

# **“Action” to Justice:**

## **Addressing Access to Justice in the Saskatchewan Court of Queen’s Bench**

**Dean’s Forum on Dispute Resolution  
and Access to Justice**

**University of Saskatchewan, College of Law  
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**Julia Quigley | Graham Sharp | Janelle Souter**

# Table of Contents

<b>EXECUTIVE SUMMARY</b> .....	<b>3</b>
<b>A. INTRODUCTION</b> .....	<b>3</b>
<b>B. DEFINING THE PROBLEM – The Court Process: Costly, Complex, and Inefficient</b> .....	<b>4</b>
<b>C. CURRENT ACCESS TO JUSTICE INITIATIVES IN SASKATCHEWAN</b> .....	<b>4</b>
<b>1. Court Initiatives</b> .....	<b>5</b>
i) Modified Court Rules .....	5
ii) Mandatory Mediation and Pre-Trial Conferences.....	5
iii) Court Fees .....	5
<b>2. Other Initiatives</b> .....	<b>5</b>
i) Family Law Initiatives: .....	6
ii) Civil and Family Law Initiatives: .....	6
<b>D. SUMMARY OF CONSULTATIONS IN THE SASKATCHEWAN CONTEXT</b> .....	<b>7</b>
1. General Concerns with Access to Justice in Saskatchewan.....	7
2. Revised Court of Queen’s Bench Rules.....	8
3. Triage .....	8
4. Judicial Case Management .....	9
5. Mediation .....	11
6. Judicial Dispute Resolution and Pre-Trial Conferences .....	11
7. Expanding Roles for Non-Judicial Court Workers.....	13
8. Measuring Success.....	13
<b>E. CONCLUSION</b> .....	<b>14</b>
<b>F. QUESTIONS FOR REFLECTION</b> .....	<b>15</b>
<b>G. APPENDICES</b> .....	<b>16</b>
APPENDIX A: Summary of Cromwell Report and CBA Reaching Equal Justice Report .....	16
APPENDIX B: Initiatives in Other Jurisdictions .....	18
APPENDIX C: Literature Review .....	20

## EXECUTIVE SUMMARY

In recent years, access to justice initiatives such as the Cromwell Report have called on all courts to take a critical look at their processes in order to improve access to justice. The Saskatchewan Court of Queen's Bench and the Department of Justice have implemented innovative reforms over the last 20 years to improve access to justice in Saskatchewan, including modifying the Court of Queen's Bench rules, introducing mandatory mediation and pre-trial conferencing, and waiving administrative fees for low-income litigants. Several community organizations in Saskatchewan and throughout Canada have also implemented initiatives to facilitate access to courts and to justice. However, there is more progress to be made. To explore the possibilities, we conducted a series of consultations with various stakeholders in the legal community. A number of potential initiatives were identified: 1) revising the Queen's Bench rules to further simplify court procedures; 2) implementing a triage regime to streamline matters according to their needs; 3) increasing the use of judicial case management; 4) reforming the mandatory mediation regime; 5) enhancing the role of judicial dispute resolution; and 6) expanding the role of non-judicial court workers to increase the efficiency and accessibility of the court. This report also considers the importance and means of measuring success of reforms so as to maximize the benefits of such reforms in terms of increasing access to justice.

### A. INTRODUCTION

A key component of access to justice is the accessibility of the courts, often the public's only means for resolving legal issues or obtaining judgment. The inaccessibility of the civil and family justice system is a serious concern in Canada.<sup>1</sup> Superior courts and their procedures are of particular concern and have been the subject of recommendations for reform. The Dean's Forum on Access to Justice provides a well-timed opportunity to gather various stakeholders in the justice system to explore and pursue pragmatic solutions to this access to justice issue. This report will focus on the Saskatchewan Court of Queen's Bench (SKQB) and will:

- a) define the issues related to the accessibility of courts and court procedures;
- b) identify initiatives that have been undertaken in Saskatchewan;
- c) outline the perspectives of a sample of judges, lawyers and other stakeholders within the justice system on potential reforms; and
- d) present questions for reflection that will guide the Forum's participants in further discussions.

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<sup>1</sup> Action Committee on Access to Justice in Civil and Family Matters, *Access to Civil and Family Justice: A Roadmap for Change* (Ottawa: October 2013) [Cromwell Report] at iii.

This report is limited to considering access to justice within the SKQB court system itself. While making the courts more accessible to, and reflective of, the needs of the public is a crucial component of increasing access to justice in Saskatchewan, this project does not purport to deal with broader access to justice issues. Such financial, social, and cultural aspects, which may exacerbate access to justice concerns, are a separate yet vital issue that must be addressed to improve substantive access to justice. Accordingly, this project operates on the assumption that a potential litigant has the desire, resources and knowledge to identify and attempt to resolve a legal problem through the SKQB.

## **B. DEFINING THE PROBLEM – The Court Process: Costly, Complex, and Inefficient**

The court process can be daunting, often failing to provide a timely and cost-effective means of resolving legal issues. A lawyer can help litigants throughout the court process, but often at great cost in time and money. Many cannot afford legal representation, resulting in a growing percentage of people having to navigate the court system as self-represented litigants (SRLs). Court processes that are unnecessarily long and costly exacerbate the hardship faced by SRLs. Although the SKQB introduced simplified court rules in 2013 in order to make the court process less taxing, they may still be too complex for those without legal training. Often, the interests and values of those operating in the court system, including lawyers, judges, and users, are in tension, which can complicate attempts to identify problems and their potential solutions.

In Saskatchewan 5,626 civil non-family actions were commenced in the SKQB in 2014, but only 17 went to trial. Similarly, 4,467 family actions were started, with 68 going to trial.<sup>2</sup> While many cases were resolved at various points in the process, others may have been abandoned for several reasons. Due to a lack of data, it is difficult to gauge which processes were effective in achieving settlement without trial, which matters were abandoned without resolution, and whether any resolutions achieved were meaningful for the parties involved.

