Comparing the Views of Judges and Lawyers Practicing in Alberta and in the Rest of Canada on Selected Issues in Family Law: Parenting, Self-represented Litigants and Mediation

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Executive summary

Introduction

The National Family Law Program is a high-profile, four-day biennial conference organized by the Federation of Law Societies of Canada that attracts hundreds of lawyers and judges from across the country, and was most recently held in Whistler, British Columbia between 13 and 17 July 2014. The authors recognized the opportunity offered by such a gathering, and arranged, with Professors Rachel Birnbaum and Nick Bala, to survey the views and attitudes of conference attendees on issues relating to access to justice, the resolution of family law disputes and shared custody.

A total of 555 lawyers, judges, mediators and mental health professionals attended the conference in Whistler. An email invitation to complete the National Family Law Program 2014 Survey was distributed to conference participants by the conference organizer in early July and again approximately one week before the commencement of the program. Participants were asked to complete the survey by 31 July 2014. A total of 176 valid responses were received by the end of the polling period, resulting in a response rate of 31.7%.

This report examines the results of our survey of attendees of the National Family Law Program 2014, and compares the views of Alberta respondents with those from the rest of Canada.

Conclusions

Shared custody and shared parenting

With respect to the resolution of parenting disputes after separation, fewer of the family law cases of respondents from Alberta resulted in a form of shared custody, defined in this report as the equal or near-equal distribution of children’s time between separated parents, compared to the cases of respondents from the rest of Canada. Although almost the same proportion of Alberta respondents (76.5%) and respondents from the rest of Canada (76.7%) said that the number of their cases resulting in shared custody has increased substantially or increased somewhat in the last five years, respondents from Alberta were more likely than respondents from the rest of Canada to say that the number had increased somewhat or stayed the same, and the proportion of respondents from the rest of Canada who said that the number increased substantially was about a third greater than the proportion of Alberta respondents. These results may be a function of Alberta’s generally more conservative political and social values but
are more likely a consequence of the geographic separation of parents owing to lengthy periods of site-based work in the oil patch or the interprovincial relocation of separated parents to take work in the province, making shared custody arrangements difficult if not impossible to implement.

However, Alberta respondents also reported a significantly higher rate of cases resulting in shared parenting, defined in this report as the equal or near-equal distribution of decision-making between separated parents, than respondents from the rest of Canada. The difference in the views of Albertans may result from the child-centred nature of the province’s Family Law Act and its presumption that both parents are the guardians of their children, during their relationship and after its dissolution. This presumption of guardianship and the general reluctance of Alberta courts to remove guardianship or a right of access from a parent may explain the lower rate of cases resulting in limited contact or no contact between the child and a parent reported by Alberta respondents compared to those from the rest of Canada. The data obtained from British Columbia respondents, whose province has legislation substantially similar to that of Alberta with respect to parental guardianship and the care of children, showed the same pattern of results relative to those from respondents from the rest of Canada.

**Amending the Divorce Act**

Although a significant majority of all respondents were in favour of amending the Divorce Act to change the language used to describe the post-separation care of children from “custody” and “access” to alternative terminology such as “parental responsibilities” and “parenting time,” a slightly larger proportion of respondents from Alberta supported the proposed amendment than respondents from the rest of Canada. The higher rate of support may stem from the present use of such alternative terminology by Alberta’s Family Law Act and either an established preference for such language or a preference toward eliminating the dissonance between federal and provincial terminology. Respondents from British Columbia, whose legislation uses similar alternative terms, demonstrated a similarly elevated level of support for the proposed amendments.

A significant majority of all respondents were opposed to amending the Divorce Act to create a presumption of shared custody. Although the proportion of Alberta respondents (73.5%) opposed to such an amendment was only slightly lower than respondents from the rest of Canada (77.7%), the difference in the views of Albertan respondents assumes somewhat more significance when compared to the results from respondents in provinces with more than 10 respondents, namely British Columbia (79.2% opposed), Ontario (80.8% opposed) and Nova Scotia (85.7% opposed). The views of Alberta respondents regarding a presumption of shared custody may reflect a positive view of the
presumption of parental guardianship in Alberta’s *Family Law Act* or a reaction to the conflict suggested by Albertan’s comparatively higher rate of court involvement in family law matters and their higher divorce rate.

Interestingly, the comments provided by respondents from Alberta both in support of and opposed to such an amendment tended to concern conflict and power imbalances between parents or be neither child- nor parent-centred, while the comments of respondents from the rest of Canada tended to concern the best interests of children.

**Self-represented litigants and dispute resolution**

Findings from the survey indicated that over three-quarters of all respondents thought that there are more self-represented litigants now than there were three years ago, with lawyers and judges from Alberta being even more likely to report this than legal professionals from the rest of Canada. Further, while a substantial majority of all respondents said that added challenges arise in cases involving a self-represented litigant, Albertans were more likely to say that these challenges *always* or *usually* arise than respondents from the rest of Canada. These challenges are frequently related to litigants’ lack of familiarity with the applicable legislation, the rules of court and court processes and the law of evidence. Alberta judges and lawyers were also more likely to say that settlement is much less likely in cases involving at least one self-represented litigant than respondents from the rest of Canada.

More than one-half of all respondents thought that self-represented litigants obtain outcomes that are worse than litigants with legal representation with respect to child support, spousal support and the division of property. When asked what might improve self-represented litigants’ use of the court system and promote settlement of their cases, the most common measures supported by respondents was a requirement that self-represented litigants attend an information session on the law and court processes and providing these litigants with plain language guides to court and trial processes. Respondents from Alberta were more than twice as likely to support mandatory mediation when at least one party is self-represented than were respondents from the rest of Canada.

Lawyers from Alberta were slightly more likely to report that they provide services on an unbundled basis than were lawyers from the rest of Canada; they were also more likely to say that they were aware of other lawyers providing these services. The most common unbundled service that lawyers reported providing was legal advice. The availability of legal services on an unbundled basis could be a more affordable alternative for self-represented litigants than
full representation, and could serve to promote case settlement by ensuring that these litigants have the benefit of some legal advice.

Another mechanism that might serve to provide self-represented litigants with some measure of legal assistance is the use of licensed paralegals to provide limited legal services in certain family law disputes. A slightly higher proportion of respondents from Alberta supported the provision of legal services by paralegals than did respondents from the rest of Canada.

