

Keynote address: The Canadian experience

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Nick Bala is currently working on a number of projects in the Family and Children's law field, most of which have an interdisciplinary aspect and relate to the role of the justice system and the government in the lives of families and children. He recently completed a project involving a group of judges, government policy makers and lawyers in Alberta on the legal representation of children in that province. Nick continues to work with child psychologists related to child witnesses, and with criminologists on youth justice issues. He is also working with Canada's National Judicial Institute in education planning and programming for judges on issues related to cases involving child witnesses and high-conflict divorces. Nick is the lead author on recently published papers for Status of Women Canada on polygamy and its relationship to same-sex marriage, and co-authored a paper for Justice Canada on family violence issues and parental separation. A number of his recent projects have international or comparative aspects, and he has worked with justice system professionals and scholars in a number of countries, including the United States, Great Britain, Ireland, New Zealand, Australia and Hong Kong. He is the co-winner of the Association of Family and Conciliation Courts 2006 award for best article, on the role of mental health professionals in child-related proceedings.

Controversy over family law in Canada

It is an honour and a pleasure to be here and I am very grateful for the invitation from the Australian Institute of Family Studies to speak about developments in family law in Canada.

In many ways, Australia is at the vanguard of family law policy and there are many areas in which other countries, particularly Canada, are learning from you. There are, however, some developments in Canada that may of interest to you.

Today I would like to provide you with a very quick overview of a number of issues in family law in Canada—particularly focusing on children's issues.

We had a very significant period of law reform in Canada, as in Australia and many other countries, to give recognition to gender equality in family law and in other areas of law. In the family law field in Canada, this period of legislative reform was essentially from 1968 to 1997. This was a period during which many laws were changed to give women greater rights and protections in family law cases, as well as to change divorce legislation to establish a regime in which almost all divorces are now based on no-fault grounds (one-year separation). Since the mid-1990s we have had a lot of controversy in Canada about family law issues, especially related to children, but no statutory reform on a federal level. While women's groups were very influential in law reform in the period until 1997, in the last decade we have seen women's groups being effectively challenged by men's groups. I understand

that you've had the similar law reform controversy in Australia—a 'gender war' on law reform that often reflects what happens in individual high-conflict family cases, with allegations on both sides. Some of the allegations are extreme and some of the rhetoric is excessive, but there are also some reasonable and important points being made.

We have also had other competing groups involved in seeking family law reform: grandparents against parents; religious groups against civil liberties groups; and, interestingly more subtly, disagreements between professional groups (not just lawyers, but also judges, mediators, people who work in the family justice system) challenging advocacy groups about what the problems are and how to solve them. As a result of this controversy and lack of consensus, since 1997, we have had no significant family law reform at the federal level, with one important exception: same-sex marriage (which I'll discuss shortly).

We've had a lot of systemic change, particularly for practitioners. I use the word 'practitioner' here very broadly—including judges, lawyers, academics and bureaucrats. Professionals who are involved in the justice system have had a role in changing the family justice system in important but subtle ways. These changes are largely procedural and attitudinal—new approaches which reflect a growing recognition of the importance of non-adversarial dispute resolution; a growing recognition of the need to distinguish the high-conflict cases from the low-conflict cases; and recognition that family violence is a serious issue.

We have begun research into family justice issues, particularly over the past ten years, but certainly nothing like the sophistication of research that you've had in Australia. Sometimes I think that in Canada, and perhaps elsewhere, the debates about reform of family law have been more influenced by *misinformation* coming from advocacy groups than good solid research.

One of the questions in Canada (bearing in mind that we have not had much recent legislative family law reform) is to consider the role of statutory reform in changing the family justice system. In Australia, you had major legislative reform related to children's issues in 1995. My sense from listening to people here is that it has had limited impact, and so one has to ask: Is legislative reform necessary to change the family justice system? Is it important? How does legislative reform fit with things like attitudes of professionals, and public resources and programs? I'd like to address some of these issues.

Demographic change in Canada

But before getting into that, I want to talk briefly about demographic change. I note that there's been a lot of discussion about this at this conference, including, in the last few days, recent data provided by the Australian Bureau of Statistics. I think that the kind of change we have seen in Canada is very similar to what you have experienced in Australia: the population is ageing; it is increasingly diverse. Canada historically was a largely Caucasian country. Now 18 per cent of the population is foreign-born and many of those are from Asia, Africa and the Caribbean, so Canada is an increasingly racially diverse country, particularly in the large cities. Toronto, the country's largest city, is expected to be 50 per cent non-white within a decade. We also have an aboriginal population. It is about 3 per cent of the adult population, a little bigger on a percentage basis than in Australia. The aboriginal population in Canada is growing much faster than the rest of the population, with more than 5

per cent of the population under 21 years of age aboriginal, and in Canada and there are many issues of concern about aboriginal children and youth.

Canada's population is increasingly urban (with almost two-thirds of the population living in the twenty-five largest cities) and increasingly secular (with less than one-third attending a religious service at least once a month). The birth rate in Canada (1.50 per fertile woman) is actually below that in Australia, and average family size is shrinking. The marriage rate is falling and there's been an increase in unmarried cohabitation.

For the first time, in 2001, the census in Canada began to collect data on same-sex couples (at 0.5 per cent of all adults, very likely under-reported, as many same-sex couples are not willing to reveal themselves, even to Census Canada). Some of those families (15 per cent of female couples and 3 per cent of males) have children living with them, so when we're thinking about same-sex families, we want to recognise we're thinking about children as well.

One of the pieces of research that we've done in Canada, and I know you've done similar work in Australia, has studied changes within the 'intact family'. I think that these changes are related to changes occurring in the context of divorce and separation. Within the family, we have seen in Canada a very significant change in gender roles. Women are much more involved in the labour force than was the case thirty to forty years ago. Fathers are now more involved in parenting in intact families. There are families where the father is the primary caretaker, but in a typical family, the mother is still doing more child care, and has more household responsibilities. Interestingly, we see that when children are young, the mother is clearly spending more time with them in the average family, but as children age, according to recent Canadian research, fathers are equally involved, and sometimes more involved than mothers in terms of time spent with their adolescent children.

We have a high divorce rate, but it's stabilised at about 38 per cent of marriages.