## **C. CURRENT ACCESS TO JUSTICE INITIATIVES IN SASKATCHEWAN**

Saskatchewan has often been at the forefront of implementing reforms to court processes intended to increase access to justice, particularly with the introduction of mandatory mediation and pre-trial conferencing several decades ago. More recently, there has been a push to simplify court processes

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<sup>2</sup> Saskatchewan, Ministry of Justice, *Local Registrar Statistics* (2014) [unpublished].

through revisions to the court rules and to establish services to help litigants pursue their family law matters. Below is a brief summary of current initiatives in Saskatchewan.

## 1. Court Initiatives

### i) **Modified Court Rules**

The Saskatchewan *Court of Queen's Bench Rules* were recently revised, with several modifications attempting to improve access to the SKQB. First, the rules make use of plain language and a more intuitive organization scheme, with the goal of increasing access to justice by making the court process more efficient and less costly, especially for SRLs. Second, the rules allow for judicial case management under rules 4-5 to 4-9. There is also the option to convene a case conference under rule 4-4. Third, under Part 7, the revised rules permit trials of particular issues under rule 7-1, and further streamline proceedings by expanding the availability of summary judgment under rules 7-2 to 7-8. Lastly, the Rules outline an expedited procedure in Part 8, which may be used in certain cases. Despite these modifications it has been observed that the new procedures have not been widely used by counsel, even though these procedures theoretically simplify the process and bring cases in front of a judge in a more timely manner.

### ii) **Mandatory Mediation and Pre-Trial Conferences**

Mandatory mediation and pre-trial conferencing have been in place in Saskatchewan for many years, and intend to obviate the need for trial where the parties can settle their issues under the guidance of a mediator or judge. Mandatory mediation occurs early in the process at the close of pleadings, or can be postponed, while pre-trial conferences take place later as a final step before trial.

### iii) **Court Fees**

The *Fee Waiver Act* was passed in 2015 to waive administrative fees for low-income litigants in order to reduce the costs associated with bringing a legal action.

## 2. Other Initiatives

Various government and community organizations have programs intended to assist members of the public in accessing the court and understanding legal procedures, particularly for family law matters.

**i) Family Law Initiatives:**

- **Family Law Forms Assistance:** Public Legal Education Association (PLEA) has introduced family law forms to assist SRLs in bringing forth their own claims.
- **Saskatchewan Family Matters Program:** The Family Services Branch of the Ministry of Justice has initiated a pilot project by which social workers and mediators triage and refer members of the public to relevant services. This program will be running province-wide by the spring of 2016.
- **Family Law Information Centre:** The Ministry of Justice operates a telephone-based program that provides legal information and self-help kits for a range of family law issues.
- **Family Law Clinics:** Family Law Saskatchewan and the Family Information Centre, in conjunction with Law Society of Saskatchewan, Station 20 West, Pro Bono Law Saskatchewan, CLASSIC, and the Saskatoon Public Library, host free legal assistance clinics.
- **Family Law Advice Clinic (FLAC):** Community Legal Assistance Services For Saskatoon Inner City (CLASSIC) operates a free clinic for low-income members of the public. Lawyers do not represent clients in court on these matters, but can provide advice and assistance with forms.

**ii) Civil and Family Law Initiatives:**

- **Pro Bono Law Saskatchewan:** Provides free legal advice for all legal issues for those who do not qualify for Legal Aid but who are unable to afford a lawyer.
- **Public Legal Education Assistance:** Provides free legal information and referral services.
- **Legal Advice Clinic (CLASSIC):** SRLs can make half-hour appointments to discuss their legal issues with a practicing lawyer.
- **Saskatchewan Human Rights Commission:** The Commission provides a dispute resolution process, particularly helpful for SRLs, for complaints pursuant to the province's *Human Rights Code*. Legal remedies may ultimately be pursued through SKQB but this is rare. The Commission's recent reports demonstrate progress in the achievement of timely, appropriate and restorative resolution for human rights complaints.<sup>3</sup>

These various initiatives have made a difference, but gaps still exist. The information we have gathered from key informants<sup>4</sup> sheds light on these remaining challenges and opportunities.

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<sup>3</sup> See Annual Reports online at <http://saskatchewanhumanrights.ca/learn/publications-guidelines-resources/annual-reports>.

<sup>4</sup> "Key Informants" is a term used to describe the strategic gathering of information in the qualitative social science research.

## **D. SUMMARY OF CONSULTATIONS IN THE SASKATCHEWAN CONTEXT**

Our group conducted interviews with various stakeholders to get a sense of the particular access to justice concerns regarding SKQB court processes and potential solutions. We were fortunate enough to conduct interviews with a diverse group of professionals with first-hand knowledge and experience in civil and family matters, including:

- Former Chief Justice of Ontario Warren Winkler
- Justice D.B. Konkin, Saskatchewan Court of Queen’s Bench
- Greg Walen, Q.C., experienced family lawyer in Saskatoon
- Robert Kennedy, Q.C., experienced civil lawyer in Saskatoon
- Anna Singer, civil and family lawyer in Saskatoon
- Anonymous experienced poverty lawyer in Saskatoon
- Anonymous experienced criminal and family lawyer in Saskatoon
- Anonymous articling student
- Murray Walker, Ministry of Justice Dispute Resolution Office
- Glen Gardner, Assistant Deputy Minister of Justice
- Stacy Muller, Justice Innovation Division, Ministry of Justice
- Kim Newsham, Innovation and Strategic Initiatives, Ministry of Justice
- Professor Michaela Keet, Faculty Liaison to Dean’s Forum, University of Saskatchewan
- Tom Schonhoffer, Q.C., Executive Director of the Law Society of Saskatchewan

Below is a summary of our consultations and the common themes that came to our attention during the course of these interviews.

