



# FAMILY JUSTICE

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Family law cases account for over 35% of all civil court cases. In the Alberta Court of Justice, at least 40% of all family matters have at least one unrepresented litigant. Research shows that family conflict is toxic, particularly for children. Innovations in family justice would not only save court time (and thus costs), but reduce long term impacts on families such as students doing poorly in school due to stress, and parents being less productive at work and less adept at parenting.

## **CBA Alberta recommends**

1. Improved access to legal aid for lower income families to create a less combative process and to reduce court time;
2. An Alberta Family Court with specialized expertise and a focus on dispute resolution; and
3. Family support services to encourage more consensual resolutions and to offer post-conflict support.



## ALBERTANS NEED GREATER ACCESS TO FAMILY JUSTICE.

Vulnerable children and families face systemic barriers seeking legal recourse for their family disputes and are exposed to toxic levels of stress in our adversarial justice system. Neuroscience research has shown that family conflict is especially harmful to children.<sup>1</sup>

## BACKGROUND

Report after report over decades has documented issues with cost, delay, complexity, and other barriers to accessing legal services and exercising legal rights. Low-income and Indigenous Albertans face even greater barriers in the justice system when they experience a family law problem. Legal aid is dramatically falling short as the foundation for access to family justice. Almost every family in Alberta encounters a family law problem at some point in their lives.

**Family law cases account for over 35% of all civil court cases. In the Alberta Court of Justice, at least 40% of all family matters have at least one unrepresented litigant.<sup>2</sup>**

The best interests of Alberta children and families are at stake. In family disputes it is often the most vulnerable in our communities who are losing:

- Those in situations of family violence;
- Those on the losing side of power imbalances in their relationships;
- Unrepresented parties having to negotiate complex law and complicated procedures.

<sup>1</sup> *The Palix/Norleen Foundation is well known for its research on the effects of adverse childhood experiences on developing brains: [https://www.albertafamilywellness.org/resources/results?search-term=&topic\\_filter=social-policy](https://www.albertafamilywellness.org/resources/results?search-term=&topic_filter=social-policy)*

<sup>2</sup> *Alberta Civil Liberties Research Centre (ACLRC): Access to the Civil Litigation System.*

The social costs of failing to meet the family justice needs in our province are potentially more costly to the Government of Alberta than wise investment with proven returns on this investment.

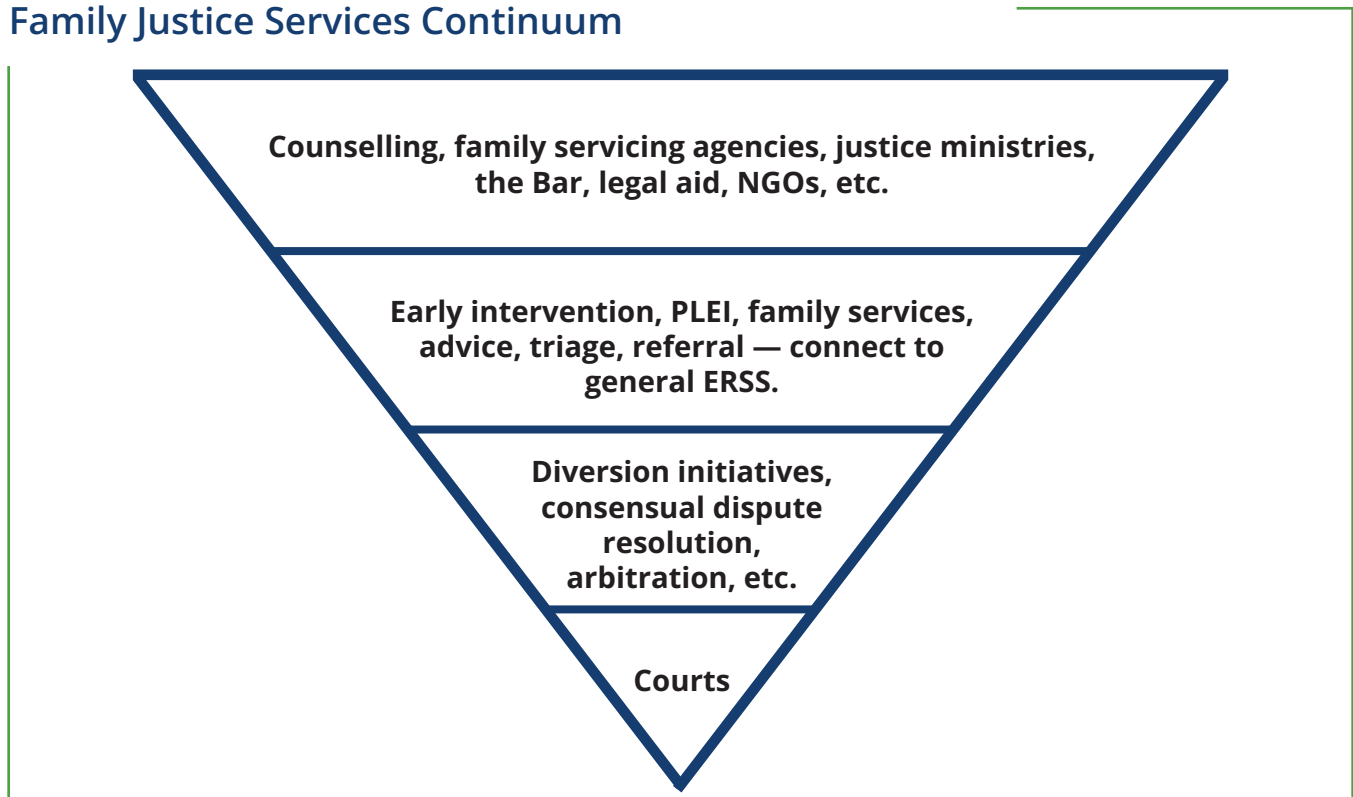
Family conflict leads to students doing worse in school and creates more stress and conflict in classrooms.