Let me briefly mention joint custody and what's going on post-divorce. We have had a very significant increase in what we call 'joint legal custody'—a form of shared parenting, an issue that I will return to.

We have a significant domestic violence problem in Canada, but there is some good news: our rates of domestic violence seem to be slowly coming down.

Constitutional issues and family law

I won't go through the constitutional issues in Canada, as there is actually a very complicated division of responsibility for family matters (again, we could learn from what you have done in Australia to consolidate jurisdiction in the federal government—a simple resolution politically unattainable in Canada). I will just mention that, largely, I'll be talking about matters within the federal jurisdiction, which includes divorce law and in matters related to divorce, principally support and custody issues for divorcing couples. There are also significant areas of provincial responsibility around property and unmarried couples, and important jurisdiction for the administration of justice. So the federal government and provinces, in practice, have to agree about various issues to achieve effective reform.

One significant thing that we've been working on is unified family courts. These are courts that have a comprehensive jurisdiction for all family law cases, including child protection, specialist judges and support services. This, I think, is a very good

model to be used in different countries, and in fact I understand that it is being used in Western Australia, so you don't have to look to Canada. It is a very important model.

One very significant development in Canada was the introduction of a constitutionally entrenched Charter of Rights in 1982. I know you don't have a Charter of Rights in Australia, but increasingly countries are adopting constitutions to protect individuals from arbitrary state power, promote equality and protect fundamental rights. One day Australia may join that group of nations.

One thing that has happened in Canada because of the Charter of Rights is that in child protection cases, in particular, there is increased respect for the rights of parents, and in some cases even children. Child protection agencies in Canada cannot remove children from the care of their parents without giving respect for the principles of fundamental justice. This gives parents certain protections—for instance, low-income parents have the right to have legal representation paid for by the state. Every constitution always has some internal balancing, and so they are not absolute rights, and certainly, in appropriate cases, abusive and neglectful parents may lose custody of their children.

The equality provisions of the charter have also had significant impact on same-sex relationships, and fathers have gained some rights.

History of family law reform in Canada

Very briefly, the history of family law reform in Canada is broadly similar to that of Australia and the United Kingdom—there was a 'gender equality' revolution in family law. If one goes back and looks at the law in 1960, in most countries you will find specific statutory references to 'husband' and 'wife', with unequal rights in terms of various issues. In custody cases in the middle of the twentieth century, women had the presumptive right to custody of their children if the parents separated. There was gradual reform.

In 1968, Canada had its first national Divorce Act, with another major reform in 1986. Under the 1986 reforms, the usual grounds for divorce is one year of separation, though there is also the possibility of a divorce based on adultery or cruelty. In practice, we don't have contests over the legal issue of divorce (dissolution of the marriage), nor do you in Australia. Gradually we have moved towards a regime of equal rights in regard to property in the context of separation, and the focus in child-related issues is the 'best interests of the child'. There has been the removal of any legal presumptions in favour of mothers in terms of children, and we've moved slowly, much later than Australia, in having child-support guidelines.

Same-sex marriage

I would like to address two major family law issues that we've dealt with in the last year in Canada: same-sex marriage and Sharia-based family arbitration. These have received a lot of international attention, and both raise issues of the relationship between family law and freedom of religion and multiculturalism.

The issue of same-sex marriage is an issue of family law, but it's also an issue of fundamental human rights that is more symbolic than practical. The public, politicians and academics have become very engaged in this issue in Canada—I think because it speaks partly to the nature of the society, and partly to the nature

of the family. What is the 'family'? This is a fundamental issue that affects everyone in society, so many people care about it and got very engaged in the debate over same-sex marriage.

We had constitutional litigation that began in 2000. When the litigation began, a majority of politicians were opposed to recognition of same-sex marriage. Most politicians were prepared to recognise limited rights for same-sex partners, but were not prepared to allow 'marriage' for same-sex partners. Gradually, we had some court decisions—the most famous one being the 2003 Ontario Court of Appeal decision in *Halpern v Toronto* that ruled that the definition of marriage of 'one man and one woman to the exclusion of all others' violates the charter, as it discriminates based on sexual orientation. Our charter actually does not explicitly prohibit discrimination on the basis of sexual orientation; it simply says that people are 'equal' and entitled to 'equal benefit of the law without discrimination'. It has been interpreted by the courts to include a prohibition on discrimination based on sexual orientation. Initially in these cases, the federal government argued to uphold the traditional definition of marriage, but gradually the attitude of the then Liberal government started to change, as public opinion began to change.

Same-sex marriage is now supported by a narrow majority of Canadians, who view this as a matter of fundamental human rights. In 2005, the litigation ended when, after contentious debate, Parliament voted by a narrow majority to enact the Civil Marriage Act, allowing same-sex marriage. Part of the debate focused on what would be the effect of recognising same-sex relationships on families and marriage. One of the very important aspects of this has been social science research that clearly indicates that same-sex parents, gay and lesbian parents, do as good or bad a job as opposite-sex parents. The outcomes in terms of education, behaviour, emotional wellbeing and so on are no different for children of same-sex relationships to children of opposite-sex relationships. Furthermore, excluding same-sex couples from the opportunity to marry sends a negative message not only to gays and lesbians, but also to the increasingly large number of children who are growing up in these relationships in Canada (and in Australia). Many of these children are the product of artificial insemination, some are children from a prior relationship, and they're getting an unfortunate message if their parents' relationships are regarded as 'second class'. Same-sex marriage is partly an issue of children's rights. The Federal Parliament acted before the Supreme Court of Canada ruled on this issue, as a result of the Civil Marriage Act, and we now have same-sex marriage everywhere in Canada. Very recently, a South African court made a decision to recognise same-sex marriage too, citing some Canadian jurisprudence on this issue, though I understand that decision is being appealed.

One of the interesting things that came up in the course of the debate was that if you are going to change the definition of marriage from 'one man and one woman' to allowing two men or two women to marry, why stop at two? What about polygamy? And, in fact, this is an issue in Canada. I think it's an issue elsewhere, as there is an increasingly large immigrant population. Muslims are now moving to countries like Canada and Australia in large numbers, and some of them are involved in polygamous marriages. Should we recognise those marriages? In Canada, polygamy is a criminal offence. There are also issues in Canada concerning a significant number of fundamentalist Mormons who have been practising polygamy for a long time. I think that polygamy is a very different kind of issue from same-sex marriage, but

there is a growing controversy over polygamy in Canada, and the courts are likely to have to resolve the issue of the constitutionality of our prohibition on polygamy.

