Report to the
Standing Committee on Social Programs of the
16th Legislative Assembly of the Northwest Territories

Review of the *Child and Family Services Act*

Submitted by:
Sharon Sutherland
Assistant Professor
University of British Columbia
Faculty of Law
and Manager of Development
Child Protection Mediation Practicum
Mediate BC

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I. Introduction

Focus of this Report

The Terms of Reference for the Review of the *Child and Family Services Act* ("*CFSA*") by the Standing Committee on Social Programs (the "Committee") are broadly based to allow the Committee to examine all aspects of the legislation, its implementation and resourcing required in furtherance of the legislative objectives. The focus of this Report is narrower. This Report explores:

> 1. d) The use of alternative dispute resolution methods such as mediation, conciliation, arbitration and case settlement conference to avoid child apprehension and adversarial court proceedings wherever possible.

This focus on dispute resolution methods necessarily addresses an aspect of the first of the Committee's Terms of Reference as well: the use of dispute resolution methods to avoid child apprehension and adversarial court proceedings is one means of achieving "the objectives stated in the preamble of the Act." The collaborative decision-making processes discussed in this report share with the *CFSA* the stated goals of supporting families, inclusion of children, families and communities in decision-making related to the welfare of children, and the recognition of and respect for traditional cultural practices. As a consequence, while this Report focuses on Term 1. d), it does so as a means of meeting the broader objectives in the preamble.

Throughout this report, I emphasize the importance of language selection in reflecting and supporting a shift away from adversarial approaches to child welfare work. Much of the language of the current *CFSA* reflects an adversarial framework deriving from common law litigation models. This language influences all stakeholders in child welfare and reinforces a tendency towards adversarial framing of issues and resulting decisions. In order to change the culture of decision-making from an adversarial to a collaborative mode, it is essential that care be taken to adopt language that does not innately reflect or perpetuate adversarial values. For this reason, I use the term collaborative decision-making in this Report when discussing methods for resolving child welfare issues, and I consciously avoid the language of the Terms of Reference. The phrase "alternative dispute resolution" used in the Terms of Reference necessarily carries a presumption that collaborative processes are not the norm, but are "alternatives" to the usual litigation process. I suggest throughout this Report that the goal of any legislative and/or policy changes arising from the present review must be to reverse this bias: collaborative decision-making must be embraced by all stakeholders as the normal and primary approach to resolving issues, while litigation should be seen as an alternative that would be utilized only as a last resort. As such, I encourage the Committee to strive for the use of language in the *CFSA* and in its own Terms of Reference that reflects the desired approach to child welfare work, and does not inadvertently replicate and reinforce an adversarial perspective.

II. Shifting from an Adversarial Model of Conflict Management

In Canada, as in many other jurisdictions throughout the world, approaches to conflict in a wide variety of contexts have been shifting from the adversarial paradigm embedded in common law traditions towards resolution of conflict through more collaborative, interest-based processes. Social work practice in child welfare has been the site of some of the most comprehensive efforts to create a legislative and practice environment that supports collaborative decision-making engaging a child and the child's family, including extended family and often other community members, in plans of care for the welfare of the child.[1]

In the child welfare context, collaborative decision-making reinforces many of the values and aspirations for supporting families that have found expression in legislation throughout North America and are expressly identified in the preamble to the Northwest Territories *CFSA.* These values include the following.

- The family is the basic unit of society and its well-being should be supported and promoted.
- Children are entitled to be informed in decisions affecting their rights.
- Families are entitled to participate in decisions affecting their rights.
- Decisions concerning children should recognize and respect differing cultural values and practices in determining the best interests of children.
- Extended family can often provide important support.

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[1] Several provinces have developed programs for Child Protection mediation, family group conferencing and traditional dispute resolution processes. In this report, I will draw most examples from two of these provinces – British Columbia and New Brunswick. In part, I draw on these provinces as the sites of my own experience, but also for two other key reasons.

- British Columbia is the province that has developed, to date, the most comprehensive program of collaborative decision-making in this area, including a province-wide mediation program that conducts nearly 1,000 child protection mediations annually. While the demographics of BC are different than those of the NWT, BC's program has had to explicitly examine culturally appropriate dispute resolution processes in the face of grossly disproportionate numbers of aboriginal children in care due to a history of residential schools and related racist child welfare practices. As a result, several of the projects undertaken by BC in building a presumption of collaborative decision-making have examined culturally appropriate processes and have addressed the challenges of implementing collaborative processes in the face of historic distrust. In addition, several projects have examined the challenges of providing services in small, geographically remote communities.
- NB provides an example of a province that has recently (December 2008) enacted new legislation specifically aimed at increasing the use of collaborative decision-making.