### **1. General Concerns with Access to Justice in Saskatchewan**

Our interviewees expressed grave concerns about access to justice in Saskatchewan in both the civil and family law contexts. With regards to the family law context, access to justice is a particularly pressing issue due to the high-conflict and personal nature of disputes. In addition, concern was expressed regarding the portion of the public who do not qualify for legal aid but remain incapable of affording a lawyer, resulting in SRLs who must navigate the SKQB with little guidance. Furthermore, several interviewees noted that the SKQB court system is complex and intimidating. Court procedures and services should be oriented to encourage people with legitimate legal issues to come forward and feel comfortable enough to pursue resolutions without having to enlist a private lawyer.

## 2. Revised Court of Queen’s Bench Rules

**What is it?** Saskatchewan updated its *Court of Queen’s Bench Rules* in 2013. Although the use of plain language is seen as an improvement, the rules still may be too complex for many SRLs to fully understand and use. A common perception of both lawyers and judges is that the new rules and procedures are not being used as often as they could be. Potential reasons for the lack of uptake by lawyers are that:

- lawyers lack knowledge of the rules;
- lawyers may be resistant to change or are risk-averse;
- many cases are seen as too complex for the expedited rules; and
- lawyers have not developed a sense of ownership in the changes from the beginning, resulting in a lack of buy-in.

**Options for Reform:** Several stakeholders suggested that one option for increasing the use of the revised rules would be to implement a mandatory “opt-out” system where the expedited rules would be the norm with justification needed to follow traditional court processes. Another option would be to hold more seminars or presentations for lawyers to become more knowledgeable and comfortable with the rules. Others recommended increased dialogue and consultation with lawyers, with the hopes of increasing uptake by the legal community. The *Report of the Court Processes Simplification Working Group* highlights this tension, and encourages conversation with stakeholders to build on common goals: increasing efficiency, reducing costs, and maintaining the integrity of the court procedures.<sup>5</sup>

**Considerations:** Implementation of mandatory procedures has been effective in the past, as evidenced by the successes of mandatory pre-trial conferencing and mediation. However, it was suggested that an opt-out scheme might be “bulky and awkward,” leading to further confusion. There is also concern that expedited rules may compromise fairness in favour of expediency. Some felt that establishing appropriate oversight of procedures would be necessary to ensure fairness. Others recommended more joint education programs with the legal community, where new reforms would be the focus.

## 3. Triage

**What is it?** “Triage” is a newer innovation with regards to court processes and may have different meanings. It appears to contain elements similar to an early case management conference in which a

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<sup>5</sup> Action Committee on Access to Justice in Civil and Family Matter, *Report of the Court Processes Simplification Working Group* (Ottawa: May 2012) at 19-20 [Court Simplification Working Group].



judge or other court worker sets a matter on a procedural track according to the inherent needs of the case and the parties involved. However, triage could involve an initial assessment of whether a matter requires litigation, or whether an alternative dispute resolution process may be more appropriate. A triage model can include elements of court-supervised mediation, judicial dispute resolution, and case management. For example, New Brunswick has initiated a pilot project that allows a triage coordinator to forward a family matter to mediation or a Case Management Master (CMM) according to the needs of the case. Since the concept of a “triage” system in the courts is still in development, defining what a triage process would be like in SKQB is an opportunity for novel thinking, to implement creative and innovative solutions to access to justice problems that could be emulated by other Canadian jurisdictions.

**Options for reform:** Two general views of triage were suggested in the consultations: i) judicial triage, where a judge mandates the appropriate procedural track a case is to follow, or ii) non-judicial triage, where a triage coordinator, usually an experienced lawyer, determines which procedural track is appropriate given the demands of the case.

**Considerations:** Those in favour of judge-led triage felt that judges are best positioned to determine the needs of a particular case, the level of compliance of the parties, and the most expedient way to resolve the dispute. Others expressed concern that judicial involvement too early in the process would result in a lack of appropriate information, making it difficult for judges to determine the appropriate course of action. Some felt that placing judges in a triage position might usurp the responsibility that lawyers have in directing the process on behalf of their clients. Several interviewees were concerned that a triage process that is not consultative will disempower the parties and render them unable to self-determine how to proceed with their matter.

#### 4. Judicial Case Management

**What is it?** Judicial case management involves a single judge overseeing and managing a particular case, beginning early in court procedures and ending at resolution. Case management works to “simplify and streamline proceedings, reduce costs, and provide judges...with a powerful tool to assist in the overall project of improving access to justice.”<sup>6</sup> Saskatchewan’s *Court of Queen’s Bench Rules* provide that a judge

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<sup>6</sup> *Ibid* at 8.

may be appointed to manage a case, and that a party may request such an appointment.<sup>7</sup> A case management judge can take steps to clarify and simplify the issues, refer the parties to dispute resolution services, and facilitate settlement between the parties.

**Options for Reform:** Three different ideas for increasing the use of case management were suggested in consultations: i) using triage to guide litigants to case management; ii) encouraging more parties to request case management under the current scheme; and iii) implementing a mandatory case management process. Reform options differed regarding the most appropriate timing for case management (immediately after triage,<sup>8</sup> or at any other point in the process), as well as the role of the judge. The case management judge may or may not be same judge as the trial judge. There are two views of the role of the judge: i) the judge as a “facilitator,” whose goal is to guide and streamline the process; or ii) the judge as an “interventionist,” whose goal is to actively intervene in order to increase efficiency.

#### **Considerations:**

- **Timing:** It was suggested that the optimal timing of a case management conference is following the initial petition but before further documents are filed to limit the number of issues in dispute. Some expressed concern that if case management conferences are held too early in the process they may be ineffective due to lack of information available, particularly financial disclosure.
- **Mandatory Nature:** Some expressed the view that case management should be mandatory, at least for particular types of disputes. However, there was concern that making case management mandatory may be an inefficient use of resources and may not be necessary for simpler matters.
- **Role of the Judge:** There is some concern that there may be an increased perception of judicial bias, particularly if the case management judge is the trial judge. However, it was countered that judges are professionals and are guided by judicial ethics of impartiality and independence. It was also noted that judges are in a position of power and may have undue influence on the process. Others view the pressure that can be exerted by judges as a means to increase efficiency and compliance by the parties.

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<sup>7</sup> Saskatchewan, *Court of Queen’s Bench Rules*, r 4-6.