Parents who are employees are less productive at work, or if they are entrepreneurs, at running their small businesses.

Family justice must receive focused attention because the impact on families and children is frequently life-changing.

**We are fortunate to be a jurisdiction with the capacity to ensure that vulnerable Alberta children and families do not experience insurmountable barriers to family justice.**

### Family Justice Services Continuum



<sup>3</sup> Bank of Canada inflation May 2015 to May 2022: 19.7%

# THE ISSUES

## Legal Aid Funding for Family Justice

Legal Aid Alberta (LAA) is unable to fully support vulnerable children and families in Alberta.

We have a huge number of unrepresented litigants descending on an already over-burdened, inefficient and overwhelmed court system.

There has been, in recent years, gross under-funding by some \$54.6 million in breach of the 5-year **Legal Aid Governance Agreement** negotiated in 2018. Funding was cut by 35% in the last two years. Criminal and family lawyers have expressed their concerns through direct action. Meanwhile, low-income Albertans are not getting the legal supports they need.

On October 5, 2022, the Government of Alberta announced an 8.225% increase to the Financial Eligibility Guidelines (FEGs) and a corresponding increase to the Tariff Rates paid to private roster lawyers bringing the hourly rate from \$92.40 to \$100. This was the first increase to the Tariff since 2015. An adjustment reflecting inflation would have been closer to 20%.<sup>3</sup>

Effective January 1, 2023, the Tariff Rate increased again to \$125/hour. We acknowledge the government's commitment in its December 21 news release to review all aspects of legal aid funding, to be completed in 2023. We urge the review to include both the Tariff Rate and the FEGs.

The inefficiencies and deficiencies of legal aid leaving vulnerable children and families in the cold cannot be addressed without a commitment to consistent and adequate funding.

### RETURN ON INVESTMENT IN LEGAL AID SERVICES

CBA Alberta commissioned research in 2020-2021 to determine the value of increased government investment in the justice system.<sup>4</sup>

This economic analysis shows that even a modest increase in legal aid funding of \$6 million would generate a net public savings of \$11 million annually by reducing the number unrepresented litigants and by extension, alleviating the burden on an already over-burdened and dysfunctional court system.

The report goes on to show how a further \$22 million is a defensible funding allocation from a costs perspective as this would produce savings from reduced burdens on the court.

<sup>4</sup> See GK Fellows, "Estimates of Alberta Court Time and Public Expenditure Savings Resulting from Reduced Rates of Self Representation", in Appendix A, pg 50

In US and UK studies, for every dollar spent on legal aid, the average social return on investment is \$6.17.<sup>5</sup> In Ontario, Pro Bono Ontario found that \$1 invested resulted in \$10 of savings overall.<sup>6</sup> The reasons are clear:

- Unrepresented litigants use significantly more court resources than those represented by counsel;
- Reduced delays from unrepresented people have been found to be \$268.28 per court hour of savings;<sup>7</sup>
- For every hour an unrepresented person takes time off work to attend court this represents a loss of \$7.20 per hour of income tax as well as other non-cash benefits -- reduction in court delays, faster resolution of files.

