case Flow Model.

4. LESSONS LEARNED

4.1 The Importance of System-Wide Reform

The experience of Manitoba in improving access to justice in family and child protection matters demonstrates that systemic change requires system-wide problem-solving.

Different institutions and partners involved in justice delivery should acknowledge each other’s interdependent roles and, within their boundaries, should coordinate and collaborate towards a common overarching goal.

In seeking greater access to justice for family litigants, the Court pursued efficiencies in the court process, just as the FRS pursued a more human-centered approach for its predominantly out-of-court model. The benefit to Manitoba families that arises from the interplay between the two approaches is greater than what either could have achieved on its own. Moreover, as mentioned above, this work was supported and encouraged by legislative reform and “unbundling”, a subtle change to the practice of law in Manitoba with great potential to help those who are traditionally unlikely to pursue or afford legal representation.

4.2 Potential for Adaptability

During their presentation on March 11, 2022, Chief Justice Joyal and Associate Chief Justice Hatch acknowledged that in each province and court there are different circumstances and challenges that may hinder exporting the Manitoba reforms in their entirety, but would favour a customized application. That said, they noted that a great deal of the Models’ success does not come from the structure of the Family Division of the Court of King’s Bench. Rather, the Models insist upon satisfying strict timelines with respect to appearances, filings and setting trial dates. Additionally, efficiency and continuity have been found in having the same judge preside over pre-trial conferences, case conferences and motions. Such innovations are relatively straightforward and are adaptable to other jurisdictions.

POINT OF CONTACT

For more information on the New Child Protection or New Family Case Flow Models, please contact:

Office of the Chief Justice
Manitoba Court of King’s Bench

For more information on the Manitoba Family Resolution Service, please contact:

Family Resolution Service
getguidance@gov.mb.ca

ADDITIONAL RESOURCES

The Honourable Chief Justice Glenn D. Joyal, Remarks to the Manitoba Child Protection Conference, December 2, 2016

<https://www.manitobacourts.mb.ca/court-of-queens-bench/about-the-court-of-queens-bench/welcoming-remarks-from-the-chief-justice/chief-justice-speeches/>

The Honourable Chief Justice Glenn D. Joyal, Practice Direction Re: Child Protection Proceedings, dated February 10, 2017

https://www.manitobacourts.mb.ca/site/assets/files/1152/practice_direction_cp_model_final.pdf

The Honourable Chief Justice Glenn D. Joyal, *New Model for Scheduling and Case Flow Management of Non-Child Protection Family Division Matters*, Presentation to Members of the Manitoba Family Bar, July 18, 2017

https://www.cba-mb.ca/CBAMediaLibrary/cba_mb/images/Sections-and-Community/NEW-MODEL-FOR-SCHEDULING-AND-CASE-FLOW-MANAGEMENT-MBA-Presentation-July-18-Final.pdf

The Honourable Chief Justice Glenn D. Joyal, Practice Direction Re: Comprehensive Amendments to Court of King's Bench Rules (Family) Effective February 1, 2019, dated December 19, 2018

https://www.manitobacourts.mb.ca/site/assets/files/1152/december_19_revised_and_corrected_practice_direction.pdf

The Honourable Associate Chief Justice Gwen B. Hatch, Practice Direction Re: Family Division Case Flow Model Practice Issues, dated December 14, 2020

https://www.manitobacourts.mb.ca/site/assets/files/1152/practice_direction_fd_case_flow_model_practice_issues_december_14_2020.pdf

The Honourable Associate Chief Justice Gwen B. Hatch, Practice Direction Re: Divorce Act Amendments Rules, dated February 12, 2021

https://www.manitobacourts.mb.ca/site/assets/files/1152/practice_direction_-_divorce_act_amendment_rules_-_feb_12_21.pdf