- The community has a role in supporting and promoting the best interests of children and the well-being of families.

By contrast, the historic child welfare approach in Canada, which still finds expression in much of the language and assumptions that underlie legislation, policy and practice in this area, involves removal of a child in need of protection from the home followed by an adversarial, deficit-focused process aimed at proving or disproving the need for removal. This adversarial process is found from the very outset of a case, as social workers are required to demonstrate that removal is warranted while parents necessarily seek to disprove any allegations of wrongdoing.

> [The adversarial model] frames the question of the child's welfare as a contest, and positions the parties as opponents. The opportunity for real dialogue diminishes as combat values and attitudes take hold. The disadvantages flowing from this approach are manifold: conflict is often exacerbated, the parties polarize, and there is reduced acceptance of the eventual judicial decision. This is particularly problematic where the social worker and family must continue to work with each other after the trial, as they often must. The litigation process squanders goodwill.[2]

The result of a lengthy history of adversarial approaches to child welfare is insidious. Despite overwhelming theoretical and empirical support for collaborative decision-making in child welfare work and legislation that explicitly acknowledges the importance of ensuring the participation of children, families and communities in decision-making, achieving a significant shift in practice is complex, challenging and requires significant ongoing support. Legislative change alone cannot bring about a fundamental shift in practice. The challenge that must be recognized in seeking to shift policy and practice is that moving to a truly collaborative approach requires both a fundamental cultural shift amongst all professionals involved in child welfare work and a concurrent building of trust. This building of trust is particularly difficult where those asked to trust are families and communities who have experienced the imposition of racist and classist policies and systemically racist and classist practices.

Shifting Child Welfare Practice

It is important to acknowledge that collaborative decision-making represents a significant shift in thinking for all professionals in the child welfare system, regardless of personal philosophy and varied individual approaches. Experience throughout the common law world in all areas of practice shows that the adversarial culture is deeply entrenched – indeed, many of the values inherent in an adversarial system of decision-making are so normalized within the professional culture that the social workers, lawyers and others

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[2] M. Jerry McHale, Irene Robertson, and Andrea Clarke, "Building a Child Protection Mediation Program in British Columbia," 47:1 *Family Court Review* January 2009, 86-97 at 87.

who hold onto those values are almost incapable of perceiving of those values as biases. While not a perfect analogue, similar issues of embedded cultural biases forming barriers to change from adversarial assumptions have received significant study by academics, practitioners and judges in the area of legal culture. Noting the resistance of the legal profession to fully adopt collaborative approaches that have been written into legislation and rules of court, Professor Julie Macfarlane identifies three entrenched assumptions that reduce the effectiveness of processes other than litigation:

- "The source of conflict is an uncompromising moral principle, or an indivisible good";
- "Information is for winning", and therefore "[p]resenting information as evidence means presenting it as 'fact' and requires the denial of any ambiguity, circumstance or context (unless self-serving)"; and,
- "Legal conflicts are "owned" by lawyers, who take possession of a problem from an unskilled client and transform it into a legal claim."[3]

Each of these entrenched assumptions can be seen to block collaborative practice even where lawyers engage in a mediation or other collaborative decision-making process. Furthermore, each appears at least analogous to those assumptions that infuse social work practice, which has normalized comparable values through ongoing interactions between child welfare workers and the courts. For all professionals engaged in child welfare work, there is a natural tendency to think in terms of a fundamental moral objective which may not be compromised – the best interests of the child. When this objective is framed as an indivisible good in a battle between opposing parties, it is easy to see that cultural differences (for example) in determining what is in the child's best interests become seen by the parties as revolving around a moral judgment as to what constitutes good versus bad parenting.

The adverse impact of such differences is exacerbated by the assumption that information should be presented as "facts". This inevitably leads to inflammatory disputes regarding what facts are "right" (or "true") and "wrong" (or "false") in the context of the case, rather than allowing the cooperative exploration of areas of potential agreement and future planning for the child and family.