**Recommendations**

The findings obtained in the present study lead to a number of recommendations regarding the language used to describe parenting arrangements after separation, addressing the needs of self-represented litigants and their increasing involvement in the family law proceedings, and resolving family law disputes through mediation:

- Given the strong support among survey respondents for amendments to the terminology for the post-separation arrangements for the care of children in the *Divorce Act*, as well as the fact that some provinces have already changed the terminology used in their legislation, the federal government should consider enacting such amendments independent of another private member’s initiative such as Bill C-560.

- Since a majority of survey respondents agreed that family law cases are less likely to settle before or during trial when one or both parties are self-represented, work should be undertaken to promote the awareness and availability of unbundled legal services among the members of the family law bar. These services would be more affordable for self-represented litigants than full representation and would likely result in more timely settlement of cases and fewer family law trials. Further research needs to be conducted on litigant satisfaction and the outcomes of cases where services are provided on an unbundled basis.

- Given that a substantial majority of respondents said that challenges arise in cases with self-represented litigants because of their unfamiliarity with the applicable legislation, the rules of court and the law of evidence, plain language guides in these areas should be drafted and made readily available to these litigants.

- As a substantial proportion of survey respondents said that self-represented litigants should be required to attend an information session on the law and court processes, consideration should be given to
developing and instituting such sessions. These sessions should be evaluated to determine their effectiveness in promoting case settlement and decreasing the number of trials.

• Given that a majority of Alberta respondents thought that mediation prior to trial should be required in cases where at least one party is self-represented, the feasibility and effectiveness of such a program, either by rule or by invocation of one party like BC’s Notice to Mediate regulation, on case settlement should be investigated by Alberta Justice.

• In light of the mixed views of respondents to the notion of licensed paralegals providing some services in family law cases, consideration should be given to introducing pilot programs involving the provision of various services by paralegals. It would be essential that these programs be evaluated to determine the extent to which they provide a cost effective and efficient means of settling family law disputes.

• Given that a majority of lawyers who refer cases for mediation said that they screen their family law clients for domestic violence, but relatively few said that they use standardized questions or a standardized form for this purpose, educational efforts should be made to raise the awareness among members of the bar of the availability of standardized instruments and the benefits of using them, as well as instruction on how to administer and interpret them.
Acknowledgements

The authors gratefully acknowledge the kind assistance of Justice James Williams of the Nova Scotia Supreme Court for providing us with the opportunity to survey those attending the Federation of Law Societies of Canada’s National Family Law Program 2014 in Whistler, British Columbia, and of Heather Walker for distributing our notices about the survey. We also extend our appreciation to Professors Nick Bala, Queen’s University, and Rachel Birnbaum, Western University, for their collaboration in drafting and administering the survey used in this project. Thanks are due to Joanne Paetsch, Canadian Research Institute for Law and the Family, for her assistance and thoughtful comments in preparing the text of the survey and her review of earlier drafts of this report.

The authors also wish to acknowledge the generous and continuing financial support of the Canadian Research Institute for Law and the Family by the Alberta Law Foundation, without which this project would not have been possible.
1.0 Introduction

Two issues have dominated the national dialogue on family law matters over the past several years: the need to ensure and improve Canadians’ access to justice, and the question of whether the federal Divorce Act should be amended to establish a rebuttable presumption of shared custody when married parents separate.

The issue of access to justice is not a new one, as Canada’s Chief Justice, Beverley McLachlin P.C., put it in her introduction to the final report of the Action Committee on Access to Justice in Civil and Family Matters (2013, p. i), because “as long as justice has existed, there have been those who struggled to access it.” However, this issue has taken on a fresh urgency of late:

... as Canadians celebrated the new millennium, it became clear that we were increasingly failing in our responsibility to provide a justice system that was accessible, responsible and citizen-focused. Reports told us that cost, delays, long trials, complex procedures and other barriers were making it impossible for more and more Canadians to exercise their legal rights.

Two of the barriers to justice identified by the Chief Justice, cost and complexity, figure prominently in a number of recent high-profile reports on access to justice and the burgeoning phenomenon of self-representation in civil and family court proceedings, including the report of the Family Justice Working Group of the Action Committee on Access to Justice in Civil and Family Matters (2013), the report of the Canadian Bar Association’s Equal Justice Initiative (2013), and the report of the National Self-represented Litigants Project (Macfarlane, 2013). These reports, together with the past work of the Canadian Research Institute for Law and the Family on the views of Alberta lawyers and judges (Bertrand, Paetsch, Bala & Birnbaum, 2012; Boyd, Bertrand & Paetsch, 2014), establish that the number of litigants without counsel is rising and that the primary cause of self-representation is the cost of obtaining legal services. These reports also acknowledge the role that the complexity of court rules, court processes and the rules of evidence play in frustrating self-represented parties’ effective use of the justice system.

Reports exploring potential solutions to the problem of improving access to justice, notably those of the Family Justice Working Group and the Equal Justice Initiative, suggest that the emphasis on litigation as a dispute resolution mechanism is a barrier in itself, and that, particularly in family law matters, the parties to legal disputes might be better served if other dispute resolution
mechanisms, such as mediation and collaborative settlement processes, were emphasized and presented to litigants as being on par with court processes.

The controversial issue of shared custody is also not new. Professors Susan Boyd and Claire Young (2002) have traced discussion of this issue to the debates of the federal Standing Committee on Justice and Legal Affairs in the early 1980s that led to the enactment of the “no-fault” Divorce Act of 1985. The question was most recently revived as a result of Bill C-560, a private member’s bill tabled by Conservative MP Maurice Vellacott (Saskatoon-Wanuskewin), which, if passed, would have amended the present Divorce Act to impose a rebuttable presumption of shared custody.

The family justice systems in each of Canada’s provinces and territories are affected by the dialogue on these two issues, particularly as the provinces and territories begin the difficult task of reappraising their civil justice systems in light of the recommendations made in the final report of the Action Committee on Access to Civil and Family Justice. In Alberta, this work is being undertaken by the Reforming Family Justice Initiative, led by the Alberta Court of Queen’s Bench, Alberta Justice and members of the Law Society of Alberta.

The National Family Law Program is a high-profile, four-day biennial conference organized by the Federation of Law Societies of Canada that attracts hundreds of lawyers and judges from across the country, and was most recently held in Whistler, British Columbia between 13 and 17 July 2014. The authors recognized the opportunity offered by such a gathering, and arranged, with Professors Rachel Birnbaum and Nick Bala, to survey the views and attitudes of conference attendees on issues relating to access to justice, the resolution of family law disputes and shared custody.