<sup>8</sup> The Court Simplification Working Group recommends that case management be initiated early in the process to foster early settlement of legal issues, especially in the family law context (*supra* note 3 at 9).

## 5. Mediation

**What is it?** Currently, mediation is mandatory for contested non-family civil matters in the SKQB. For family disputes, parties may voluntarily agree or judges may make an order for mediation sessions. Public mediators through the Ministry of Justice Dispute Resolution Office (DRO), or private mediators, are used to facilitate mediations. The Ministry of Justice reports 53% resolution rate of civil cases following mandatory mediation through the DRO.<sup>9</sup>

**Options for Reform:** Suggestions included making mediation a voluntary process or initiating mediation later in the process so that there is greater disclosure before a session is commenced to facilitate settlement. Others suggest retaining the current scheme but adding requirements to facilitate meaningful participation, including mechanisms to encourage earlier disclosure.

### Considerations:

- **Mandatory Nature:** Opinions on mandatory mediation differed, with some interviewees feeling it is an overwhelming success while others expressed concern about its mandatory nature. Some view mediation as a mere “rubber stamp” in the process and as an obligation that contributes to delays and higher legal costs. Currently, litigants receive a “Certificate of Attendance” and it has been suggested that this be changed to one of “Participation” in order to encourage good faith mediation.
- **Timing of Mediation:** It was suggested mandatory mediation is not as effective as it could be because it occurs at an early stage in the process before there has been adequate disclosure. However, lawyers are not prevented by the rules from providing disclosure before mediation occurs. Many see mandatory mediation as being effective in its current form. Since early and effective dispute resolution should be the goal, efforts should be made to increase disclosure at an early stage.

## 6. Judicial Dispute Resolution and Pre-Trial Conferences

**What is it?** Judicial dispute resolution includes judge-led processes outside of litigation intended to facilitate early settlement of legal disputes. Pre-trial conferences, made mandatory in both family and

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<sup>9</sup> Saskatchewan, Ministry of Justice and Attorney General, *Annual Report (2007-2008)* at 26.

non-family civil matters at SKQB in the 1980s, are widely regarded as a successful court reform. Saskatchewan demonstrated early leadership on this front and therefore has a longer history with settlement conferences than most other provinces.

**Options for Reform:** There has been a movement across Canada towards increased use of “early and active” judicial dispute resolution prior to pre-trial conferences, a shift that could be emulated in Saskatchewan.

**Considerations:**

- Proponents of judicial dispute resolution assert that the process is incredibly effective because parties respect the opinions and role of judges and their influence may increase the likelihood of resolution. Many interviewees noted that judicial mediation helps to mitigate power imbalances between the parties, which may be of particular benefit in the SRL context. However, the difficulty of dispute resolution may increase when one of the parties is an SRL, as judges cannot give legal advice to parties. Expanded availability of duty counsel may be needed in these cases. Some noted that non-judges who are trained in leading dispute resolution could be as effective, and that relying heavily on judges to lead dispute resolution processes could be an inefficient use of limited resources.
- There is some debate as to whether judges should adopt an “interventionist” or “facilitator” role in judicial dispute resolution. While interventionist methods may lead to quicker settlement, interviewees expressed concern about judges imposing settlements upon parties without their consent. Conversely, the judge as facilitator may encourage voluntary settlement, but at the risk of using disproportionate resources relative to a conflict’s complexity, in violation of the principle of proportionality.
- Judicial dispute resolution is seen as effective where there is the presence of (1) full disclosure, (2) realization of costs, and (3) a willingness to compromise, as is the case in pre-trial conferences. As such, early dispute resolution prior to disclosure and discovery may not be as effective as that occurring later in the process. One suggestion was to implement disclosure rules where the parties are required to file disclosure within 30 days.
- Different judges have different skill sets - some judges are geared more towards trial while others have responded favourably to the expanded role of dispute resolution. These differences may be due to generational factors, training, or the individual judge’s preference. As such, suggestions

were made that special training in dispute resolution continue to be provided to judges and that willingness towards performing dispute resolution be considered in the judicial selection process.

## 7. Expanding Roles for Non-Judicial Court Workers

**What is it?** The Court Simplifications Working Group Report advocates that case management officers should be employed to facilitate the court process, especially in family law matters.<sup>10</sup> Some jurisdictions have established non-judicial case management and triage workers who facilitate the court process through various means. For example, the Federal Court has appointed prothonotaries, experienced lawyers who carry out various case management functions. They can conduct mediations and mini-trials, provide neutral opinions, and effect settlements in dispute resolution conferences.<sup>11</sup> Ontario and British Columbia family law systems have created “masters” positions that carry out similar functions.

**Options for Reform:** Suggestions included increasing the role of non-judicial, legally trained, court workers to triage cases and oversee certain applications and legal matters. Such workers could refer parties to other dispute resolution services like mediation.

**Considerations:** Appointing non-judicial caseworkers may be a cost-effective and efficient way of expediting the court process and achieving meaningful resolutions for litigants. Making use of experienced lawyers to preside over simpler matters may reduce backlog in the court system and relieve some of the burden on judges, freeing them up for more complex issues. However, there are concerns that non-judicial caseworkers may not possess the requisite skills that specially trained and experienced judges may have. There is some concern that judges will begin to rely too heavily on caseworkers, or conversely, be reluctant to give up responsibility over some matters.

## 8. Measuring Success

**What is it?** Whether or not reforms to the SKQB process are successful at increasing access to justice requires measurement of outcomes. Outcome data may be difficult to collect, and there may be disagreement as to what data best reflect access to justice. Statistics Canada’s Centre for Justice Statistics

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<sup>10</sup> *Supra* note 5 at 10.

<sup>11</sup> *Federal Court Rules*, r 387.

collects and releases data through their civil court survey regarding such measures as volume of applications initiated, time to resolution and type of resolution.