Faith-based family law arbitration

Speaking about Muslim families, in Ontario in particular, but also in other provinces, we have allowed arbitration of family law disputes, and the issue of Sharia-based family law arbitration has been controversial. Traditionally, arbitration of family law cases was done by psychologists and lawyers, but there are people who want religious leaders to do family arbitrations. In the Orthodox Jewish community there were some families, though a very small number, who were going to rabbis and the Jewish tribunal, the Beth Din, to have issues related to separation arbitrated and decided under Jewish rabbinical law. Muslim groups have argued that if the Jewish community can do it, they should also be able to do so. The Government of Ontario commissioned a study about this. Marion Boyd, a former Attorney-General who is a prominent feminist wrote a report that argued that, as we respect multiculturalism in Canada, and if both parties to a marriage want to choose to have faith-based arbitration, they should be able to do that. The Boyd report caused great controversy. The Government of Ontario was unsure of how to respond, and for months wavered back and forth. There were demonstrations in Europe and across Canada to protest against allowing people to choose to adopt Sharia law to resolve family disputes. There was a concern that some women would be coerced into accepting Sharia law, which very much favours husbands. The Ontario Government recently introduced legislation to prohibit arbitration based on religious principles in family law cases. Any family arbitration not based on the laws of Canada will be denied any legal recognition, and family arbitrators will be regulated.

Child-related issues at separation

Fathers

One of the issues in the Western world has been the growing role of fathers in intact families and then after a separation. In Canada, as in many other countries, we now have the 'best interest of the child' test for dealing with many legal issues. The courts in Canada have abandoned any presumption in favour of mothers, but many judges believe that there should be a 'primary caregiver' presumption. Many fathers argue that this is just a masquerade for the continuation of the now-abandoned 'tender years' doctrine that favoured mothers. This is an ongoing controversy in Canada. We don't have any legislative kind of presumption in favour of primary caregivers, but it is an approach many judges follow.

One significant victory for fathers was a Supreme Court of Canada case based on the Charter of Rights. In a number of provinces, legislation said that when a child is born out of wedlock, the mother has the right to name the child if the parents can't agree. There's a long history of this issue based on illegitimacy, which has largely been abolished. The Supreme Court ruled that fathers who wish to identify themselves have equal rights to mothers in regard to naming their children. Different provinces now have different processes, but generally if the parents can't agree about what the order that their names will be used for naming, there's an alphabetical rule.

Fathers in Canada, as in other countries, have enormous concerns about enforcement of access. It's a big problem in Canada. Courts are struggling to deal with it and we certainly don't have anything as sophisticated as the Australian Child Support

Agency. I am very impressed with how the Australian Child Support Agency has created better enforcement of child support, but also has recognised they have to deal with access problems; this both promotes the interests of children and increases the likelihood that child support will be paid.

Child-centred family justice strategy

In 1997, the federal government made a promise to the fathers and grandparents advocacy groups, who were raising concerns about the guidelines and a range of child-related issues, that after the guidelines were in force, a special Parliamentary Committee would be established to study child-related aspects of the Divorce Act. In 1998, we had a lengthy set of parliamentary hearings held across the country. I was an expert witness before the committee, but there were literally hundreds of other people, primarily father's groups. Mother's groups were also involved. Professionals and academics had a relatively small role in the hearing process. The committee heard from the most voluble spokespersons, and the committee, I think, was clearly sympathetic to fathers and grandparents. When you look at the committee composition, you wouldn't be surprised, because there were about three times as many men as women on the committee. There were also grandparents on the committee, who were clearly sympathetic to grandparents and fathers. The 1998 committee report, *For the sake of the children*, advocated moving in the direction that you have gone in Australia, removing the language of 'custody' and 'access', and using concepts like 'shared parenting'.

Another issue examined by the committee was domestic abuse. The committee's report had a list of factors that should be taken into account in making post-separation decisions for the care of children. The report suggested that domestic violence should be considered, but only if 'proven'. Interestingly, that's the only part of the report that used the word 'proven'. There was concern that domestic abuse allegations had to be proven in a criminal court to be considered in a family proceeding.

The committee said it wanted to really open up and give fathers more rights, similar to where Australia's going. However, the Department of Justice and the federal ministry had a more temperate response and said: maybe the committee and politicians are going too far: 'Yes, we want to move in that direction, but we need to do more research. We should have new concepts, but maybe not the concepts the committee reported and suggested'. So there was both public consultation and the government began to sponsor research around various issues. (I'll come back shortly to one of the papers that I co-authored on domestic violence which they sponsored.)

Custody and access

Then, in 2002, the Liberal government proposed new legislation (Bill C-22) to deal with custody and access. We had a number of Australians to Canada, including Justice Chisholm, who told us about things happening in Australia. Our proposed legislation was largely modelled on Australia's 1995 reforms, with some other ideas included. It removed the use of 'custody' and 'access' terminology, and adopted 'shared parenting' language and parenting plans. There was no presumption of equal-time parenting. Family violence was mentioned. This was the first legislation that would specifically refer to family violence in the context of parenting arrangements at the federal level. The Bill was brought before Parliament and again there was lots of controversy. The Minister let it sit on the Order table, and while hearings

started, these were not concluded and so nothing was done. That legislation was not enacted, although in 2005 Alberta, interestingly one of the more conservative provinces in Canada, did adopt legislation that is largely modelled on your 1995 Act, which eliminates the concept of 'custody' and 'access', and uses the language of parental responsibilities and parenting time. This legislation deals with a relatively small proportion of cases in Alberta where people are not married.

While federal legislation has not changed, we've had very significant change in terms of practice, and so joint custody in 2002 (the last year we had data) was up to 42 per cent of cases. This is legal custody or decision-making, but not equal time. Even so, equal time has gone up to 8 per cent of cases and that's been a very dramatic increase. A decade ago those numbers were much lower. Judges are more receptive to the idea that joint custody, in appropriate cases, can be imposed upon couples even if there is intense conflict, provided there is a history of cooperation. On the other hand, the Ontario Court of Appeal recently said that it should not be imposed merely 'in the hope' that there will be cooperative parenting.