This report examines the results of our survey of attendees of the National Family Law Program 2014, and compares the views of Alberta respondents with those from the rest of Canada.

### 1.1 Terminology

It has been suggested that a distinction should be made between “unrepresented” and “self-represented” parties (Law Society of Upper Canada, 2008), with unrepresented litigants being those who do not have legal representation because they have no choice but to represent themselves, usually due to financial reasons, and self-represented litigants being those who elect to

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1 Divorce Act, RSC 1985, c. 3 (2nd Supp.)
proceed without counsel. It is often difficult to distinguish between these two groups (Birnbaum, Bala, & Bertrand, 2013), however, and in this report the term “self-represented” is used to describe litigants who do not have a lawyer for any reason.

Somewhat greater confusion surrounds the terminology used to describe children’s parenting arrangements after their parents’ separation, partly because the language of the federal Divorce Act is often different than that of the provincial legislation on domestic relations, and partly because similar terms can have different meanings in different jurisdictions.

“Shared custody” is the term used by the federal Child Support Guidelines to describe a situation in which the payor of child support has the children for 40% or more of the children’s time. Other terms that describe parents who share their children’s time equally or near-equally include “equal parenting time,” the term used in Bill C-560, “joint physical custody” and “shared residence.” As the Child Support Guidelines are in place throughout Canada except Quebec, the term “shared custody” is used in this report to describe circumstances in which separated parents share their children’s time equally or near-equally.

Circumstances in which separated parents are jointly involved in making decisions about the raising of their children are variously described as “joint custody,” “joint legal custody,” “joint guardianship” and “shared parenting.” In this report, the term “shared parenting,” the term used by the Association of Family and Conciliation Courts, is used to described circumstances in which parents are jointly responsible for making decisions about the children, as parents with shared parenting may or may not have shared custody of their children.

1.2 The survey

With the kind permission of Justice James Williams of the Nova Scotia Supreme Court, we were able to survey the attitudes of attendees of the National Family Law Program 2014, on shared parenting and shared custody, and on establishing a legislated presumption that separated parents should have shared custody of their children; their familiarity with and use of mediation; and, their experiences with and perceptions of self-represented litigants, self-represented litigants’ difficulties with the court system and the case outcomes for self-represented litigants; see Appendix A.

The portion of the survey on respondents’ experiences with self-represented litigants was based on the instrument used in the survey of Alberta judges by
Boyd et al. (2014), which was itself an adaptation of the instrument used in the survey of Alberta lawyers by Bertrand et al. (2012).

A total of 555 lawyers, judges, mediators and mental health professionals attended the conference in Whistler. An email invitation to complete the National Family Law Program 2014 Survey was distributed to conference participants by the conference organizer in early July and again approximately one week before the commencement of the program. Participants were asked to complete the survey by 31 July 2014. A total of 176 valid responses were received by the end of the polling period, resulting in a response rate of 31.7%.
2.0 Survey findings

This chapter presents a selected range of findings from the National Family Law Program 2014 Survey. These findings concern: lawyers’ and judges’ experience with shared parenting and shared custody, and their views on establishing a legislated presumption that separated parents should have shared custody of their children; respondents’ familiarity with and use of mediation to resolve family law disputes; and, respondents’ experiences with and perceptions of self-represented litigants, self-represented litigants’ difficulties with the court system and the case outcomes for self-represented litigants. The findings are supplemented by respondents’ write-in comments elaborating on each of the survey subjects.

2.1 Demographic data

A total of 176 valid responses to the survey were received, of which 22 were provided by judges and 145 were provided by lawyers. Of these 167 legally-trained respondents, 48 identified as male and 119 identified as female.

The majority of judges and lawyers answering the survey practiced in British Columbia (n=55), Alberta (n=35), Ontario (n=26) and Nova Scotia (n=14); eight or fewer responses were received from practitioners in Manitoba, Newfoundland and Labrador, Northwest Territories, Quebec, Saskatchewan and Yukon, as presented in Figure 2.1. No responses were received from professionals practising in Nunavut and Prince Edward Island.

Figure 2.1
Respondents’ province/territory of practice

n = 167
Survey respondents were very experienced and their practices tended to focus on family law matters. Judge respondents had been appointed for an average of 11.3 years (range = 0.2 to 35 years) and 63% of their cases in the past year had been family law matters; lawyer respondents had been practising for an average of 19.5 years (range = 1 to 46 years) and 85.3% of their cases in the past year had been family law cases.

### 2.2 Resolution of parenting disputes

On average, 41.6% of Alberta judges’ and lawyers’ family law cases involving children resulted in a form of shared custody and 77.8% resulted in a form of shared parenting; judges and lawyers from the rest of Canada reported that 47.4% of their cases resulted in a form of shared custody and 64.9% resulted in a form of shared parenting, as shown in Figure 2.2. Cases resulting in limited or no contact with a parent were less common in Alberta (9.9% and 1.4%, respectively) than in the rest of Canada (13.7% and 3.2%).

![Figure 2.2](image)

Resolution of parenting disputes in respondents’ family law cases

A significant majority of respondents reported that in the past five years, the portion of their family law cases resulting in a form of shared custody has increased substantially or increased somewhat; see Figure 2.3. Only one respondent said that the portion of his or her family law cases resulting in a form of shared...
custody had decreased somewhat, and none said that the portion of such cases had decreased substantially.

In light of the recent public debate on Bill C-560, respondents were asked whether they supported amending the Divorce Act to use terminology other than “custody” and “access” to describe the post-separation arrangements for the care of children, such as “parental responsibilities,” “parenting time” or other similar alternatives. More than three-quarters of respondents in Alberta (81.8%) and in the rest of Canada (76.3%) indicated that they would support such an amendment, as shown in Figure 2.4. Respondents were also asked whether they supported amending the Divorce Act to create a presumption that separating spouses would have shared custody of their children, phrased in the survey as “a presumption of equal care or residential time.” Although about three quarters of all respondents opposed such an amendment, support for the amendment was slightly higher in Alberta at 26.5% than in the rest of Canada at 22.3%; see Figure 2.5.