Finally, the impact of "authorities" such as lawyers and social workers creates an unbalanced power environment which tends to force parties apart rather than bringing them together. Following their traditional training, lawyers will often approach a dispute by framing the issue as one of legal rights, which then places the lawyers themselves in a powerful position of superior knowledge. A similar power position is granted to social workers, who are assigned responsibilities under child welfare legislation that create a form of "ownership" in the dispute that does not lend itself well to collaborative decision-making. While social workers rightly (in light of their legislative directives) focus on

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[3] Rodney MacDonald, "Legal Culture," (2005), <http://www.bcjusticereview.org/working_groups/civil_justice/cjrwg_paper_02_23_05.pdf>

their personal responsibility for ensuring a child's safety, the consequence can be that social workers entering collaborative processes may question their role. The collaborative nature of this process may be seen by them to take away their power to carry out their statutory obligation – they may feel the process renders them unable to perform their job. Even though collaborative decision-making can better be viewed as empowering children, families and communities to participate in decision-making, and is not in and by itself focused on removing legal powers and obligations from social workers, this does not negate the fact that many social worker experience a shift to collaborative decision-making as unsafe. It seems to take away their "ownership" of the issues.

Given these barriers, it is not surprising that where efforts to institutionalize collaborative processes have been undertaken but without addressing the underlying adversarial culture of the status quo, those efforts have failed; instead, they have resulted in adversarial professionals co-opting the collaborative processes and then shaping these processes in practice to support adversarial goals.[4] This failure is not due to malice on the part of these professionals; to the contrary, the vast majority would firmly assert that they take the approaches they take to promote the "right (or perhaps just or moral) answer". For this reason, a desire to shift to a collaborative practice model requires both thoughtful implementation and ongoing support for continuing development as new barriers emerge.

Overcoming Historic and Continuing Systemic Barriers to Trust

The preceding discussion observes the manner in which assumptions built on years of adversarial practice may create barriers to the full engagement of child welfare professionals in a shift to collaborative practice. However, this issue is not restricted to the professionals. Families "caught in the process" will also frequently have an ingrained reaction against any type of interaction with child protection authorities, even if that interaction is structured to be collaborative. This reaction has obvious historical foundations, generating an ongoing distrust of the system itself and of anyone working within the system. This distrust is greater in aboriginal families and communities that have experienced generations of racist child welfare polices, including both residential schools and the subsequent "scoop" of aboriginal children from aboriginal homes and communities under the banner of "child protection." The Committee heard many moving and eloquent submissions on the basis for this distrust; I need not detail this history here. However, I believe that the barriers created by generations of fear and distrust of child welfare professionals and the child welfare system can be overcome by a committed, consistent and long term use of collaborative approaches to child protection. Building trust will be achieved one family at a time, if child protection workers demonstrate a genuine commitment to collaborative decision-making.

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[4] Barbara M. Young, QC., "Change in Legal Culture: Barriers and New Opportunities," (2006), <http://www.bcjusticereview.org/working_groups/civil_justice/young_paper_02_06.pdf>

The pressing need to establish trust in the child protection system and its workers has one important implication for the selection of collaborative processes: I believe there will be a need for facilitated processes that utilize either a neutral facilitator (e.g. mediation or FGC) or a facilitator drawn from the community (e.g. Traditional Dispute Resolution practices, FGCs or forms of mediation that draw on aboriginal mediators). This will be essential over and above the dedication of resources to the enhancement of skills of child protection workers, training them to participate in interest-based negotiations with families, and in promoting the use of such relatively low cost processes as Family Planning Meetings (described below). Thus, I believe a key facet of a shift to collaborative child protection decision-making will be the development of resources for such facilitated processes, supporting the efforts of child protection workers to adopt more collaborative approaches, and building trust in families with inter-generational history of adversarial contact with the child welfare system.

III. COLLABORATIVE DECISION-MAKING PROCESSES

Collaborative decision-making encompasses a potentially limitless number of processes, ranging from the most informal interest-based discussions between a parent and a social worker aimed at preventing removal and keeping a child in the family home to formal processes of mediation involving parents, social worker, lawyers and other stakeholders in a structured negotiation regarding a plan of care for the child. Ideally, a wide range of processes are available to social worker and parent(s) in order to choose a process that best suits the needs of the family at a specific point in time. A family may find that different processes are more suitable at different times, and it is common for families to utilize more than one process as circumstances, including the relationship with the social worker, changes over time.