The other area of change has been in the practice of lawyers. I've been involved in doing some work with the Canadian Research Institute for Law and the Family in surveying lawyers about how they deal with different issues. It's clear that lawyers in practice have been significantly influenced by the literature, the discussion, what's going on in other countries, and even by Bill C-22, despite the fact that it was not enacted. Interestingly, lawyers we interviewed said that they thought that some type of reform legislation would eventually be enacted, so they had already started to use the new concepts. Even though Parliament still has not passed the legislation, lawyers are using those new concepts in their settlement agreements. My sense is that most lawyers in most cases are trying to encourage their clients to settle, and say to clients: 'You've got to be reasonable and you've got to think of the best interests of your child'. In fact, in some provinces, like Ontario, there is an ethical obligation written into the code of professional conduct stating that lawyers have a responsibility to advise their clients about the best interests of their children. Lawyers are generally trying to get settlements and they're not pushing the parties further apart. However, when you get very high intensity family litigation, there are some lawyers who act like barracudas (we call them 'sharks'); clients often choose them because they reflect some clients' innate tendency to want to litigate. While some lawyers may heighten animosity, I don't think that is the norm. Most family lawyers in Canada are encouraging use of parenting plans, working very much with mediators, psychologists and so on.

Child support

We have child support guidelines in Canada. I won't take you through all of the details. Essentially it is a percentage-of-gross-income model, although a little more complex. We have certainly, on the whole, been satisfied with the guidelines in the sense that they have produced greater consistency and have significantly reduced the level of litigation. More child support cases are settled, and the guidelines have resulted in an increase in the amount of child support. Interestingly, one issue that the child support guidelines in Canada don't deal with very well are situations where there is joint physical custody (where each parent has the child at least 40 per cent of the time). The guidelines essentially allow the judge to decide what is appropriate. Trial judges tried to develop a formula for joint custody cases, and we had different approaches where trial judges tried to encourage settlement by

articulating a formula. The Supreme Court of Canada recently ruled that Parliament didn't have a formula for joint physical custody cases, and trial judges should not impose one. The circumstances of each case are to be assessed. There have been research reports written saying that we should have clear guidance for dealing with child support where each parent has the child at least 40 per cent of the time, but no such guidance exists at present.

In most provinces in Canada, the amount of access that a father has is not taken into account for the purpose of child support until he has 40 per cent of the care, which is a fairly high threshold. That, of course, is controversial, particularly with father's groups.

You might notice that I haven't said anything yet about Quebec, Canada's largely francophone province with its civil law heritage. Quebec has a different system of child support guidelines, where they take into account access time to reduce child support—if an access parent (usually the father) has an increase in time spent (above a 20 per cent threshold), this will reduce child support. There is lots of controversy about this in Quebec, as a change in the father's time from 23 per cent to 24 per cent would result in the readjustment the child support. We're starting research to compare those kinds of models. I think the view among most professionals is 40 per cent is a high threshold, but because it gives a lot of certainty, you get a lot more settlements.

The definition of 'parent'

One controversial issue in Canada that is also an issue in Australia is: 'Who is a parent, and when does childhood end?' In Canada, if parents have separated, the legal obligation to pay child support continues as an adult child is going through college or university, reflecting the moral obligation that most parents assume in intact families. There is controversy over this, with fathers who no longer live with their children arguing that they should not have a legal obligation that is not imposed on parents in intact families. This has been challenged under the Charter of Rights, but the courts have upheld this law.

Another issue in the definition of parent relates to 'de facto' or social parents or 'psychological parents'. In Canada, a person who has 'stood in the place of a parent' has a child support obligation, and also a right to seek access or custody of the child. In Canada, the obligation of a non-biological parent is secondary in theory to that of a biological parent. Often the biological parent is unemployed or hard to find and so the psychological parents may play a full role, and the intention here very much is to focus on the best interests of children. The message to psychological fathers, largely stepfathers, who separate is that if they had a significant relationship with their ex-partner's children, they should continue that relationship. That is in the best interests of children. The implicit message to these step-parents is: 'Don't think if you stop seeing children you won't have to pay child support. You're going to have to pay support. We don't want to give financial incentives for determining that relationship'.

As in Australia, there has been considerable controversy in Canada about cases involving 'paternity fraud'. A recent article in the *Journal of Family Studies* on 'paternity misattribution' suggests that these cases are not uncommon. While judges in Canada have had different views, most courts have ruled that an established psychological

relationship between parent and child does not end merely because it turns out that this was a situation of paternity fraud, and the child support obligation continues.

There is also lots of discussion in Canada about grandparents' rights. They have limited opportunity to seek a right to custody or access, especially if they have had a significant care relationship with children as a result of actually having cared for them. The general attitude of the courts is that merely having a 'grandparental' relationship is *not* enough to give a legal right of visitation if the parents are not agreeable.

Spousal support guidelines

Spousal support is another issue worthy of brief mention. This is an interesting issue because there has been tremendous variation in Canada in how judges were dealing with spousal support because of a very vague set of legal provisions. Spousal support was typically not awarded, given that there is a primary obligation to pay child support, and child support has to be fully paid before a court can even consider awarding spouse support. But in a range of cases, particularly involving long-term, middle-/upper-middle-class women, spousal support has been given. The vagueness of the law and the discretion encouraged litigation, as well as pressure on the risk-averse, usually women, to give up the possibility of seeking spousal support. So people in the Department of Justice as well as lawyers, judges and academics have been arguing that we should have guidelines for spousal support, just as we do for child support. These advocates for spousal support guidelines approached politicians, who quickly recognised the relatively complex and contentious nature of the issue, without wishing to totally reject it. So in 2003, the then Minister of Justice authorised the establishment of a committee of professionals, including lawyers, judges, mediators and assessors to study the issue. In 2005, they proposed a set of spousal support 'advisory guidelines', which involved a fairly complex formula based on differences in income, the length of the relationship, whether there are children, resulting in a presumption of amounts of spousal support. For each case, there is a possible range of spousal support, rather than a single number. This range is now being used by judges and lawyers to help resolve cases, though it is purely advisory. Although this is still early days, it would seem that the spousal support advisory guidelines have significantly increased predictability and resulted in more cases being settled.