#### Options and Considerations:

- **Need for Outcomes:** It was suggested that any reforms also include a strategy for gathering information about the efficacy of the reforms in question to ensure that the goal of increasing access to justice is being attained. In determining an appropriate strategy for measuring outcomes, it was seen as essential that adequate consultation with lawyers, judges, and community groups be conducted to guarantee that the data collected is helpful in increasing access to justice.
- **Pilot Projects:** Many interviewees were of the view that pilot projects be utilized to identify areas for broader reform, while gathering evidence to measure the efficacy of the respective innovation. However, pilot projects may lead to delay in the implementation of wide-scale reform.
- **Measurements of Interest:** Ideally, both qualitative and quantitative measures should be used. However, qualitative data is often more expensive and difficult to obtain. Measures such as user satisfaction, time until resolution, and number of cases settled before trial were suggested as potential guides to assess whether access to justice was improved. Use of exit surveys could be one means of assessing user satisfaction.
- **Access to Justice Centre of Excellence:** It was suggested that there might be a role for the Access to Justice Centre of Excellence at the College of Law, University of Saskatchewan to assist in facilitating measuring success of court reforms. The Centre may be seen as a neutral source that could collaborate with the various stakeholders, conduct data analysis, and report on the measurements of success.

## E. CONCLUSION

The legal community, including lawyers, judges, court users, and other stakeholders, is ready to implement reforms to court processes in order to increase access to justice in Saskatchewan. As stated by former Justice Rebecca Courlis, “[i]t is up to us to build a justice system that truly offers a just, speedy, and inexpensive resolution for every case.”<sup>12</sup> The key goal of these reforms is to make courts more reactive

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<sup>12</sup> Courlis, Rebecca, *10 Ways to Reform the Civil Justice System by Changing the Culture of the Courts*, (2016) online: ABA Journal.

to the needs of the public by simplifying and demystifying the process. Many of these reforms, such as amendments to the court rules and increasing the use of pre-trial conferencing, require only that existing processes be built upon and refined, while others demand more inventive thinking and concerted effort. By further simplifying the rules of court and increasing the scope and use of dispute resolution processes, including mediation, case management, and judicial dispute resolution, resolving legal disputes can be inexpensive, quicker, and more meaningful for participants. The input from the Dean's Forum participants is invaluable for identifying areas in need of reform and establishing realistic solutions to access to justice problems in Saskatchewan.

## F. QUESTIONS FOR REFLECTION

- What should the expanded role of the SKQB judge look like? Should the judge assume the role of facilitator or interventionist, or should the role of the judge depend on the skills of the judge or the situation?
- How do we encourage judges to facilitate the resolution of disputes without going so far as to allow judges to impose solutions on parties without their active participation in the process?
- In your opinion, what is involved with “case management” and what should be involved with “triage”? How does the definition of each process impact the accessibility of courts?
- Is there an access to justice issue that prevents many from attempting to resolve their legal issues through the SKQB? How should encouragement of enforcing legal rights through the SKQB be balanced with merely increasing litigiousness?
- Do any initiatives under consideration risk decreasing substantive fairness as a result of increasing procedural efficiency? Instead of improving access to justice, are we creating a situation of access to “injustice”?
- Are there different challenges to improving access to SKQB in Aboriginal, northern or rural communities?
- An important stakeholder that was not consulted in these interviews was the public. Who is the public and how can the views and needs public be meaningfully obtained and addressed?

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<[http://www.abajournal.com/mobile/article/to\\_reform\\_the\\_civil\\_justice\\_system\\_we\\_need\\_more\\_than\\_rule\\_changes/?utm\\_content=buffer43eec](http://www.abajournal.com/mobile/article/to_reform_the_civil_justice_system_we_need_more_than_rule_changes/?utm_content=buffer43eec)>.

## G. APPENDICES

### APPENDIX A: Summary of Cromwell Report and CBA Reaching Equal Justice Report

Both the Cromwell Report<sup>13</sup> and the CBA Reaching Equal Justice Report<sup>14</sup> identify judicial case management and dispute resolution, as well as simplified court rules and procedures as areas in which changes can be made to improve access to justice. With respect to this topic, the Cromwell Report sets two goals: that courts and tribunals be made “fully accessible multi-service centres for public dispute resolution” by 2019<sup>15</sup> and that “coordinated and appropriate multidisciplinary family services” be made easily accessible by 2018.<sup>16</sup> All of the recommendations provided by the Cromwell Report speak to the accessibility of superior courts and court procedures. The report recommends that:

- Courts be made more accessible to society and reflect the needs of the public they serve.
- Courts be transformed into multi-service dispute resolution centres that offer various dispute resolution services including “negotiation, conciliation and mediation, judicial dispute resolution [and] mini-trials.”<sup>17</sup> Specialized court services should be offered and the role of online dispute resolution options expanded.
- Courts should have appropriate and accessible processes for self-represented litigants or litigants with limited scope retainers. This can be achieved by: training workers to reasonably assist litigants; coordinating and integrating courts with early resolution service information and providers; expanding and integrating law information centres; and expansion of civil and family duty counsel and pro bono programs.
- Judicial case management is to be made readily available in all appropriate cases. As well, the use of non-judicial case management officers (trained lawyers, duty counsel, etc.) to assist with case management and dispute resolution should be expanded.
- Court processes and procedures should be reformed to make them more accessible and user friendly through simplification of rules and processes, and through technological modernizations.
- All innovation to reform the courts and the judicial role must “complement and reinforce” judicial independence and ethical standards.<sup>18</sup>

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<sup>13</sup> *Supra* note 1 at 15-19.

<sup>14</sup> Canadian Bar Association, *Reaching Equal Justice Report: An Invitation to Envision and Act* (Ottawa: November 2013) at 82-92 [CBA Reaching Equal Justice Report].

<sup>15</sup> *Supra* note 1 at 15.

<sup>16</sup> *Ibid* at 17.

<sup>17</sup> *Ibid* at 15.

<sup>18</sup> *Ibid* at 17.