Although access to multiple processes might be ideal, resources will inevitably restrict the availability of more than a small number of processes from being available in a given jurisdiction. I do not purport to have sufficient insight into the existing infrastructure in the NWT at this time to enable me to recommend specific processes. That said, I provide below outlines of five processes which I believe may respond to some of the needs and capacity limitations that were raised with me during my travels with the Committee. Specifically, I suggest that the Committee contemplate inclusion of at least the following five processes as features of a more collaborative decision-making environment:

- interest-based negotiation
- Family Planning Meetings
- Family Group Conferencing ("FGC")
- traditional dispute resolution ("TDR")
- mediation

Interest-based negotiation

In the context of this Report, interest-based negotiation refers to informal negotiation focused on parties' interests, rather than on legal rights, between social workers and families regarding planning for the child. The Committee's community meetings

suggested a need for continuing training that addresses specific aspects of a social worker's interactions with families. Although social workers will normally have received training in conflict resolution skills such as active listening and interest-based negotiation while in school, it is not uncommon for social workers in practice in an adversarial framework to develop approaches that tend to under-utilize these skills. Enhanced context-based training for even experienced social workers therefore may be appropriate, aimed at increasing the potential for a collaborative relationship to develop with the social worker from the first interaction with the parents, while also strengthening the social worker's ability to shift a difficult relationship with a parent or family through direct discussion. Continuing professional development focused on first meetings with the family, for instance, could provide an opportunity to reinforce collaborative goals with situational practice. Such training can also be conducted in conjunction with the introduction of other processes, such as mediation; these would then favourably reinforce each other, as the skills social workers require in mediation are closely related to interest-based negotiation skills that enhance direct negotiation.

Family Planning Meetings

The term "Family Planning Meeting" is a general name for a variety of informal meetings amongst support professionals working with the family and the family members. These meetings can take different forms, but I understand a successful pilot project in a specific form of Family Planning Meetings has been conducted in Yellowknife. That model might well be examined as an early intervention option.

Family Group Conference (FGC)

The idea of a "Family Group Conference" has developed from indigenous practices in New Zealand and has been successfully adopted and adapted in many regions of Canada. As it is generally practiced, an FGC is a structured meeting organized by an FGC coordinator. FGCs will normally include members of a child's/youth's immediate family, members of the extended family, members of a First Nations band, and others with a significant established relationship with the family. This group comes together on a voluntary basis to develop a plan regarding the child/youth. A unique characteristic of most FGC processes is the provision of "private family time" during which a family meets and develops a plan regarding the child/youth without the presence of social workers or other service providers. Following this private time, there is an opportunity to present the family's plan for feedback and contribution by the social worker to ensure that all issues have been addressed and to examine the need for resources and support from the Department in any part of the plan.

As with Family Planning Meetings, I was advised that a pilot project in FGCs was run in Yellowknife with good success, but that it did not continue past the pilot stage. As such, it is likely that this favourable past local experience could support adoption of an FGC process.

Traditional Dispute Resolution

"Traditional Dispute Resolution", often called "TDR" or sometimes "Cultural Dispute Resolution", is an umbrella term covering a very wide variety of processes, typically

developed within a community or adopted by a community to reflect traditional values and approaches. The BC Presumption in Favour of Collaborative Planning and Decision-making[5] describes TDR in the following terms.

> Traditional Decision Making (TDM) processes are ways of planning and/or resolving disagreements by following community or cultural models and/or practices. Traditional or cultural forms of decision making can vary from highly formalized traditional processes to relatively informal processes, depending on the context.
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> While the structure and approach of the decision making process will differ from nation to nation and community to community, there are some common elements that are present in culturally-based decision making traditions:
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> - Inclusion of extended family
> - Inclusion of wider community
> - Several models use co-mediators (male/female, insider/outsider, Aboriginal/non-Aboriginal)
> - Clear explanation of roles
> - Consensus format used in many models
> - Process oriented rather than task oriented (not just focusing on reaching agreement)
> - Use of teaching/lecturing/story telling.
> - Non-interference (when each participant's input and behaviour is not judged and each participant can provide input without interruption)
> - Focus on restoring relationships, balance, and harmony rather than affixing blame
> - Focus on appropriateness/personal qualities of the person leading the process, rather than on academic/professional qualifications
> - Inclusion of ceremonial/spiritual aspects, following of local cultural protocols
> - Voluntary participation
> - Children included whenever possible
> - Family/community as witness to agreement (this ensures compliance to agreement).