Property

As in many countries, there is a rough presumption in Canada of equal division of property. This is a provincial area of jurisdiction and there is significant variation and controversy around important details, such as how to deal with property that was inherited or owned before the marriage, and there's a certain amount of variation around the issues like the division of businesses. Pensions are equally divided, and marriage contracts are permitted, though they're not used very frequently.

Unmarried partners

Canada has had a very significant increase in unmarried cohabitation. All provinces give some legal recognition to unmarried cohabitation, but there's considerable variation in how this is done. Some provinces limit legal recognition of non-marital *de facto* relationships. The Supreme Court of Canada has ruled that there has to be

some legal recognition of these relationships, but because people who are in this type of relationship have chosen not to marry, the law does not have to give them all the rights and obligations of a marital relationship. Interestingly enough, some people argue: 'If there is legal recognition of these relationships, it will discourage people from marrying'. And that's certainly a plausible argument. Interestingly, in Quebec, which has a somewhat different regime and gives by far the least rights to non-marital relationships for a variety of social and cultural reasons, also has by far the highest rate of non-marital relationships. The denial of significant legal recognition, as occurs in Quebec, has not discouraged people from entering into these relationships; it simply means that those who are vulnerable or dependent (usually women) may be denied legal redress.

Family violence

I want to talk a little bit about family violence. This is clearly an issue everywhere in the world. In Canada, as elsewhere, we have seen increased social awareness, more effective social responses, and more effective legal protections, but still significant inadequacies. Some provinces have enacted Emergency Civil Orders legislation, for example, allowing victims to have speedy access to the courts to get orders for exclusive possession of their homes. We increasingly have criminal courts that are specialised and deal exclusively with spouse abuse cases. The 'Domestic Violence Court' is generally not a physical court room, but it's a designation for a type of process. There is a team approach, with police, the prosecutors, social workers and victims witness workers, having special training and better coordination; they give priority to these cases. These courts also generally have diversion to counselling programs for abusive partners, and they have a range of sentencing options. The judges, however, are not part of the team, but rotate through so that they can remain independent. We're trying different things in Canada to deal more effectively with spouse abuse, and have seen progress.

There are more cases being reported to the police, and more and more victims are coming forward. So if you look at police reporting statistics, we've had a very significant increase in domestic violence, but I think it is because more victims are coming forward. We have two measures that suggest over the last two decades we've had a gradual decrease in actual rates of spousal violence. First of all, the domestic homicide rate has slowly been coming down. Secondly, we do large-scale telephone survey victimisation studies every five years, which ask people if they have been a victim of a crime. Women have reported a gradual decrease in spousal abuse. I'm talking about going from about 30 per cent of women to the low 20s, so we still have a lot of domestic violence. Spouse abuse affects all social groups in Canada, but rates are higher among low-income couples, the young, non-marital relationships, and the aboriginal population.

Turning to legislation, most custody/access legislation does not specifically refer to family violence, but many judges, I think the majority of judges, do take spouse abuse into account in resolving cases. The biggest issue in Canada in the family law context, as in Australia I suspect, is not the theoretical legal issue of whether spouse abuse should be taken into account in dealing with custody and access, but the practical question of whether a victim can prove that she has been abused. The issue of false allegations that the Attorney-General referred to yesterday is certainly an issue in Canada, as it is elsewhere, and I think it's an important issue. My own view, and we have research around this in Canada, is that while there are women,

primarily women (but also men sometimes), who make false allegations of domestic violence, the problem of false *denials* is a much more widespread problem. There are many more abusers who will falsely deny their abusive acts than victims or alleged victims who are making these allegations falsely, so it's important to see this issue in its proper social context.

Dispute resolution services

In Canada, as in other countries (and we had a very good presentation from Joan Kelly about different things that are happening in the United States), a number of things have been done to improve access to justice and to family dispute resolution. I will just touch on a few developments. Joan mentioned parenting courses in the USA; in Canada, these are also being established and are often called PAS courses—Parenting After Separation. These are courses that are specifically intended to work with parents to help educate them to deal with their responsibilities in their relationships with their former spouse, with a special focus on child-related issues. In a few places in Canada, attendance is mandatory for those who have children and are bringing an application in the courts. We're doing research around it, and, similar to the USA findings that Joan Kelly discussed, our research suggests that Parenting After Separation courses do have a positive effect on parents and children. It's social money that is well spent, but it's by no means a panacea—you get a real significant reduction in child-related problems and you get parents being more satisfied, but it's a small part of a larger picture, and has only a limited effect on the more difficult cases.

As in other jurisdictions, we have begun to recognise the need to distinguish high-conflict cases from the medium- and low-conflict cases in order to have case management for the high-conflict cases. Case management is not in place everywhere, but there's a recognition that high-conflict cases need one judge for one family, because the case might be in the court system for eighteen months or two years before you get to trial. We'll have one judge handling all the interim applications, who tries to encourage settlement, with another judge taking over if the case goes to trial. A big change in Canada is in judicial settlement conferences or dispute resolution conferences. We are now having judges educated by trained mediators in how to help resolve disputes. Obviously in a different role from a private mediator—with different leverage and so on—but it's been effective. It is not perfect, but it's helping.

As in other jurisdictions, we have a growing number of people without lawyers in family courts. Although compared to the United States we have a relatively generous legal aid system, self-representation is a major issue. One initiative to help self-represented people is the establishment of Family Law Information Centres (FLICs). There's usually a social worker there, a library of pamphlets, videos and DVDs, and lawyers who do free advice clinics for people. The centres are an important way to get information out. Nonetheless, self-representation remains a significant issue.

We also have a growing number of government-assisted supervised access and exchange programs. Parents can use them, with fees charged on a scale that reflects income. This is an important part of the government's response to high conflict cases.

Collaborative family law

We also have collaborative family law. This was originally developed in the United States in Minnesota. Some lawyers just started dealing with family law cases in this way in about 1990. It has really caught on in Canada. All across the country, family lawyers are using collaborative family law. We're doing research around this. Generally, it's having a positive effect. Of course it's not a panacea.