## PUBLIC SUPPORT FOR LEGAL AID INVESTMENT

Public opinion research by CBA Alberta in 2020/2021 shows that 91-96% of Albertans support adequately funded Legal Aid. 94% of Albertans recognized the importance of individuals having access to Counsel to ensure fair outcomes. <sup>8</sup>Over half of Albertans polled agreed that the threshold to qualify for Legal Aid is too low.<sup>9</sup> Even with the October 8% increase, the FEGs are still below the poverty line.

With 34,857 distinct representation clients receiving services through LAA in 2021-22<sup>10</sup> the cost for legal aid actually generates a net tax savings of more than \$100 million a year. Cost-benefit studies elsewhere show a ratio of 1:18.

Failing to meet the needs of vulnerable children and families will have social consequences and costs for the government in other areas. Unresolved legal problems cause undue personal hardship and trigger non legal problems. Already marginalized people and communities are most directly impacted.

Even if legal aid were fully funded as per the Governance Agreement, the financial and substantive guidelines mean that most Albertans will get very limited, if any, family law coverage. Gaps in family legal aid impede women's ability to leave abusive relationships. It is particularly urgent to address this risk in Indigenous families and communities given the ongoing crisis of Missing and Murdered Indigenous Women and Girls.

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<sup>5</sup> *Ibid*

<sup>6</sup> *Investing in Justice: A Literature Review in Support of the Case for Improved Access* by Lisa Moore and Trevor Farrow, pg. 48

<sup>7</sup> "A Win for All: Return on Investments in Alberta's Justice System" – provided to then Justice Minister Kaycee Madu

<sup>8</sup> See Nanos Public Opinion Research (quantitative) in Appendix B; pg 70, slide 5.

<sup>9</sup> See Nanos Public Opinion Research (quantitative) in Appendix B; pg 70, slide 5.

<sup>10</sup> See Nanos Public Opinion Research (quantitative) in Appendix B; pg 72, slide 9; and Nanos Focus Group Research (qualitative) on pg 84, slide 16.

Risks for children are shown by neuroscience research. All the stressors result in a generation of less productive adults with greater risks of social problems.

But more than this there is a direct connection between adequate funding for legal aid, the increasing numbers of unrepresented people in the courts, and the functionality of the court system.

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**The large number of unrepresented people with family disputes is an expensive burden on the justice system which then results in more delays in the criminal arena. Matters will take longer, backlogs will mount, access to justice will decline and overall system costs will increase.**

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As the Government of Alberta has recently announced several affordability measures for Albertans in a time of high inflation and increasing costs for basic needs, legal aid for family justice should also be an affordability issue for low income and vulnerable Albertans.

The current legal aid income cut off for a family of four is \$41,270.52; yet an average income for that household in Alberta ranges from \$84,000 (Edmonton) to \$87,000 (Calgary)<sup>11</sup>. A household operating at just the average income - or less than average - does not typically have access to resources for unexpected legal costs. Many will choose to represent themselves.

As detailed in the "Access to Justice" chapter of this document, self represented litigants cost the system materially in more court cancellations and delays, in fewer settlements, and generally excess court time.<sup>12</sup>

Family lawyers are unable or unwilling to take Certificates from Legal Aid because under-funding results in the expectation of working entirely for free. It's a house of cards about to collapse. The Government of Alberta, together with Legal Aid Alberta, is well-positioned to prevent this from happening.

## **CHILDREN'S PARTICIPATION AND REPRESENTATION IS DEPENDENT ON FUNDING FOR LEGAL AID**

Canada is a signatory to the United Nations Convention on the Rights of Children (CRC). The best interests of children is a foundational legal principle in Canadian Family Law.

The right of children to participate in family justice processes includes the right to

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<sup>11</sup> 2020 data. Source: Statistics Canada.

<sup>12</sup> Please see Appendix A for a detailed analysis of court cost savings when legal aid is increased.

independent legal representation to represent solely the best interests of the child(ren) when so required.

Fulfilling these obligations is wholly dependent on adequate legal aid funding.

The pandemic had a disproportionate impact on access to justice, including access to courts and court related services for children.<sup>13</sup> An investment of resources is needed to ensure the implementation of the procedural safeguards identified by the United Nations' CRC, including legal representation when children's best interests are being assessed by decision-makers.<sup>14</sup>

We also advise that amendments to the *Child Youth and Family Enhancement Act* should take into consideration not only a child's Indigenous heritage, but a family's history of exposure to the damages caused by residential schools, as well as the general disadvantages that First Nations communities experience living on reserve.