Finally, respondents were invited to provide their comments on whether the Divorce Act should be amended to create a presumption that separating parents should have shared custody of their children; their responses are presented in Table 2.1. Among those in favour of amendment, the most frequent comment, made by two respondents from Alberta and three from the rest of Canada, was that the presumption would reduce conflict between separated parents. Among those opposed to amendment, the most frequent comments were that parenting arrangements must be determined according to the best interests of the child, made by five respondents from Alberta and 23 respondents from the rest of Canada, and that arrangements must be determined according to the unique circumstances of each family and each child, made by five respondents from Alberta and 18 respondents from the rest of Canada.
Figure 2.4
Whether respondents support amending the language of the *Divorce Act* regarding arrangements for the post-separation care of children

Alberta n=33, rest of Canada n=131; Missing cases=3

Figure 2.5
Whether respondents support amending the *Divorce Act* to create a presumption of shared custody

Alberta n=34, rest of Canada n=130; Missing cases=3
Table 2.1
Respondents’ comments on the amendment of the *Divorce Act* to establish a presumption of shared custody

<table>
<thead>
<tr>
<th>Comment</th>
<th>Alberta</th>
<th>Rest of Canada</th>
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<tbody>
<tr>
<td><strong>Supports amendment</strong></td>
<td></td>
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<tr>
<td>Presumption of shared custody would reduce conflict and promote settlement</td>
<td>2</td>
<td>3</td>
</tr>
<tr>
<td>Presumption of shared custody would address inequalities created by parenting styles and responsibilities</td>
<td>1</td>
<td></td>
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<tr>
<td>Presumption of shared custody is a good starting point</td>
<td></td>
<td>3</td>
</tr>
<tr>
<td>Children have a right to equal time with both parents</td>
<td></td>
<td>2</td>
</tr>
<tr>
<td>Presumption of shared custody would help to reduce the initial conflict following relationship breakdown which often results in the making of false criminal allegations</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>Presumption of shared custody would address the impact of the status quo established following relationship breakdown when the father moves out</td>
<td>1</td>
<td></td>
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<tr>
<td><strong>Expresses qualified support of amendment</strong></td>
<td></td>
<td></td>
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<tr>
<td>Support goal of presumption of shared custody, but parenting responsibilities will not be shared in practice</td>
<td>2</td>
<td></td>
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<tr>
<td>Support presumption of shared custody, but must be subject to the best interest of the child</td>
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<td>3</td>
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<tr>
<td>Support presumption as a starting point, but would create problems in abusive relationships</td>
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<td>1</td>
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<tr>
<td><strong>Does not support amendment</strong></td>
<td></td>
<td></td>
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<tr>
<td>Parenting arrangements must be determined by reference to the child’s best interests</td>
<td>5</td>
<td>23</td>
</tr>
<tr>
<td>Parenting arrangements must be determined by reference to the unique circumstances of each family and each child</td>
<td>5</td>
<td>18</td>
</tr>
<tr>
<td>Shared custody is not appropriate in all cases</td>
<td>5</td>
<td>12</td>
</tr>
<tr>
<td>There should be no presumptions about parenting arrangements at all</td>
<td>3</td>
<td>12</td>
</tr>
<tr>
<td>Presumption of shared custody would promote conflict</td>
<td>2</td>
<td>7</td>
</tr>
<tr>
<td>It is often best for children to have a primary residence</td>
<td>2</td>
<td>6</td>
</tr>
<tr>
<td>Shared custody is not always in children’s best interests</td>
<td>1</td>
<td>13</td>
</tr>
<tr>
<td>Presumption of shared custody is inappropriate</td>
<td>1</td>
<td>12</td>
</tr>
<tr>
<td>Shared custody may not mesh with parenting arrangements prior to separation</td>
<td>1</td>
<td>8</td>
</tr>
<tr>
<td>Shared custody will not result in an equal sharing of the costs or responsibilities of raising children</td>
<td>1</td>
<td>5</td>
</tr>
<tr>
<td>Social scientists do not support shared custody</td>
<td>1</td>
<td>3</td>
</tr>
<tr>
<td>Shared custody would be dangerous</td>
<td>1</td>
<td>1</td>
</tr>
</tbody>
</table>
Presumption of shared custody would encourage court to take shortcuts in its analysis

Presumption of shared custody would be used as leverage to extract concessions relating to support or property

Presumption of shared custody focuses on parents’ rights not on children’s rights

Presumption of shared custody would shift the burden of proof in cases where there is a need for a child to have one primary caregiver

Shared custody would make parenting after separation harder

Presumption of shared custody could be used as a tool of control in situations of domestic violence

Abused parents may not have the financial or emotional resources to contest a presumption of shared custody

Presumption of shared custody would create a high potential for adverse outcomes on initial applications

Alberta n=25, rest of Canada n=103
Multiple response data

### 2.3 Self-represented litigants

A significant majority of respondents said that there are *much more* or *more* self-represented litigants now as compared to three years ago (80.7% of Alberta respondents and 76.5% of respondents from the rest of Canada), as shown in Figure 2.6. Only one respondent said that the number of self-represented litigants is *less*, and none said that the number is *much less* than three years ago.

#### 2.3.1 Frequency of self-representation

On average, Alberta respondents said that 22.5% of their family law cases over the past year had involved at least one self-represented litigant for *part* of the litigation process (range = 0 to 60%) and that 15% of their cases had involved at least one self-represented litigant for *all* of the litigation process (range = 0 to 40%). Respondents from the rest of Canada said that 20% of their cases over the past year had involved at least one self-represented litigant for *part* of the litigation process (range = 0 to 100%) and that 10% had involved at least one self-represented litigant for *all* of the litigation process (range = 0 to 90%). These results are shown in Figure 2.7.
2.3.2 Challenges arising from a party’s decision to self-represent

Drawing from the earlier survey (Bertrand et al., 2012), respondents were asked whether added challenges arise in cases involving at least one self-represented litigant because: such litigants have unrealistic expectations for the outcome of
the case; such litigants are more likely to take unreasonable positions based on principle; and, such litigants are more interested in the fight than the result. These results are presented in Table 2.2. Respondents from Alberta were significantly more likely to say that challenges always or usually arise for these reasons than respondents from the rest of Canada; respondents from the rest of Canada were more likely to say that challenges arise only sometimes.