I'll just say a word about collaborative family law for those of you who do not know what it is, though some of you already know a great deal about it. Essentially, it is an approach to family law cases where the parents each have their own lawyer and agree in writing to two things: (i) they are going to use their very best efforts to come up with a settlement in a constructive, collaborative way that focuses on their needs and the needs of their children; and (ii) if they were to litigate, they cannot use either of those two lawyers, but have to get new lawyers, which is a big incentive for everyone to settle the case. Collaborative law is being done across Canada, more in some places than others. Seemingly it works better in smaller places—places with a population of 500 000 or less. In large cities, the family bar is less cohesive and it may be more challenging to use this approach, but it is also being done in large cities in Canada.

Assessments and lawyers for children

We have court-ordered assessments available in most places in Canada. These are most commonly done by social workers, who may do home visits and interviews with children. In some provinces, the government pays for social work assessments. If the parties can afford it, a psychologist or psychiatrist may do an assessment.

In a number of provinces, particularly in Ontario, we have lawyers appointed for children, especially in high-conflict family cases and also child protection cases. It's provided without cost to parents, by the Office of the Children's Lawyer (OCL). The Office of the Children's Lawyer is an agency that has both social workers and lawyers. They have a central office in Toronto, the biggest city in the province; there is a small full-time staff, while lawyers and social workers in private practice handle most of the cases. All of the lawyers and social workers who are in this program have to undertake joint training and education. It's a very good model of education. Most of the lawyers and social workers who do this are in private practice; it's very helpful for them not only to represent children, but also to deal with other family law cases. It's a very interesting program. When the Ontario government went through a major process of cost-cutting, it didn't cut this program at all. They saw it as not only socially valuable, but ultimately saving resources, especially in the court system.

The office decides on a case-by-case basis whether the child should have a lawyer, a social worker, or both. Each professional has different roles and they can work together. The lawyer's major function, usually, is to help settle cases. In effect, they are mediators with a very high degree of leverage and it's 'open mediation' (these are not the words they use, but are my words). They sit down with the parents and give them the assessment of the child that was done by the social worker. Parents are in effect told, 'We think that this is the best outcome for your child and if you don't like that we can go to court and I'll tell that to the judge'. As you can imagine, that prompts most people to settle. Now, they're not always right and sometimes a judge

disagrees with them, but in a lot of cases the judge is going to do what the children's lawyer is suggesting, and that obviously helps people to settle cases.

Family law reform: The role of legislation and research

So where are we going? I don't expect much from our federal government in terms of legislative change. We are actually just starting an election campaign in Canada. There are many issues, but family law is not one of them. I think that Canadian politicians want to keep their heads down on this type of contentious, complex issue. It's not going to be a 'vote-getter', no matter what they say. I doubt that we will see major legislative changes in the foreseeable future in Canada, but I think we are going to continue to see systemic and service changes.

My own view is that legislation is significant for changing the family justice system, and it helps to change attitudes, but it's never enough alone. I think the limited impact of your 1995 legislation is an example of the limited impact that legislation alone can have. You have to work with and educate the professionals. It's a long process that goes on over time. The day the legislation comes into effect, it's not going to have the effect; it's the change in attitudes, education, and working on a community-by-community basis. It's not at a national level; it's in each community. We talk about 'the family law system'. Well, in some sense, we do have a family law system, but really you have a system that's in each community, and that's where the work has to be done.

The Federal Government and the state governments clearly have a role. Giving adequate resources is certainly a way to help encourage and move the system along. And I should say, in fairness to Canada's Federal Government, while they haven't been changing legislation, they have quietly been putting more money into the system—nothing like Australia, but we have a lot more spending on family justice than we had in the past. We certainly look to Australia as a leading world jurisdiction and, in fact, I think it is right now the leading jurisdiction in the world. I think the Governor-General, in his speech, appropriately recognised that Australia in many ways has a leading role in the world. Everyone can learn from Australia. It doesn't mean Australia can't learn anything from other countries, but I think you're being very innovative, you're being collaborative, your politicians are prepared to confront controversy and take a stance to improve the justice system, and you have community resources. I think this conference is a very ample demonstration of that and, of course, you have very sophisticated research.

The work that the Australian Institute of Family Studies is doing is unique in the entire world and, again, this is one of your 'exports'. I believe that the work of AIFS is of great social and economic value to Australia, though I must acknowledge that the rest of us also get to use this research without paying for it. That's always the nature of research. It's a great service that you're providing for the rest of us.

Thank you for your attention.

Postscript: On 23 January 2006, a conservative minority government was elected. As of 25 May 2006, there were no announcements of any family law initiatives of the government, though in other areas, such as criminal law, there have been significant new initiatives and Bills introduced.

PowerPoint presentation—Professor Nicholas Bala

Changes in family life and controversies over family law

Cautious politicians and activist professionals slowly changing Canada's family justice system

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International Forum on Family Relationships in Transition
Australian Institute of Family Studies
Canberra, Australia
2 December 2005

1

Gender wars and other controversies slow reform, but systemic change is occurring in Canada

- 1968–1997 reforms strongly influenced by women's movement
- In 1990s other groups organised around family law issues
 - Women vs. men 'gender wars' that mirror litigation
 - Grandparent groups
 - Religious versus civil liberties groups
- Since 1997, politicians cautious about family law reform controversies
- Systemic changes achieved by activist practitioners (lawyers, judges, academics, bureaucrats) rather than legislation from cautious politicians
 - Growing emphasis on non-adversarial dispute resolution
 - ◆ Procedural changes and new services
 - ◆ Practitioners adopt new approaches
 - Recognition of high vs. low conflict
 - Recognition that family violence is a serious issue
- Increase in Canadian government-sponsored research, but less than in Australia
 - Controversy often framed by interest group advocacy and misinformation
- Query role for legislative action?
 - Nature of issues
 - Attitudinal vs. legislative change
 - Resources and programs vs. statutory reform

2

Family demographics in Canada Similar to Australia

- **Population ageing:** Median age 37.5 years and only 18% under 15 years
- **Increasingly diverse:** Increasing immigrant population, especially non-Caucasian—18% foreign-born; aboriginal population increasing, especially children—3.3% of total, but 5% of under-18
- **Increasingly urban:** 64% in 25 largest cities
- **Increasingly secular:** 32% attend church at least 1 per month, still predominantly Christian, but Muslims and 'no religion' growing fastest
- **Smaller families and falling birth rate:** 1.50 per woman
- **Marriage rate falling** and later average age at marriage up to 29 years
- More single persons
- **Increase in unmarried cohabitation:** 14% of couples
- **Same-sex couples:** 0.5% (likely under-reported), with 15% of female couples and 3% of males having children