## Implementing the Alberta Family Court

A unified Alberta Family Court would save the Government of Alberta money in the long run while eliminating duplication of resources, confusion in the public, and improving access to family justice in Alberta.

The initial investment required by the Government of Alberta for the Alberta Family Court was to be matched by a federal contribution of 17 new judicial positions. Alberta would be responsible for staffing and operational costs.

For more than five decades, family law stakeholders have been calling for the creation of unified Family Courts across Canada with specialized judges, early assessment (triage) and case management, a single judge presiding over a family dispute, and all the benefits of the more accessible Alberta Court of Justice, including a continuum of dispute resolution services to meet the myriad of needs of families.

Hamilton Wentworth was first to implement such a one-stop court some 45 years ago. Saskatchewan, Manitoba, New Brunswick, Nova Scotia, Newfoundland and Labrador, and Ontario have since followed with some or all of the court systems now unified in those provinces.

As early as 1968, the Law Society of Alberta recommended the establishment of a unified Family Court. There were then recommendations to unify our Family Court from various Committees and Task Forces in 1972, 1976, 1978, 1999, 2000, and 2003.

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<sup>13</sup> *Action Committee on Court Operations in Response to COVID-19, Examining the Disproportionate Impact of the Covid 19 Pandemic on Access to Justice for Marginalized Individuals.*

<sup>14</sup> *Committee on the Rights of the Child, General Comment No 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art 3, para 1) UN Doc. CRC / C / GC / 14 (2013) at paras 85-99).*

In 2012 the Family Justice Working Group of the National Action Committee on Access to Justice in Civil and Family Matters (the Cromwell Report) recommended that each jurisdiction establish its own unified Family Court with “unified legal jurisdiction, specialized courts, simplified rules and procedures, a range of dispute resolution methods, integrated legal and community and social services.”<sup>15</sup>

In Alberta, the emergence of the Reforming Family Justice Initiative (RFJI) in sync with the brain science on family conflict and the impacts on children sought to re-orient the family justice system to be wellness focused and more responsive to the needs of children and families. The principles of the RFJI were embedded in the proposal for the unified Alberta Family Court.

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**The unified Alberta Family Court is not a new idea or a radical idea. It is widely regarded as the key pillar of reforming family justice to better meet the needs of families and children.**

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Even with a substantial initial investment in staffing, set up and operating costs, the plans for a unified Alberta Family Court were and continue to be intended to save taxpayer money and cut red tape.

## **BENEFITS**

A unified Alberta Family Court would promote cost-effective, appropriate, and proportionate child-centered family justice.

The other benefits of a unified Alberta Family Court include:

- Judges with substantive and procedural expertise in family law.
- Judges with the ability to bring strong dispute resolution skills to family disputes.
- Training in psychological, social, and cultural dimensions of family law cases including family violence, trauma-informed practice, and various cultural competencies impacting on children in separation and divorce.
- Child-focused family justice meeting our international obligations and ensuring the way we practice family justice does not continue to harm children.
- One stop family justice as a “hub” of information and referrals for family justice services for families.

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<sup>15</sup> *Committee on the Rights of the Child, General Comment No 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art 3, para 1) UN Doc. CRC / C/ GC/ 14 (2013) at paras 85-99).*



- Early and effective triage and problem-solving to prevent going down the path to protracted litigation, inappropriate or disproportionate use of courts.
- Case management and settlement facilitation early and at all stages.
- Non-judicial case managers to move matters forward and narrow issues (court workers, resolution counsel).
- Mental health professionals to assist with assessment and case management.
- Accessible remote and virtual court processes; improved and simplified electronic procedures and forms.
- More oral evidence to prevent heavy legal fees for document preparation at interim hearings.

## INVESTING IN THE ALBERTA FAMILY COURT IS SUPPORTED BY THE PUBLIC

Public opinion polling by CBA Alberta in 2020/2021 shows that just over four fifths of Albertans support or somewhat support unifying the courts to handle family matters even if it costs money.<sup>16</sup>

Currently, in some parts of Alberta, the average wait time for a family trial is more than three years. No other province comes close to this delay in the court system. The proposed Alberta Family Court model with the additional judges will relieve stress on Family Court and throughout the entire court system, and better serve families under stress.

## Family Resolution Support Services

For families, early intervention is key.

We know that exposing children to toxic levels of stress alters their brain development. By assisting families to get out of situations of violence, to achieve financial security, and to avoid protracted separation proceedings by offering family focused services, the government can contribute to eliminating the negative effects of toxic stress on children and families.

Building on the unified Alberta Family Court model, all reports on reforming family justice for the last several decades have called for “front-end” services to keep people with family disputes out of court.