Table 2.2
Respondents’ views on whether certain challenges arise in cases involving at least one self-represented litigant

<table>
<thead>
<tr>
<th></th>
<th>Always</th>
<th>Usually</th>
<th>Sometimes</th>
<th>Rarely</th>
<th>Don’t know</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Self-represented litigants have unrealistically high expectations of outcome</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Alberta</td>
<td>25.0</td>
<td>59.4</td>
<td>15.6</td>
<td>0.0</td>
<td>0.0</td>
</tr>
<tr>
<td>Rest of Canada</td>
<td>16.8</td>
<td>43.0</td>
<td>37.4</td>
<td>0.0</td>
<td>2.8</td>
</tr>
<tr>
<td><strong>Self-represented litigants are more likely to take unreasonable positions based on principle</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Alberta</td>
<td>22.6</td>
<td>58.1</td>
<td>19.4</td>
<td>0.0</td>
<td>0.0</td>
</tr>
<tr>
<td>Rest of Canada</td>
<td>19.6</td>
<td>47.7</td>
<td>29.9</td>
<td>0.9</td>
<td>1.9</td>
</tr>
<tr>
<td><strong>Self-represented litigants are more interested in the fight than the result</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Alberta</td>
<td>6.5</td>
<td>22.6</td>
<td>58.1</td>
<td>9.7</td>
<td>3.2</td>
</tr>
<tr>
<td>Rest of Canada</td>
<td>4.7</td>
<td>21.5</td>
<td>59.8</td>
<td>9.3</td>
<td>4.7</td>
</tr>
</tbody>
</table>

Expectations of outcome: Alberta n=32, rest of Canada n=107; Missing cases=28
Positions based on principle: Alberta n=31, rest of Canada n=107; Missing cases=29
More interested in the fight: Alberta n=31, rest of Canada n=107; Missing cases=29

Respondents were also asked whether the involvement of a self-represented party in a case impacted the likelihood that a case would settle either before trial or before the end of trial. About two-fifths of respondents from both Alberta (37.5%) and the rest of Canada (40.4%) said that settlement in such circumstances was less likely than if all parties had counsel, however respondents from Alberta (46.9%) were more likely than respondents from the rest of Canada (41.3%) to say that a party’s self-representation made the prospects of settlement much less likely; see Figure 2.8.

Although respondents, particularly those outside Alberta, were generally less skeptical of the likelihood of settlement when no party has counsel (68.8% of respondents from Alberta believed that the chances of settlement are less likely or much less likely when all parties are self-represented, compared to 59.1% of respondents from the rest of Canada), respondents still viewed the likelihood of settlement as significantly less likely than if all parties had counsel. Only 3.1% of respondents from Alberta and 4.8% of respondents from the rest of Canada believe that the chances of settlement before trial or before the end of trial are
more likely or much more likely if all parties are self-represented. These results are presented in Figure 2.9.

**Figure 2.8**
Respondents’ views of the likelihood of settlement when one party is self-represented compared to when all parties have counsel

![Bar chart](image)

Alberta n=32, rest of Canada n=109; Missing cases=26

**Figure 2.9**
Respondents’ views of the likelihood of settlement when all parties are self-represented compared to when all parties have counsel

![Bar chart](image)

Alberta n=32, rest of Canada n=105; Missing cases=30

Drawing from the earlier survey (Bertrand et al., 2012), respondents were asked whether added challenges arise in cases involving at least one self-represented litigant because: such litigants are unfamiliar with the legislation that applies to
their case; such litigants are unfamiliar with the rules of court; such litigants are unfamiliar with hearing and trial processes; and, such litigants are unfamiliar with the law of evidence. These results are presented in Table 2.3. A significant majority of all respondents said that challenges *always* or *usually* arise for these reasons, but two notable differences were revealed between the views of Albertans and those of respondents from the rest of Canada:

- Most respondents from Alberta said that challenges *usually* arise from self-represented litigants’ unfamiliarity with the rules of court (61.3%), while most respondents from the rest of Canada said that challenges *always* arise for this reason (48.6%).

- Half each of Alberta respondents said that challenges *always* or *usually* arise from self-represented litigants’ unfamiliarity with the law of evidence, while a clear majority of respondents from the rest of Canada said that challenges *always* arise for this reason (61.3%) and about a third said that challenges *usually* arise for this reason (34.9%).

**Table 2.3**
Respondents’ views on whether added challenges arise in cases involving at least one self-represented litigant because of the litigant’s lack of familiarity with the law, rules and court processes

<table>
<thead>
<tr>
<th>Unfamiliarity with the applicable legislation</th>
<th>Always (%)</th>
<th>Usually (%)</th>
<th>Sometimes (%)</th>
<th>Rarely (%)</th>
<th>Don’t know (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alberta</td>
<td>40.6</td>
<td>50.0</td>
<td>9.4</td>
<td>0.0</td>
<td>0.0</td>
</tr>
<tr>
<td>Rest of Canada</td>
<td>29.9</td>
<td>57.0</td>
<td>10.3</td>
<td>1.9</td>
<td>0.9</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Unfamiliarity with the rules of court</th>
<th>Always (%)</th>
<th>Usually (%)</th>
<th>Sometimes (%)</th>
<th>Rarely (%)</th>
<th>Don’t know (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alberta</td>
<td>38.7</td>
<td>61.3</td>
<td>0.0</td>
<td>0.0</td>
<td>0.0</td>
</tr>
<tr>
<td>Rest of Canada</td>
<td>48.6</td>
<td>43.9</td>
<td>5.6</td>
<td>0.9</td>
<td>0.9</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Unfamiliarity with hearing and trial processes</th>
<th>Always (%)</th>
<th>Usually (%)</th>
<th>Sometimes (%)</th>
<th>Rarely (%)</th>
<th>Don’t know (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alberta</td>
<td>34.4</td>
<td>62.5</td>
<td>3.1</td>
<td>0.0</td>
<td>0.0</td>
</tr>
<tr>
<td>Rest of Canada</td>
<td>36.9</td>
<td>55.3</td>
<td>4.9</td>
<td>1.9</td>
<td>1.0</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Unfamiliarity with the law of evidence</th>
<th>Always (%)</th>
<th>Usually (%)</th>
<th>Sometimes (%)</th>
<th>Rarely (%)</th>
<th>Don’t know (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alberta</td>
<td>50.0</td>
<td>50.0</td>
<td>0.0</td>
<td>0.0</td>
<td>0.0</td>
</tr>
<tr>
<td>Rest of Canada</td>
<td>61.3</td>
<td>34.9</td>
<td>2.9</td>
<td>0.0</td>
<td>0.9</td>
</tr>
</tbody>
</table>

Applicable legislation: Alberta n=32, rest of Canada n=107; Missing cases=28
Rules of court: Alberta n=31, rest of Canada n=107; Missing cases=29
Hearing and trial processes: Alberta n=31, rest of Canada n=103; Missing cases=33
Law of evidence: Alberta n=32, rest of Canada n=106; Missing cases=29
2.3.3 Results achieved by self-represented litigants

With respect to the results that self-represented litigants are likely to ultimately achieve, the majority of respondents said that self-represented litigants fare worse than litigants with counsel, with respondents in Alberta expressing a more negative view of the probable outcomes for self-represented litigants than respondents from the rest of Canada, particularly regarding the outcomes for self-represented litigants on parenting issues; see Table 2.4:

- For matters involving child support and spousal support, 59.4% of Alberta respondents and 53.2% of respondents from the rest of Canada believe that self-represented litigants achieve worse results than litigants with counsel. Only three respondents, one of whom was from Alberta, believe that self-represented litigants achieve better results on support issues.