3

Families and separation

- **Roles within the family are slowly changing,** but still significant gender differences. In intact families gradual increase in dads' role, but dads still do less childcare than moms
- Many women take maternity leave, but 81% of married women in labour force by the time youngest child is 6 years; most women with young children work part-time
- Never-married women without children earn almost as much as men, but poverty rate is highest for female single-parent families
- **Divorce rate has stabilised** at 38% of marriages
- Higher separation rate for cohabitants than married
- 20% of children experience parental divorce before age 10 years
- **Joint legal custody increasing:** 42%, dad 9%, mom 49%
- 12% of families are step-families
- **Spousal homicide and violence rates are slowly declining**

4

Constitutional context

- Complex division of powers (Constitution Act, s.91 and 92)
 - Divorce and related support and child issues are federal
 - Property and most issues for unmarried provincial
 - Administration of justice is largely provincial
 - Gradual de facto increase in federal power
- Unified family courts
 - Requires federal–provincial cooperation—very slow implementation
- Since 1982 Charter of Rights
 - S. 7 state deprivation of ‘liberty and security of the person’ only ‘in accordance with the principles of fundamental justice’
 - ◆ Right of low-income parents in child welfare proceedings to counsel paid by state (SCC, 1999)
 - S.15 equality
 - ◆ Same-sex marriage
 - ◆ Fathers claiming equal rights to mothers
 - ◆ Limits to differential treatment of non-marital partners
 - S. 1 all rights subject to ‘reasonable limits’
 - ◆ Balancing of interests
 - ◆ Freedom of religion (s.2) does not prevent child protection agency interventions to protect children

5

History of family reform law in Canada

- Pre-1968
 - Explicitly gendered rules (‘husband’ and ‘wife’)
 - Presumption of maternal custody unless guilty of adultery
 - Fault-based laws with limited rights to wives
 - Provincial laws
- 1968 Divorce Act
 - First national divorce law
 - Allowed for no-fault divorce (3 years separation), but retained fault grounds
 - Movement towards gender equality
- 1976 Murdoch in SCC denies property rights to married women
 - Provincial legislative responses to give equal property rights to married women
- 1986 Divorce Act
 - 1-year separation principle divorce ground
 - Best interests of child
 - Marital fault not a factor in support or custody
- 1993 Moge in SCC recognises compensatory spousal support
- 1997 Child Support Guidelines
 - Organised lobbying by fathers and grandparents
 - De facto federalisation of family law (except property and unmarried cohabitation)

6

Public controversies of 2005 Secular rights triumph over religion

- Same-sex marriage
 - Constitutional litigation begins in 2000, results in ruling that marriage to ‘one man and one woman’ violates charter (Halpern v Canada, Ontario, CA, 2003)
 - Federal government refuses to appeal, but seeks opinion of SCC on reference, but SCC declines to take heat for politicians
 - Politicians, feeling pressured by litigation, enact Civil Marriage Act to allow same-sex partners to marry (July 2005)
 - Challenge to Criminal Code prohibitions on polygamy may be next
 - ◆ Politicians unwilling to prosecute for polygamy or legislate to allow
- Sharia-based family law arbitration
 - Dec 2004 report recommends if parties agree (Ontario)
 - After eight months of debate and protest, Ontario government prohibits legally enforceable religious-based arbitration of family law issues
 - ◆ Concerns about exploitation of women
 - ◆ Concerns about limits of multiculturalism—
one law for all

7

Fathers

- In theory, end of ‘tender years’ doctrine
 - Best interests test of Divorce Act 1986
 - Is ‘primary caregiver presumption’ just a gender-neutral form of tender years doctrine?
- Equal rights to name children (Charter of Rights) (Trociuk SCC 2003)
- Enforcement of access problematic
- Controversy about child support

8

Child-centred family justice strategy

<http://canada.justice.gc.ca/en/ps/pad/about/#links>

- Parliamentary Special Committee (1998)
 - 'Gender war' at committee hearings
 - Committee sympathetic to fathers and grandparents
 - Replace 'custody' and 'access' with 'shared parenting'
 - Right to contact in preamble
 - Ambivalent approach to domestic abuse (only a factor if 'proven')
- Justice Department response
 - 1999 paper:
 - ◆ Affirmed idea of no presumptions: 'one size does **not** fit all'
 - ◆ Supported change of 'custody' and 'access' concepts
 - Sponsored family research (1998 to present) and undertook more public consultations (1999–2002)
 - Federal–provincial report 2002

9

Custody and access

- 2002 Bill C-22
 - Compromise
 - Elimination of 'custody' and 'access'
 - 'Parenting orders' allocating parenting time and 'parental responsibilities' (decision-making)
 - No shared parenting presumption
 - Only weak presumption of contact
 - Best interests checklist with 'history of care' and family violence
 - Not enacted due to controversy, but promises of new Bill
 - Alberta has reformed law to eliminate custody and access (2005)
- Changes in practice without legislative reform
 - Joint legal custody up to 42%
 - Shared physical custody: 8% (each at least 40% of time)
 - Courts may impose joint custody despite 'intense conflict' if 'history of cooperation', but not if mere 'hope of cooperation' (Ontario, CA, 2005)
 - Lawyers increasingly using 'shared parenting' concepts in separation agreements
 - Increasing use of parenting plans

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Child support

- 1997 Child Support 'Guidelines' (CSG)
- Mandatory unless contrary consent
- Percentage of gross payer income (8% if 1 child; 12% if 2)
- Limited flexibility
 - About 2/3 settle at table amount
 - Raised for share of extra expenses if payer can afford day care, extracurricular activities
 - 'Undue hardship' to lower (narrow)
- CSG have resulted in more consistency and higher awards
- Government agencies enforce child and spousal support
- Controversial issues:
 - Child support if shared custody (SCC, 2005, Contino)
 - ◆ Growing portion of cases (8% and rising)
 - ◆ Each parent at least 40% of time
 - ◆ Individualised determination due to lack of CSG guidance
 - ◆ No automatic trade of time for money—more shared custody
 - Fed government has not yet acted on 2002 Federal–Provincial Taskforce recommendations for CSG change (e.g. presumption of amount for shared parenting)

11

Who is a 'parent' and when does childhood end?