Other jurisdictions have implemented mandatory mediation programs, or otherwise made it more difficult to access the court. As the Alberta Family Court model has built-in

<sup>16</sup> See Nanos Public Opinion Research (quantitative) in Appendix B; page 73, slide 11.

front-end assessment / triage, the expanded notion of front-end services could include:

- A reinforced mediation program through Resolution Services to include mediation/ arbitration and a higher income of \$70,000 (up from \$40,000) for at least one spouse.
- Sufficient funding for resolution services and/or court administration and/or the restructured Alberta Justice Department overseeing the Alberta Family Court to implement:
  - Arrangements with the collaborative lawyer associations in Alberta to refer divorce matters to sliding scale joint consultations with registered collaborative lawyers as an early referral pathway out of court;
  - Precedent Parenting Plans and Parenting Orders, Child & Spousal Support Orders, Pension Division and Family Property Orders available for all parties to family disputes;
  - Various information and referral pathways to self-help;
  - Other programs and services as may be determined to be appropriate and cost-effective for the delivery of family justice in Alberta.

## POST-RESOLUTION SUPPORT SERVICES FOR ONGOING DISPUTES

With matters involving children there is an ongoing need to address changes to Parenting Plans and Support Orders. By providing post-resolution support services, parents will be less likely to come back to court. Specific examples of these services include:

- Parenting Coordination;
- Supervised Parenting time; and
- Child Support Resolution and Recalculation Programs



# RECOMMENDATIONS

## LEGAL AID FOR FAMILY MATTERS

1. Recognize legal aid family coverage as an essential service.
2. Increase provincial commitment to adequately fund legal aid in the amount of \$28 million annually for the next 4 years, to allow for meaningful access to family justice in addition to criminal justice, including:
  - Expanded financial eligibility for all family services by at least 20% in line with inflation and recognizing that those living at or below the poverty line should be able to access legal aid. AISH and Social Assistance recipients should automatically meet the eligibility requirements;
  - Expanded scope of coverage for family services on a continuum from full legal representation to public education and including family violence screening of all applicants for legal aid;
  - Establish a Tariff or compensation system that permits legal representation in court and out-of-court resolution processes, including collaborative law, mediation/arbitration and parenting coordination;
  - An increased number of Family Law Office staff lawyers to reduce the heavy reliance on private roster lawyers on family matters only;
  - Resources for trauma-informed, cultural competency training of lawyers and other staff to work effectively with Indigenous and racial minorities as well as people with disabilities, and gender/sexual minorities;
  - Permit roster lawyers on family matters to bill paralegal work at a reduced rate (given the specific nature of family matters) - specifically, a Tariff of \$50 per hour;
  - Where a family matter is found to involve family violence or is otherwise determined to be “complex”, permit an enhanced Tariff or allocation of hours to adequately address the complexities;
  - Fund a study to consider service delivery models for family matters, including a network of community Legal Aid Clinics in major centres with staff lawyers capable of reducing the reliance on private roster lawyers while maintaining sufficient service capacity to meet the demands.



## **ALBERTA FAMILY COURT**

1. Renew the Government of Alberta's commitment to work with the Court Committee to implement the Alberta Family Court as soon as viable, with a view to medium-term-cost-savings in the family justice system.
2. Confirm and seek to secure the federal commitment for 17 new justice positions for the Alberta Family Court with the Federal Department of Justice, so that these are not re-allocated to another jurisdiction or otherwise lost.
3. Include in the funding model for the Alberta Family Court non-judicial staffing for effective early triage and case management for family matters, including:
  - Family violence screening;
  - Mental health screening as appropriate;
  - Court Intake/Support Workers (to support unrepresented or self-represented parties, hopefully fewer due to more access to legal aid); and
  - Resolution Counsel
4. With the exception of long hearings or trials, continued remote and virtual court access and services or hybrid where necessary for family matters.

## **FAMILY RESOLUTION SUPPORT SERVICES**

1. A pilot project with staff parenting coordinators available through Resolution Services with similar eligibility as for mediation services and set protocols to access the services.
2. Parenting coordination legislation similar to that in BC, Saskatchewan and PEI, permitting the court to direct high conflict parents to a parenting coordinator to address minor parenting disputes and the ongoing implementation and enforcement of Parenting Plans and Orders.
3. Provide funding for a supervised parenting time service on a sliding scale basis particularly in remote communities.
4. Continue to provide virtual child support resolution services to unrepresented parents with child support matters.
5. Continue to fund the Alberta Recalculation Program.