Several of the family services recommendations from the Cromwell Report speak to the topic of the accessibility of courts and court procedures. The Report recommends that:

- All family justice reforms be guided by the core values and principles of “conflict minimization; collaboration; client-focus; empowered families; integration of multidisciplinary services; timely resolution; affordability; voice, fairness, safety; and proportionality.”<sup>19</sup>
- A variety of accessible and affordable family services be made available for all family law processes including the provision of a range of dispute resolution processes, the expansion of visible, easily accessible and user friendly early front end services, and the use of triage services.
- Dispute resolution programs be integrated as much as possible into the family justice system to “facilitate early, consensual family dispute resolution.”<sup>20</sup>
- Innovations in the family justice system such as enacting supportive law society regulations, facilitating public education, providing mandatory information sessions for self-represented litigants, and expanding the use of trained and supervised non-lawyers, such as paralegals and law students, must be encouraged.
- Court jurisdictions should evaluate whether the implementation of a unified family court would be beneficial and feasible. Unified family courts would have simplified procedures and rules, forms and dispute resolutions processes that are tailored to the needs of the users. Judges should be specialized and have substantive and procedural expertise in family law, skill in dispute resolution, training in social and psychological dimensions of family law, and awareness of the range of family justice services available. The same judge should preside over all pre-trial motions, conferences and hearings.

The CBA Reaching Equal Justice Report touches on several of the recommendations made in the Cromwell Report. It recognizes that the role and procedures of courts are changing around the world and advocates for a re-centralized role of the courts, with the courts being the “main path to dispute resolution processes and the referral of other services for non-legal aspects of people’s problems,”<sup>21</sup> and the ultimate goal being the provision of “seamless delivery of legal services to everyone, including representation when required.”<sup>22</sup> The CBA Report’s recommended reforms include effective triaging of cases; integrating practices that are evidence-based and based on feedback from those using court services; expanding the judicial role through active case management, judicial dispute resolution and active adjudication; supporting the expanded judicial function by integrating technology; and creating supportive and simplified court rules and processes.

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<sup>19</sup> *Ibid.*

<sup>20</sup> *Ibid* at 18.

<sup>21</sup> CBA Reaching Equal Justice Report, *supra* note 10 at 83.

<sup>22</sup> *Ibid* at 84.

## APPENDIX B: Initiatives in Other Jurisdictions

**Alberta** has devised a triage and case management regime that includes intake services, Family Court Counsellors (FCCs), Case Flow Conferences, and voluntary Judicial Dispute Resolution (JDR). At intake services, litigants are assisted in preparing documents and can be referred to FCCs and case flow conferencing. FCCs meet with SRLs before court to identify their issues, prepare them for court, and refer them to mediation where appropriate. Case flow conferencing is conducted before a judge and provides litigants the opportunity to identify issues and attempt to resolve their issues in an informal setting. Judges can refer the parties to mediation, courses, and other services. Finally, there is a voluntary judicial dispute resolution regime which intends to obviate the need for trials in family matters, or to narrow issues for trial to make the process more efficient. In the course of a settlement conference the judge or justice provides a non-binding opinion on the matter if the parties are not able to reach an agreement on their own. An overview of each program can be found at <http://www.justice.gc.ca/eng/fl-df/fjs-sjf/sch-rch.asp?type=3&province=6>.

Sections 16.1 and 16.2(1) of the Alberta *Court of Queen's Bench Act* allows judges to assign certain duties to case management counsel. This can include narrowing and defining issues, assisting with scheduling, and vetting applications to be made by the parties. This provision has been used in family law matters in Calgary.

**British Columbia** enacted its new *Family Law Act* in 2011. Innovations include the use of plain language that better reflects modern parenting values. For example, terms like “custody” and “access” have been replaced with “guardianship” and “contact.” A guide to the new Act can be found at <http://www.familylaw.lss.bc.ca/resources/pdfs/pubs/Guide-to-the-New-BC-Family-Law-Act-eng.pdf>.

British Columbia has also implemented an online document filing and access system, accessible at <https://justice.gov.bc.ca/cso/index.do>. Under British Columbia's *Family Law Act*, family justice counsellors are appointed to provide information on family disputes, conduct dispute resolution, and refer parties to other services. Parenting Coordinators can also be appointed under the Act to help the parties comply with an agreement or court order by creating strategies for resolving conflict, fostering communication between parents, and referring the parties to other services and agencies.

The British Columbia *Supreme Court Family Rules*, rule 7-1(17) provides that a judge or master may order that all applications be heard by that judge or master in a family law case. Through this process a judge becomes “seized” of the matter.

**Manitoba** amended its Court of Queen’s Bench rules pertaining to family matters to increase access to justice, signalled by the rules’ purpose as being “secure the just, most expeditious and least expensive determination of every family proceeding on its merits,”<sup>23</sup> and also through inclusion of proportionality as a guiding principle for court processes.<sup>24</sup> Manitoba has amended its *Court of Queen’s Bench Act* to provide for the appointment of masters, lawyers with at least five years of experience who can carry out many of the same duties as a judge.

**New Brunswick** has implemented a comprehensive pilot project in Saint John to improve access to justice in family matters. It includes a Family Law Information Centre (FLIC) located at the courthouse, a triage process, voluntary mediation, and new simplified rules of court. At a FLIC, SRLs can get assistance from staff in understanding the court process, and can access publications and forms. A triage coordinator determines the issues with the parties and can forward the matter to mediation or a Case Management Master (CMM). SRLs can attend a free one hour appointment with a Family Advice Lawyer, who can help with forms and provide general advice, although they do not represent the litigant at conferencing, mediation or trial. Voluntary mediation is provided for free. Experienced family lawyers are appointed as Case Management Masters who conduct case conferences prior to court appearances, make interim and procedural orders, and refer matters to mediation. Voluntary mediation is available through the program, and if there are outstanding issues after mediation has been attempted the matter will be referred for a conference with a CMM. The last stage before a matter proceeds to trial is a settlement conference with a Queen’s Bench judge. The program is summarized at <http://www.cfcj-fcjc.org/inventory-of-reforms/new-brunswick-family-court-pilot-project/>.