Traditional Dispute Resolution processes necessarily vary from community to community, but several successful community projects in Canada demonstrate that processes can be developed on the basis of existing or historical community practices, and can be adapted, with appropriate community-driven leadership and participation,

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[5] Presumption in Favour of COLLABORATIVE PLANNING AND DECISION MAKING, Policy and Procedures Guide. BC Ministry of Children and Family Development, January 2008.

from programs in other communities or through variations on FGCs and mediation programs. The successful models are many: the critical component is community participation and support.

Mediation

"Mediation" is a process for resolving disagreements that involves a neutral, third party. The mediation process can vary from jurisdiction to jurisdiction, but common aspects of the most successful programs in Canada include the following.

- Access to highly qualified CP mediators who are members of a roster to ensure quality of the process.
- Arrangements to ensure actual and apparent neutrality of the mediator. Mediators are not hired by or part of the Department responsible for child welfare, and are typically not social workers, Directors' counsel, or otherwise in a position of actual or perceived bias.
- Pre-mediation meetings (or orientation meetings) with all or most parties.
- Mediator works with parties to identify appropriate people to attend which may include the child, immediate and extended family, band representatives, professionals supporting the family, and others who can contribute positively to development of a plan of care. (In some provinces, lawyers participate in most mediations, while in others lawyers rarely attend.)
- Future-oriented focus that may explicitly preclude a determination of whether or not a child was in need of care.

I understand that a number of experienced mediators might be available for development of a mediation project, at least in Yellowknife. As well, mediation has been demonstrated to be a highly effective process for improving relationships between families and social workers. In light of the clear message of long term distrust that was evidenced in all the community meetings in which I participated, I believe that establishment of a mediation program could be an important early step in a shift to collaborative practice in the NWT.

IV. LEGISLATION

Legislation can form a basic institutional support for collaborative decision-making. Given the challenges of shifting adversarial practice, legislative recognition of collaborative processes plays an important initial role in legitimizing and promoting the processes identified. For this reason, I suggest that the Committee examine ways to explicitly embed collaborative processes in the legislation. Ideally, collaborative processes will be recognized in a number of ways throughout the legislation as a normative process of shifting from adversarial to collaborative approaches.

Legislative references to collaborative processes may range from the expression of guiding principles in the Act's preamble, through enabling provisions, to statutory requirements on child protection workers to consider, offer to parents, or even initiate specific collaborative processes. It is perhaps evident to the Committee from its

community meetings that statements of guiding principles may not result in any change in practice unless they are supported by specific directives in the body of the legislation. Similarly, even if the enabling legislation states that collaborative dispute resolution processes may be undertaken to resolve disputes, that statement may not bring about changes in practice if resourcing does not accompany the legislative changes. Even mandatory requirements that child protection workers must consider the use of collaborative dispute resolution processes in every instance can lack impact on practice. For example, a worker could fully comply with such a legislative requirement by considering the use of a collaborative process, but concluding in every instance that it is not a suitable option.

These challenges should not prevent the Committee from recognizing that building collaboration into the *CFSA* is an important step in legitimizing the processes, and creates an opportunity to shift practice that must be supported by both resources and education.

I recommend that the Committee consider three specific areas for legislative change respecting dispute resolution.

A) Consider presumptions of collaborative practice

Some child welfare legislation creates explicit presumptions of collaborative practice beyond the guiding principles of its preamble.[6] New Brunswick, for example, requires that where the Minister has determined that a child is in need of protection:

> *31.1(2) The Minister shall consider using the collaborative approach of mediation or a family group conference in establishing, replacing or amending a plan referred to in subsection (1).*[7] [Emphasis added.]

Wording such as this, which requires a child protection worker to consider collaborative approaches, does not independently increase the use of collaborative processes; however, it can form a solid basis for mandatory professional development of staff around the use of collaborative processes, and hence may serve a useful purpose in promoting new learning.