- With respect to matters involving parenting arrangements, 56.3% of respondents from Alberta, compared to 38.9% of respondents from the rest of Canada, believe that self-represented litigants achieve worse results than litigants with counsel. However, a significant number of respondents (21.9% of Alberta respondents and 30.6% of respondents from the rest of Canada) believe that self-represented litigants achieve better or similar outcomes on parenting issues than litigants with counsel.

<table>
<thead>
<tr>
<th></th>
<th>Better</th>
<th>No difference</th>
<th>Worse</th>
<th>Don’t know</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>n</td>
<td>%</td>
<td>n</td>
<td>%</td>
</tr>
<tr>
<td>Child support and spousal support</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Alberta</td>
<td>1 3.1</td>
<td>6 18.8</td>
<td>19 59.4</td>
<td>6 18.8</td>
</tr>
<tr>
<td>Rest of Canada</td>
<td>2 1.8</td>
<td>27 24.8</td>
<td>58 53.2</td>
<td>22 20.2</td>
</tr>
<tr>
<td>Parenting arrangements</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Alberta</td>
<td>5 15.6</td>
<td>2 6.3</td>
<td>18 56.3</td>
<td>7 21.9</td>
</tr>
<tr>
<td>Rest of Canada</td>
<td>4 3.7</td>
<td>29 26.9</td>
<td>42 38.9</td>
<td>33 30.6</td>
</tr>
<tr>
<td>Division of property</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Alberta</td>
<td>0 0.0</td>
<td>4 12.5</td>
<td>18 56.3</td>
<td>10 31.3</td>
</tr>
<tr>
<td>Rest of Canada</td>
<td>1 0.9</td>
<td>20 18.5</td>
<td>58 53.7</td>
<td>29 26.9</td>
</tr>
</tbody>
</table>

Table 2.4
Respondents’ views on whether self-represented litigants achieve better or worse outcomes than litigants with counsel

Child support and spousal support: Alberta n=32, rest of Canada n=109; Missing cases=26
Parenting arrangements: Alberta n=32, rest of Canada n=108; Missing cases=27
Division of property: Alberta n=32, rest of Canada n=108; Missing cases=27
With respect to matters involving the division of property, 56.3% of Alberta respondents and 53.7% of respondents from the rest of Canada believe that self-represented litigants achieve worse results than litigants represented by counsel. Only one respondent, from outside Alberta, believed that self-represented litigants achieve better results on property issues.

2.3.4 Treatment of self-represented litigants by the judiciary and the bar

Although most respondents viewed self-represented litigants as less likely or much less likely to resolve a case without a trial and said that the results self-represented litigants achieve at trial are worse than the results that would have been achieved with counsel, most respondents also believed that self-represented litigants are treated fairly or very fairly by both the bench and the bar, with the fairest treatment being provided by the bench; see Figures 2.10 and 2.11:

- Approximately three-quarters of respondents from Alberta (78.1%) and the rest of Canada (71.8%) said that self-represented litigants receive fair or very fair treatment from opposing counsel. More respondents from the rest of Canada (21.8%) than Alberta (9.4%) described counsel’s treatment of self-represented litigants as satisfactory, while less than 7% of respondents described the treatment they receive as unfair. No respondents said that self-represented litigants are treated very unfairly by opposing counsel.

- Almost all respondents from Alberta 96.9% said that self-represented litigants receive fair or very fair treatment from the bench; only one respondent said that self-represented litigants receive unfair treatment. The majority of respondents from the rest of Canada (89.1%) said that self-represented litigants receive fair or very fair treatment from the bench, 9.1% said that they receive satisfactory treatment and none said that they receive unfair treatment. No respondents said that self-represented litigants are treated very unfairly by the bench.
No respondents answered “very unfair”
Alberta n=32, rest of Canada n=110; Missing cases=25

One respondent suggested that the survey questions asking respondents to express a general view on the fairness with which self-represented litigants are treated by the bar and bench may have failed to capture a nuanced spectrum of treatment self-represented litigants may receive:
My comments about [self-represented litigants] receiving satisfactory treatment from opposing counsel and judges was an average as there was no satisfactory option given. In my experience, there are both judges and counsel who treat [self-represented litigants] very fairly, and some who treat [self-represented litigants] very unfairly. There are few in the middle – most tend to fall at the extremes of the spectrum.

2.3.5 Improving access to justice for self-represented litigants

Respondents were next asked a series of questions intended to explore their views on various means of improving self-represented litigants’ ability to access justice, including the unbundling of legal services provided by lawyers and the provision of legal services by paralegals. Respondents were first asked to identify which of a list of fifteen proposed measures might improve self-represented litigants’ use of the court system; their responses are presented in Table 2.5:

- Only two proposed measures received the support of more than two-fifths of respondents from both Alberta and the rest of Canada, a requirement that self-represented parties attend an information session on the law and court processes (54.3% of Alberta respondents and 42.4% of respondents from the rest of Canada) and providing plain-language guides to court and trial processes (45.7% of Alberta respondents and 45.5% of respondents from the rest of Canada).

- The measure supported by the majority of Alberta respondents was requiring mediation prior to trial when at least one party is self-represented (57.1%), supported by only 23.5% of respondents from the rest of Canada. The measure supported by the majority of respondents from the rest of Canada was providing plain-language guides to court and trial processes.