**Ontario’s** Family Law Rules provide for non-judicial Family Case Managers who can conduct many of the same duties as judges under the *Family Law Act*. Case Managers must have at least 10 years of experience as lawyers. The Ontario Court of Appeal has held that the Family Law Rules with respect to case-management allow a judge to exercise their inherent jurisdiction to “seize” him or herself of a case, meaning they alone can hear future applications on the matter (see *D.G. v. A.F.*, 2015 ONCA 290).

**Quebec** implemented a voluntary JDR framework in 2001, the purpose of which is “to facilitate dialogue between the parties and help them to identify their interests, assess their positions, negotiate, and

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<sup>23</sup> Manitoba, *Court of Queen’s Bench Rules*, r 70.02(1).

<sup>24</sup> *Ibid*, 70.02(2).

explore mutually satisfactory solutions.”<sup>25</sup> Lawyers need not be present, conferences are confidential, free, and are “without formality,”<sup>26</sup> all of which reflect an interests-based approach.

**Australia** has implemented a “less adversarial trial” system for family matters. In this model, the presiding judge takes a more active role in determining the course of the trial and the issues to be examined. The parties fill out a questionnaire which informs the judge’s approach at trial, and rules of evidence are relaxed to allow the judge to identify the material issues. Information about the process can be accessed at [http://www.familycourt.gov.au/wps/wcm/connect/169173f5-d570-48f3-b4db-9a8f99e10283/BRLESS\\_ADV\\_0313+V2.pdf?MOD=AJPERES&CONVERT\\_TO=url&CACHEID=169173f5-d570-48f3-b4db-9a8f99e10283](http://www.familycourt.gov.au/wps/wcm/connect/169173f5-d570-48f3-b4db-9a8f99e10283/BRLESS_ADV_0313+V2.pdf?MOD=AJPERES&CONVERT_TO=url&CACHEID=169173f5-d570-48f3-b4db-9a8f99e10283).

## **APPENDIX C: Literature Review**

### **1. Bala, Nicholas, Rachel Birnbaum & Justice Donna Martinson. “One Judge for One Family:**

**Differentiated Case Management for Families in Continuing Conflict” (2010) 26:2 Can J Fam Law 395.**

Family cases and disputes are a different challenge than other civil litigation, requiring judges to have a markedly different role than is traditionally expected. The authors contend that judges should possess appropriate knowledge and experience required to effectively resolve family disputes and effect changes in parental attitudes and behaviour. The differentiated approach is similar to the triage idea and involves varying methods depending upon the level of conflict, type of case, and stage of the process. The main contention is that effective and accessible family justice requires pre-trial and/or post-trial management by a single judge, dealing with conferences and motions, as well as any procedural or substantive issues. A different judge, it is conceded, must conduct the trial. The authors also consider Canadian approaches to judicial case management, as well as analysis on some case law on the matter.

### **2. Keet, Michaela & Brent Cotter. “Settlement Conferences and Judicial Role: The Scaffolding for Expanded Thinking About Judicial Ethics” (2013) 91 Can Bar Rev 363.**

The authors identify that traditional judicial roles are expanding and giving way to new roles. Judges are involved in settlement conferences more and more often. As a result, Keet and Cotter contend that ethical reasoning must be adapted accordingly. The authors look at existing judicial ethics and expectations,

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<sup>25</sup> Quebec, *Code of Civil Procedure*, r 151.16.

<sup>26</sup> *Ibid.*

which can be transferred to the expanded roles for judges, and finally, what effective ideologies and styles for judicial mediation might look like. The authors identify many dilemmas that could be posed by judicial involvement in mediation and/or settlement conferences. As a result, they argue for a temporary framework, based on “first principles,” to support a process of construction. The authors make efforts to integrate codes of conduct in the dispute resolution field with those values guiding judicial behaviour in their modified roles. The article identifies party self-determination as the bedrock principle, thus Keet and Cotter acknowledge the implications for a process framework that must meaningfully value that principle.

**3. Keet, Michaela & Teresa B. Salamone. “From Litigation to Mediation: Using Advocacy Skills for Success in Mandatory or Court-Connected Mediation” (2001) 64 Sask L Rev 57.**

The article provides a useful and extensive discussion on court-connected mediation and gives guidance for litigators who are becoming advocates in these processes to an ever-increasing extent. Although published in 2001, the advice remains pertinent today, maybe more so given the legal system’s growing use of alternative dispute resolution processes. The authors explore the benefits for the law and lawyers in expanding their practice into the dispute resolution arena, while also cautioning practitioners in their transition to mediation advocacy. Keet and Salamone then provide advice for the mediation advocate on how to focus on interests and effectively prepare for meetings. Prior to the discussion of the litigant’s role, the authors undertake a very helpful exploration of court-connected mediation processes Canada-wide, including analysis on their effects and how they have been received.

**4. Leverette, John, Trish Crowe, Rose Wenglensky & Justice Mary Dunbar. “Judicial Case Management and the Custody and Access Assessment: Melding the Approaches” (1997) 42 Can J Psychiatry 649.**

The Family Court Branch of the General Division of the Ontario Court of Justice (Unified Family Court) saw developments in the late 90’s to meet the access to justice problem in the family law sphere. Central tenets of the process included active judicial case management and a settlement focus. The authors conducted research of seventy-two judicial referrals using the Unified Family Court process in order to find that these efforts resulted in a more efficient use of resources and substantial diversion of cases from continuing litigation. The article argues for further work to assure selection criteria for various intervention formats, an idea that contemplates both triage, as well as the provision of more dispute resolution options. Though conducted in 1997, this work is a terrific assessment of court-connected dispute resolution processes relatively early in their existence.

**5. Miller, Steven J. “Judicial Mediation: Two Judges’ Philosophies” (2012) 38:3 Litigation 31.**

The associate editor of the publication has a roundtable discussion with two judges, one from Ohio and one from New York. The judges discuss their efforts in judicial settlements. Together, the judges manage to be considerably informative on the matters of ethics, concepts, motivations and benefits of judicial settlement conferences and mediation. The discussion also includes anecdotes of the judges’ experiences that are emblematic of the positive effects judicial mediation has on parties, as well as the process’ impact on meeting the access to justice challenge. Through anecdotes, readers are provided with many examples of effective means for conducting judicial dispute resolution processes.