- 'Child support' may continue while adult child is in university
 - Controversial with fathers
- Person who has 'stood in the place of parent' has child support obligation
 - 'Victims' of paternity fraud have to pay support if relationship established
 - Secondary to biological parents, if providing adequate support
- Right of psychological parents to seek custody/access
- Grandparents want more rights
 - Advocacy groups—limited recognition in Bill C-22 (not enacted)
 - Reluctance of courts to recognise rights unless parent is dead/unengaged or grandparent had primary role as caregiver

12

Spousal support

- Only about 10% of divorce orders provide for spousal support
 - Great uncertainty and variation until SSAG
 - Spousal Support *Advisory* Guidelines (SSAG, 2005)
 - <http://www.justice.gc.ca/en/dept/pub/spousal/project/index.html>
 - Fed government sponsors practitioner/academic proposal—*advisory*
 - ‘Average justice’ rather than ‘individual justice’
 - ‘Cross check’ for courts and used to facilitate settlement
 - Perhaps somewhat higher (especially at low end) and more certain
 - Quantum only and not entitlement—is there a difference?
 - Will more women seek spousal support?
- Two basic models: ranges not numbers
- No dependent children—‘merger over time’
 - ◆ 1.5–2% of difference incomes and 1/2 to 1 year per year of marriage
 - ◆ Indefinite after 20 years of marriage or rule of 65 (age + length of marriage)
 - Dependent children—‘parenting partnership’
 - ◆ After child support and taxes, transfer by higher income spouse to leave that spouse with 54–60% of income
 - ◆ Continue until youngest child graduates high school and then end or shift to no dependents formula if eligibility left

13

Property

- Fundamental model of ‘marriage as partnership’ with equal division of ‘marital property’
- Variation between provinces
 - Pre-marriage property
 - Family use vs. all property
 - How strong is the presumption of sharing?
 - Government unwilling to tackle issues like pension reform
- Marriage contracts permitted
 - Increasing use, but still not common
 - Difficult to overturn (Hartshorne, SCC, 2003)

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Unmarried partners

- About 14% of couples, with highest rate in Quebec, which has least legal recognition
- In all provinces (except Quebec), ‘spousal support’ obligations after period of cohabitation
 - Varies from any period to 3 years
- Some types of unequal treatment violate charter (SCC, 1995), but different property laws acceptable, since ‘choice’ not to marry (SCC, 2002)
- Statutory status for some purposes after cohabitation
 - 1 year for taxes (federal)
 - 3 years for all property rights in Saskatchewan
- Little-used registers in Quebec and Nova Scotia
- In most provinces, property claims only based on contributions to home or business (constructive trust)

15

Family violence

- Changes in police and prosecutor policies
- Legal aid priority for victims
- Civil emergency orders
 - Alberta, Saskatchewan, Manitoba, Prince Edward Island statutes
- Domestic violence criminal courts
 - Specialist police and prosecutor teams
 - Diversion
 - Sentencing options
- Case law takes this into account for child-related issues
 - Difficult issues of proof, especially at the interim stage
 - Victims may be pressured to settle
- Gradual decline in family violence in Canada
 - Increase in cases reported, but victimisation studies indicate decline
 - Prosecutions and programs having an effect
 - Change in public and professional attitudes
 - Effect of ageing population?
 - Domestic violence still serious problem

16

Improved family dispute resolution I

- Most cases are settled
 - Judicial dispute resolution
 - Difficult to overturn separation agreements (Miglin SCC 2003)
- Mediation
 - Mainly private
 - Limited court-affiliated and government support (Quebec and Ontario)
- Parenting After Separation courses (mandatory in Alberta and Toronto)
 - Parenting plans more common
- Collaborative family law: lawyer-led
 - Increasing use, especially in smaller cities (close family bar)
- Assessments
 - In some provinces, government will pay, at least for social work assessment (Manitoba and Ontario)
- Child representation
 - Ontario Office of the Children's Lawyer (OCL)
 - ◆ Lawyer and/or social worker
 - ◆ Lawyer in guardian role
 - Quebec
 - ◆ Lawyer to be advocate if child expresses wishes (Quebec, CA, 2002)

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Improved family dispute resolution II

- Access to justice
 - Legal aid: duty counsel, special family law clinics (Alberta, Ontario)
 - ◆ Great concerns about lack of access/funding
 - ◆ Increasing self-representation
 - Family Law Information Centres (Ontario)
 - ◆ Government in effect helps the self-represented
- Recognition of different types of cases
 - High-conflict vs. low-conflict
 - Denigration of other parent (alienation) by both parents common
 - Increasing use of case management
 - Parenting coordinators (only by agreement)
 - Parallel custody being tried
 - Recognise special needs if high-conflict, especially if violence
 - ◆ Supervised access and exchanges (Ontario)

18

Conclusion: The way ahead

- By late 1990s major responsibilities for family legislation largely shifted from provinces to federal government
- Little federal legislation since 1997
- Since 2004 minority federal government makes legislative action on contentious issues even less likely
- But systemic change is occurring, especially in regard to spousal support, dispute resolution, and custody/access
- Changes in professional attitudes and practices more important than legislative change, especially for child-related issues
 - Good research to convince professionals and policy makers
 - Professional and public education
 - Resources for services
- Arguably for some important problems, legislative change is less important than changes in attitudes and services (e.g. dispute resolution, domestic violence, custody/access)
- Canada looks to Australia as a 'leading jurisdiction'
 - Innovative
 - Prepared to tackle controversy
 - Sophisticated research

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Some Canadian resources Institutes and websites

- Research reports sponsored by Department of Justice <http://canada.justice.gc.ca/en/ps/pad/reports/index.html#res>
- Vanier Institute of the Family, Ottawa (policy and social science research) <http://www.vifamily.ca/>
- Canadian Research Institute for Law and the Family (socio-legal research) <http://www.ucalgary.ca/~criff/>

Recent books

- Hovius, *Family Law* (Carswell, 2005)—law school casebook
- Bala et al., *Canadian Child Welfare Law* (Thompson Education, 2004)
- Payne & Payne, *Canadian Family Law* (2nd ed. Irwin Law, 2005)

Journals

- *Canadian Family Law Quarterly* (Carswell—practice focus)
- *Canadian Journal of Family Law* (scholarly)

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