

June 28, 2017

To the AFCC-Ontario Board of Directors

I have just had the opportunity to carefully read the Chapter's response to the Bonkalo report. Those of you who heard my talk at the AFCC Annual Conference in Boston will not be surprised that I was very disappointed in this statement. I would like (briefly) to share why and to suggest that we find some way to discuss this further in order to try to bridge the gap between this response and what I believe to be our responsibilities to the public..

I have three overriding concerns:

1. I do not think that the response recognizes the magnitude of the problem. There is a crisis in access to justice throughout Canada and the US (and elsewhere as well). The source of this lies in the structure of the system we have created for dealing with family (and other) disputes. This is something that will require a systemic response and one critical element of such a response is to address the chokehold that the legal profession has maintained on the divorce process. There is no one solution to this, and the Bonkalo report is far from perfect or comprehensive. But the response of the AFCC-Ontario does not even attempt to face the seriousness of the issue and in fact minimizes it. Of course there are some people who choose to represent themselves and take matters to trial that ought not to go there, but this is a very small part of the overall picture. Legal services are simply not affordable to most Canadians going through divorce. The legal system is not structured to work well for those who are not represented. It needs to be restructured. Your response does not even come close to facing this.
2. The core of your response is a set of proposals designed to protect the prerogatives of the legal profession rather than promoting a greater diversity of potentially affordable services. You are saying in essence, that as long as lawyers get to triage, supervise, train, evaluate, etc., then maybe some additional role for paralegals is ok—but only if it is on a trial basis and if a myriad of details are worked out first. You base these proposals on the assumption that only lawyers are competent to deal with the complexities of divorce. This is a specious argument. Of course lawyers have critical skills and ideally all divorcees would have access to these—as well as to mediators, child development specialists, financial experts, divorce coaches, and therapists. But that is not a possibility for most divorcees. Furthermore, while some lawyers are well equipped

to deal with the complexities of divorce, many are not. One course in family law at law school does not suddenly make someone an expert. Some paralegals are far more adept than lawyers at specific aspects of the divorce process—as are some mediators who do not have a legal background, as are financial professionals and others. Furthermore I assume that you are well aware that “legal assistants” (so called because there is no professional designation for their work) already undertake many of the tasks associated with family files. The proposals you make, while certainly protecting the power of the legal profession, do not seriously address and grapple with issue of affordability and access.

3. There is an undertone of blaming the victims. Blaming the public for the archaic, inaccessible and unaffordable system we have created completely misses the point here, and is a diversion of responsibility. You even suggest that one answer to the problem that the Bonkalo report addresses is the use of court fines to discourage inappropriate filings. This is a particularly pernicious proposal which flies in the face of data in multiple studies across multiple jurisdictions, as well as the recent view of the Supreme Court of Canada’s in Pintea v Johns. It calls to mind the response we sometimes hear to complaints about sexual harassment or abuse which focus, on the very small number of unfounded complaints (less than 5%) rather than on the massive problem that sexual assault and harassment represent.

Some of your specific suggestions and reservations are legitimate, of course, and deserve attention. Establishing effective systems of triage is an important goal, for example, as is the establishment of clear training standards. But worthy though these might be, they are not a serious response to the crisis highlighted by the Bonkalo review. I am quite concerned that the response of the AFCC-Ontario, together with that of other professional organizations, will contribute, to the defeat or at least the delay of a potentially valuable reform of the system.

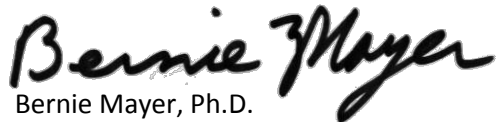
Of course the increased use of paraprofessionals is only one element of what needs to be addressed, but it is representative of a much larger problem. The legal profession has created a monopoly in many arenas, and as with all monopolies, this has resulted in higher costs and poorer services.

What I would have liked to have seen was for AFCC-Ontario to embrace the true scope of the problem, to recognize the massive failure of the legal profession to face its role in creating this problem, to welcome the major thrust (if not all the specifics) of the Bonkalo report, to offer to help to work out implementation details, and to do so in a way that would expand service options rather than throwing bureaucratic obstacles in their way. Of course, AFCC-Ontario, the Ontario Bar, and the legal profession in general are not alone in resisting the entry of paraprofessionals and others who are not a member of their guild. We see the same resistance of many in the medical profession to the role of nurse practitioners and physician’s assistants, of psychologists to the role of other mental health professionals, and the list goes on. However, I would have hoped that a multi-disciplinary organization like AFCC–Ontario would take a more socially constructive approach to this.

I know my position on this is not held by many of you and most assuredly not by the majority of the Ontario Family Bar. But it is certainly held by many who have studied the problem, and by large numbers of the (increasingly angry) general public. I would welcome further discussions, dialogue or interchange about this. In order to advance this, I ask that this letter be shared with the membership of AFCC-Ontario. I think we could use our very disagreements about this as a basis on which to engage the membership in a serious discussion of the systemic problems we face in providing services to Ontario's families.

I value much of the work that AFCC-Ontario does, and the valuable services its members offer. I would like to see AFCC-Ontario on the side of trying to address the critical issues of access to justice and helping families who cannot afford legal services as currently structured, rather than on the side of defending the status quo. I hope that we can still find a way forward to do so.

Best regards,

A handwritten signature in black ink that reads "Bernie Mayer". The signature is written in a cursive, flowing style.

Bernie Mayer, Ph.D.

Kingsville, Ontario

Professor of Negotiation and Conflict Resolution

Creighton University