- The provision of plain-language guides to the law and court processes was supported by a slightly greater proportion of Albertans (average of 42.9%) than respondents from the rest of Canada (average of 40.2%), and although the actual simplification of the law and court processes were the least preferred measures to improve self-represented litigants’ use of the court system, this measure was also supported by a slightly greater proportion of Albertans (average of 21%) than respondents from the rest of Canada (average of 20%).
Table 2.5  
Respondents’ views on measures that might improve self-represented litigants’ use of the court system

<table>
<thead>
<tr>
<th>Measure</th>
<th>Alberta</th>
<th></th>
<th>%</th>
<th>Rest of Canada</th>
<th></th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>Requiring mandatory mediation <em>prior to the trial of an action</em> when <em>at least one party</em> is self-represented</td>
<td>20</td>
<td></td>
<td>57.1</td>
<td>31</td>
<td></td>
<td>23.5</td>
</tr>
<tr>
<td>Requiring self-represented parties to attend an information session on the law and court processes</td>
<td>19</td>
<td></td>
<td>54.3</td>
<td>56</td>
<td></td>
<td>42.4</td>
</tr>
<tr>
<td>Providing plain-language guides to <em>court and trial processes</em></td>
<td>16</td>
<td></td>
<td>45.7</td>
<td>60</td>
<td></td>
<td>45.5</td>
</tr>
<tr>
<td>The court adopting a mediation-litigation hybrid approach in which judicial mediation is attempted and trial ensues if settlement cannot be reached when <em>at least one party</em> is self-represented</td>
<td>16</td>
<td></td>
<td>45.7</td>
<td>40</td>
<td></td>
<td>30.3</td>
</tr>
<tr>
<td>Requiring mandatory mediation <em>following the commencement of an action</em> when <em>at least one party</em> is self-represented</td>
<td>16</td>
<td></td>
<td>45.7</td>
<td>32</td>
<td></td>
<td>24.2</td>
</tr>
<tr>
<td>Providing plain-language guides to the <em>Divorce Act</em>, the Child Support Guidelines and the applicable provincial legislation</td>
<td>15</td>
<td></td>
<td>42.9</td>
<td>47</td>
<td></td>
<td>35.6</td>
</tr>
<tr>
<td>Providing plain-language guides to the <em>rules of evidence</em></td>
<td>14</td>
<td></td>
<td>40.0</td>
<td>52</td>
<td></td>
<td>39.4</td>
</tr>
<tr>
<td>The court adopting a mediation-litigation hybrid approach in which judicial mediation is attempted and trial ensues if settlement cannot be reached when <em>all parties</em> are self-represented</td>
<td>14</td>
<td></td>
<td>40.0</td>
<td>43</td>
<td></td>
<td>32.6</td>
</tr>
<tr>
<td>The court adopting an inquisitorial approach to the hearing of applications when <em>all parties</em> are self-represented</td>
<td>14</td>
<td></td>
<td>40.0</td>
<td>29</td>
<td></td>
<td>22.0</td>
</tr>
<tr>
<td>The court appointing counsel as amicus curiae to facilitate hearings and trials when <em>all parties</em> are self-represented</td>
<td>12</td>
<td></td>
<td>37.5</td>
<td>23</td>
<td></td>
<td>17.4</td>
</tr>
<tr>
<td>The court appointing counsel as amicus curiae to facilitate hearings and trials when <em>at least one party</em> is self-represented</td>
<td>9</td>
<td></td>
<td>25.7</td>
<td>29</td>
<td></td>
<td>22.0</td>
</tr>
<tr>
<td>The court adopting an inquisitorial approach to the hearing of applications when <em>at least one party</em> is self-represented</td>
<td>9</td>
<td></td>
<td>25.7</td>
<td>20</td>
<td></td>
<td>15.2</td>
</tr>
<tr>
<td>Simplifying the rules of court</td>
<td>8</td>
<td></td>
<td>22.9</td>
<td>34</td>
<td></td>
<td>25.8</td>
</tr>
<tr>
<td>Simplifying the rules of evidence and trial processes</td>
<td>8</td>
<td></td>
<td>22.9</td>
<td>27</td>
<td></td>
<td>20.5</td>
</tr>
<tr>
<td>Simplifying the legislation on family law matters</td>
<td>6</td>
<td></td>
<td>17.1</td>
<td>18</td>
<td></td>
<td>13.6</td>
</tr>
</tbody>
</table>

Alberta n=35, rest of Canada n=132
Multiple response data
Respondents were asked to identify and rank the three proposed measures they believed are most likely to improve self-represented litigants’ use of the court system, as shown in Figure 2.12. The most frequently selected measures by Alberta respondents were: requiring self-represented parties to attend an information session on the law and court processes (selected as first choice by 29.2% of respondents); providing plain-language guides to court and trial processes and the court appointing counsel as amicus curiae to facilitate the hearing or trial process when all parties are self-represented (selected as second choice by 13.6% of respondents each); and, requiring mandatory mediation following commencement of an action whenever at least one party is self-represented (selected as third choice by 27.3% of respondents).

The most frequently selected measures by respondents from the rest of Canada were: providing plain-language guides to court and trial processes (selected as first choice by 21.1% of respondents); providing plain language guides to the rules of evidence (selected as second choice by 12.7% of respondents); and providing plain-language guides to court and trial processes, providing plain-language guides to the Divorce Act, the Child Support Guidelines and the provincial legislation applicable in family law matters, and requiring self-represented parties to attend an information session on the law and court processes (selected as third choice by 14.1% of respondents each).

Respondents were also asked to identify other measures that they believed would improve self-represented litigants’ use of the court system. The comments provided were largely editorial in nature, except for these:

- Two respondents, one from Alberta and one from the rest of Canada, said that the scope and funding of legal aid programs should be expanded.
- One respondent from the rest of Canada said that judges need to be trained in mediation.
- Another respondent from the rest of Canada said that all documents need to be translated into “other main languages.”
2.3.5.1 Limited scope retainers

With respect to lawyers’ provision of services on a limited scope basis, 63.3% of lawyers from Alberta said that they provide services on a limited-scope retainer, and 86.7% were aware of other lawyers in their jurisdiction providing legal services on a similar basis. Lawyers from the rest of Canada were less likely to say that they provide services on a limited-scope retainer basis (59.8%) and that they were aware of other lawyers in their jurisdiction providing legal services on such a basis (75.6%).

Lawyers were asked how frequently they deal with self-represented litigants who have retained counsel for limited purposes; these results are presented in Table 2.6:

- Respondent lawyers from outside Alberta were more likely (44.9%) to sometimes deal with litigants who had retained counsel for representation in court for all or part of the litigation process than respondent lawyers from Alberta (33.3%). More Alberta respondents (63.4%) said that they rarely or never deal with litigants retaining counsel for this purpose than respondents from the rest of Canada (51.7%).
• Although similar proportions of respondents from Alberta (51.7%) and from the rest of Canada (45.5%) said that they sometimes or rarely deal with litigants who had retained counsel to conduct research, 40.9% of respondents from the rest of Canada said that they never deal with litigants retaining counsel for this purpose compared to 31% of Alberta respondents.