**6. Otis, Louise, & Eric H. Reiter. “Mediation by Judges: A New Phenomenon in the Transformation of Justice” (2006) 6:2 Pepperdine Dispute Resolution Law Journal 351.**

Drawing on the experience of Quebec’s voluntary judicial mediation program instituted by their Court of Appeal in 1997, the authors discuss judicial mediation that is closely integrated with the traditional adjudicative system. The contention is that judicial mediation offers justice that is fuller and better adapted to needs of parties with various conflicts. The authors start with a look at the classical model before delving into the benefits of the new process. They make a case for why judges are an appropriate resource to turn to for alternative dispute resolution. The authors also undertake an extensive analysis of what the process does or could look like. This includes how to properly determine and assess conflict, and crucially, the purpose of the consent requirement, the key distinction from traditional adjudication. Lastly, the authors touch on the role that ethics has played, and will continue to play, in judicial mediation.

**7. Roberge, Jean-Francois, “Sense of Access’ As a Framework for Civil Procedure Justice Reform: An Empirical Assessment of Judicial Settlement Conferences in Quebec (Canada)” (2016), online:**

**<http://cardozojcr.com/wp-content/uploads/2015/12/Roberge.pdf>**.

In this article, Roberge analyzes the trend toward designing initiatives to increase access to justice from the perspective of the citizen through an examination of Quebec’s current civil procedure reform. The new reforms incorporate guiding principles of proportionality between time and resources expended on resolving a matter relative to its complexity, cooperation, participation, and fairness. The author considers the viability of informing parties of the various methods that can be used to achieve resolution of their matter, including both private and court-connected processes. The author concludes that the efficacy of settlement processes in the public sphere should encourage private actors to provide similar services in the private arena.

**8. Roberge, Jean-Francois. "Research Report on the Experience of Citizens and Lawyers at the Superior Court and Court of Quebec" (2014), online: <[http://www.tribunaux.qc.ca/mjq\\_en/c-superieure/index-cs.html](http://www.tribunaux.qc.ca/mjq_en/c-superieure/index-cs.html)>.**

With the express support and approval of Quebec's Superior Court, Professor Roberge undertook the "first empirical study of the 'sense of access to justice.'" In order to complete the project, Roberge's group measured feelings of fairness, usefulness and professional support reported by parties and lawyers who took part in settlement conferences at the Superior Court and Court of Quebec. Overall, Roberge's findings bear out that settlement conferences have been highly successful, though not without their challenges. Unsurprisingly, the report shows that parties are more satisfied when settlement is reached, but also notes that defendants are more satisfied than plaintiffs. Roberge highlights that the greater the cost, the lower the satisfaction, and identifies the importance of timely resolution, respect and dignity. The report shows that parties sometimes want an active judge, and in family cases in particular, there is a desire for more dynamic solutions and the development of communication creating trust.

**9. Salem, Peter. "The emergence of triage in family court services: the beginning of the end for mandatory mediation?" (2009) 47:3 Family Court Review 371.**

Salem is not writing about Saskatchewan's mandatory mediation, a process that is not part of the Family Court procedure. In fact, since his argument is that mandatory mediation should not be in place for family cases, the choices made in Saskatchewan are well supported in the article. As indicated in the title however, Salem goes even further by highlighting the benefits of triage and recommending its adoption by courts. The author recognizes the benefits of the continuum of services that have been employed in most jurisdictions for family cases, and he notes that mediation tends to be at the heart of it. However, he raises concerns with increasing the dependence upon such a process and identifies the growth of dispute resolution options beyond a basic mediation model. Starting with a look at triage processes in Arizona, Connecticut, and British Columbia, the author proceeds to make a case for triage as a worthy option to pursue, whilst recognizing the challenge of predicting with accuracy the appropriate services for each family. Salem still asserts that such "differentiated case management" would reduce the burden on families by determining the most appropriate services, including mediation, and thereby guarantee a more efficient use of resources.

**10. Sourdin, Tania & Archie Zariski, eds. *The Multi-Tasking Judge: Comparative Judicial Dispute Resolution* (Sydney: Thomson Reuters, 2013).**

Reflecting that the world has changed and most civil cases are settled before trial, this book analyses the expanding role of judges beyond the adjudicative and into the area of dispute resolution. A product of extensive scholarly consideration and reference, the book begins with empirical research in Canada to identify judicial dispute resolution's place in the future of our justice system. The book is a compilation of chapters contributed by various scholars, including the editors. Each is concerned with judicial dispute resolution in some manner but while certain chapters may canvass innovations in various parts of the globe, others focus in on Canada and both the benefits of, and challenges presented by, court-connected mediation and judicial involvement therein. While the book presents important theoretical discussion, it also provides welcome analysis of actual effects and successes of these innovations. Sourdin and Zariski do tremendous work in answering the what, why, and how for the extension of practice of judicial dispute resolution.

**11. Wellington, Alex. "Exquisite Examples' of Creative Judicial Dispute Resolution: The Potential of Alternative Dispute Resolution for Intellectual Property Cases" (2011) 23:3 IPJ 289.**

Though written with a view towards the intellectual property context, this article consists of a much less narrow view on alternative dispute resolution. The author embarks upon an analysis of the motivations for turning to ADR generally, and canvasses the different procedural options at work in different Canadian jurisdictions. These include arbitration, mandatory mediation, pre-trial conferences, mini-trials, and lastly, judicial mediation and case management, deemed "the most promising option." For each option, the author goes through an extensive analysis of the benefits and drawbacks of the process, citing considerable amounts of research. Wellington also considers lawyer and client perceptions and attitudes about the processes, as well as some illustrative cases. The article concludes with a view of the global context and development of dispute resolution for not only intellectual property, but also civil litigation more broadly.