The 1998 revisions to the *CFSA* introduced steps aimed at increasing the participation of extended family and/or community through Child and Family Services Committees. Community feedback during the Committee's public hearings indicated that these provisions might be revisited to ensure that their purpose of increasing collaboration is met. While lack of implementation resources may have been the primary cause for a failure of uptake in Child and Family Services Committee creation and utilization, the same reason cannot be blamed for an apparent failure to increase early, collaborative discussions with extended family members.

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[6] In other provinces, such as British Columbia, presumptions of collaborative practice are created by Ministry policy.

[7] *Family Services Act,* S.N.B. 1980, c. F-2.2.

The Committee may seek directed submissions from child welfare professionals specifically with respect to the barriers child welfare workers are experiencing in seeking immediate participation of extended families, and the potential either to alleviate such barriers through statutory reform or to create greater statutory inducements. For example, the Committee heard several references to the manner in which short time limits to seek a court confirmation of an apprehension forces child protection workers to focus on adversarial proofs before exploring alternative placement in order to ensure the time constraints are met. Child protection workers may offer suggestions for alleviating that barrier to collaborative practice while still ensuring that families are protected against unnecessary apprehensions. Similarly, it may be possible to create inducements to consult with extended family at this early stage through requirements, common in child welfare legislation in other jurisdictions, to demonstrate to a judge that less disruptive steps (for example, placement with other extended family members) have been given reasonable consideration.

B) Revisit procedures that reinforce adversarial approaches

Some aspects of the *CFSA* lead inevitably to adversarial practice. For example, the requirement to seek a court order confirming the grounds for an apprehension within 4 days restricts the time a child protection worker may have to discuss alternatives with the family following an emergency apprehension.

A child might be quickly returned to extended family if a child protection worker were obligated to immediately seek to consult with parents and extended family regarding temporary placements while further planning occurs; however, under current law and practice, a child protection worker is obligated to prepare to justify her actions in an apprehension, which interferes with her ability and time to make consultation a primary goal during this period. As the statute has been created in order to protect the family from wrongful apprehensions and to ensure that wrongful apprehensions are ended as quickly as possible, I suggest that the family should have the ability to waive that time requirement in order to permit the negotiation of a temporary placement to ensure the child remains with extended family, or at a minimum within the community, while discussions with the Department about an ongoing plan are undertaken.

Similarly, the child protection worker might be required to offer collaborative decision-making processes such as FGCs, TDR and mediation to families at specific points in the child welfare process. Such specific points might include:

- the time of an initial report and investigation;
- immediately following apprehension;
- prior to any court hearings for either temporary or permanent placement of the child; and
- following permanent custody for the purpose of adoption.

Finally, a provision that has proven to increase the potential for consent orders in BC, and consequently for collaborative discussion related to consent orders, is a clause permitting parties to reach agreements which are “not an admission by the parent of any grounds

alleged by a director for removing the child."[8] This clause has been shown to be highly effective in supporting collaborative processes, as interim agreements do not carry a stigma for parents, nor a danger of misuse against the family should the agreement not resolve all issues on a permanent basis. This enables parents' counsel to encourage their clients to enter into interim agreements that advance their interest in the return of their child without fear that the client might be seen at a future date to have made an adverse admission.

The foregoing are intended to provide examples of modest changes which could address an inherently adversarial bias in the existing legislation that derives from years of common law jurisdiction over child protection matters. More radical approaches might also be considered, but I would not recommend radical change to the process (outside of a redrafting of the legislation as a plain language statute as discussed below), as I believe such an approach would likely meet with strong resistance.

C) Add enabling provisions for collaborative decision-making processes

While the current *CFSA* does not preclude the use of FGCs, TDR or mediation, and it is not strictly necessary to create enabling clauses to allow for the use of these processes, explicit statutory support for such processes does legitimize them and creates an opportunity for professional development amongst child welfare professionals. As such, I recommend that the Committee consider simple enabling provisions regardless of its choices in respect of other considerations.

Most legislation that seeks to enable collaborative decision-making includes these topics:

- A statement that collaborative decision-making is desirable (or even presumptive). Such a clause will normally name the processes that are expected to be used most frequently and that will be resourced while also allowing for alternatives.
- A statement regarding confidentiality in collaborative decision-making in order to enhance the ability of parties to negotiate candidly without fear that their discussions may be used against them in future litigation. Exceptions to confidentiality, such as requirements to report information regarding a new child protection concern, are spelled out in most legislation.
- A statement regarding the ability of a court to adjourn its proceedings for a stated period of time in order to permit the parties to engage in a collaborative decision-making process.

Plain language

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[8] s. 60 (5), CHILD, FAMILY AND COMMUNITY SERVICE ACT [RSBC 1996] CHAPTER 46.

The Committee heard several requests for a plain language Act and/or plain language information for families regarding the Act. In considering the possibility of redrafting the Act entirely to a plain language form, I would encourage the Committee to reflect on the importance of communication with families in child welfare and the disempowerment expressed by so many participants in public hearings that related to lack of understanding of the Act. One member of the public stated forcefully that legislation written in "legalese" is both racist and classist. While her sentiments were strongly worded, her point is well taken: when families cannot understand the legislation without help from a lawyer, they are disempowered from collaborating fully in decision-making regarding their children. Should the NWT choose to undertake the significant revision that would be necessary to create to a plain language *CFSA*, it would be highly desirable to engage in concurrent rethinking of the many hidden assumptions of adversarialism also found within the Act and the language of the Act. Such a project would be ambitious, but has the potential to bring about much more meaningful change simply because families could more effectively participate in informed decision-making.

V. ADDITIONAL CONSIDERATIONS: PRACTICE AND POLICY

Legislative change can support a shift to collaborative practice, but it must be supported by policy and practice direction from within the Department, including significant professional development for child protection workers and the bench and bar.

Similarly, the loss of pilot projects in Family Planning Meetings and FGCs evidences insufficient resource commitment to projects aimed at shifting practice. Inroads can be made in collaborative practice through training and support for interest-based negotiation and family planning meetings within offices, but those provinces that have seen the most significant shifts over the shortest periods (most notably, but not exclusively, British Columbia) have all dedicated resources to one or more of the facilitated decision-making processes as well. The ability to refer a dispute between parent(s) and a social worker for facilitation in the form of mediation with the aid of a neutral third party is a powerful tool to help rebuild broken trust between families and the Department. In addition, it provides the added benefit of providing child protection workers (and, in the case of mediation, lawyers) with experiential learning in interest-based negotiation, enhancing their skills outside of the facilitated process as well as within. As the subject of more evaluations than other processes, mediation has been shown to:

- deemphasize the tone of blame,
- improve relationships between the family and the social worker,
- empower clients,
- provide a good forum for extended family involvement in planning,
- lead to earlier return of children, and

- provide a more client- and worker-friendly setting that allows parties to have more shared control over the proceedings.[9]

Studies of FGCs and TDR suggest very similar findings. This indicates that the provision of support for at least one ongoing project providing a neutrally facilitated process for collaborative decision-making would be an important companion to any legislative change.

I see one further consideration in thinking about the resources needed for a practice change. It will be important to consider whether legal aid tariffs are sufficient to support lawyers' participation in collaborative decision-making, and if so, whether such supported participation should be limited to specific formats. Parents' counsel can be strong and important supporters of a collaborative process, but they will be less likely to become sufficiently familiar with the process if levels of legal aid tariffs effectively preclude their participation. Similarly, where mediation is supported by legal aid, but advice related to FGC participation is not, one can anticipate greater support from the bar for mediation simply through greater familiarity with the process. As a result, tariffs should be considered when creating the framework for any if the facilitated processes discussed in this Report.

VI. CONCLUDING REMARKS

The Committee's Review of the *Child and Family Services Act* has revealed great challenges in the practice of child protection work in the NWT. It is clear that many of these same challenges were in the minds of the drafters of the 1998 Act, and that legislative steps were taken at that time to initiate a more inclusive and effective environment for the resolution of issues related to child safety. Some further legislative changes related to the inclusion of collaborative decision-making processes can be made to support a desired shift to more collaborative and less adversarial practice. Such changes could form the basis for renewed efforts to implement the changes envisioned in the 1998 revisions, while also supporting a more comprehensive move to shift practice. The most important consideration in ensuring that the goals of such legislative changes are realized will be adequate and ongoing resources and policy support from the Department. If adequate and sustained support is given to a fundamental shift to collaborative decision-making as the primary model of child welfare practice, I believe the legislative goals are attainable.

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[9] Dispute Resolution Office, Ministry of Attorney General, Evaluation of the Surrey Court Project: Facilitated Planning Meeting, Final Report (2003), <www.ag.gov.bc.ca/dro/publications/index.htm#evaluation-reports>.