• Respondents most frequently deal with litigants who have retained counsel for the purpose of obtaining legal advice; 10% of Alberta respondents and 17.2% of respondents from the rest of Canada said that they usually deal with litigants who had retained counsel for this purpose. Almost half of respondent lawyers from Alberta (46.7%) and from the rest of Canada (46%) said that they sometimes deal with litigants who had retained counsel for legal advice.

• No respondents said that they always deal with self-represented litigants who had retained counsel for the limited purposes of providing representation, preparing written arguments, conducting research or obtaining legal advice, and none said that they usually deal with litigants who had retained counsel for the purposes of preparing written arguments or conducting research.

2.3.5.2 Provision of legal services by paralegals

All respondents were asked whether they approved of licensed paralegals providing some services in family law cases. Respondents from the rest of Canada were evenly split on the issue, while 54.8% of Alberta respondents favoured paralegals providing such services and 45.2% were opposed; see Figure 2.13.

Table 2.6
How frequently respondent lawyers deal with self-represented litigants who have retained counsel for specific limited purposes during the litigation process

<table>
<thead>
<tr>
<th>Services</th>
<th>Usually %</th>
<th>Sometimes %</th>
<th>Rarely %</th>
<th>Never %</th>
<th>Don’t know %</th>
</tr>
</thead>
<tbody>
<tr>
<td>Providing representation in court for</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>all or part of litigation process</td>
<td>Alberta</td>
<td>3.3</td>
<td>33.3</td>
<td>36.7</td>
<td>26.7</td>
</tr>
<tr>
<td></td>
<td>Rest of Canada</td>
<td>1.1</td>
<td><strong>44.9</strong></td>
<td>36.0</td>
<td>15.7</td>
</tr>
<tr>
<td>Preparing written arguments during the</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>litigation process</td>
<td>Alberta</td>
<td>0.0</td>
<td>23.3</td>
<td><strong>40.0</strong></td>
<td>33.3</td>
</tr>
<tr>
<td></td>
<td>Rest of Canada</td>
<td>0.0</td>
<td>29.5</td>
<td><strong>34.1</strong></td>
<td>30.7</td>
</tr>
<tr>
<td>Conducting research during the litigation process</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Alberta</td>
<td>0.0</td>
<td>13.8</td>
<td><strong>37.9</strong></td>
<td>31.0</td>
<td>17.2</td>
</tr>
<tr>
<td>Rest of Canada</td>
<td>0.0</td>
<td>18.2</td>
<td>27.3</td>
<td><strong>40.9</strong></td>
<td>13.6</td>
</tr>
</tbody>
</table>
Respondents who approved of the use of paralegals were then asked which, if any, of a list of potential services they believed paralegals could provide; these responses are presented in Table 2.7. The most common service respondents from outside Alberta said that paralegals could assist with was the preparation of court forms and other documents (65.4%); this task and assisting with the identification and disclosure of documents were the most commonly approved services by respondents from Alberta (70.6% each).

The preparation of court forms and other documents (65.4%) and the identification and disclosure of documents (59.6%) were the only tasks that more than one-half of respondents from the rest of Canada approved paralegals performing. Slightly more than one-half of Alberta respondents agreed that paralegals could also assist in the preparation of parenting schedules (52.9%), the determination of documents that need to be filed in court (52.9%), and the calculation of child support and children’s special expenses (52.9%).
No respondents from Alberta believed that paralegals could act as agent in certain simple contested matters, and no respondents from the rest of Canada believed that paralegals could act as agent in all contested matters. No respondents, from either Alberta or the rest of Canada, agreed that paralegals could provide legal advice.

Table 2.7
Respondents’ views on the services that might be performed by licensed paralegals in family law matters

<table>
<thead>
<tr>
<th>Service</th>
<th>Alberta</th>
<th></th>
<th>Rest of Canada</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Preparation of court forms and other documents</td>
<td>12</td>
<td>70.6%</td>
<td>34</td>
<td>65.4%</td>
</tr>
<tr>
<td>Assisting with identification and disclosure of documents in court proceedings</td>
<td>12</td>
<td>70.6%</td>
<td>31</td>
<td>59.6%</td>
</tr>
<tr>
<td>Preparation of parenting schedules</td>
<td>9</td>
<td>52.9%</td>
<td>11</td>
<td>21.2%</td>
</tr>
<tr>
<td>Determining which documents must be filed in court</td>
<td>9</td>
<td>52.9%</td>
<td>19</td>
<td>36.5%</td>
</tr>
<tr>
<td>Calculation of child support and children’s special expenses</td>
<td>9</td>
<td>52.9%</td>
<td>18</td>
<td>34.6%</td>
</tr>
<tr>
<td>Preparation of affidavits</td>
<td>8</td>
<td>47.1%</td>
<td>20</td>
<td>38.5%</td>
</tr>
<tr>
<td>Explaining court procedures</td>
<td>8</td>
<td>47.1%</td>
<td>17</td>
<td>32.7%</td>
</tr>
<tr>
<td>Variation of parenting schedules</td>
<td>6</td>
<td>35.3%</td>
<td>5</td>
<td>9.6%</td>
</tr>
<tr>
<td>Variation of child support</td>
<td>6</td>
<td>35.3%</td>
<td>8</td>
<td>15.4%</td>
</tr>
<tr>
<td>Acting as agent in uncontested matters</td>
<td>4</td>
<td>23.5%</td>
<td>18</td>
<td>34.6%</td>
</tr>
<tr>
<td>Calculation of spousal support</td>
<td>4</td>
<td>23.5%</td>
<td>11</td>
<td>21.2%</td>
</tr>
<tr>
<td>Variation of spousal support</td>
<td>3</td>
<td>17.6%</td>
<td>4</td>
<td>7.7%</td>
</tr>
<tr>
<td>Calculation of property division</td>
<td>2</td>
<td>11.8%</td>
<td>7</td>
<td>13.5%</td>
</tr>
<tr>
<td>Acting as agent in all contested matters</td>
<td>1</td>
<td>5.9%</td>
<td>0</td>
<td>0.0%</td>
</tr>
<tr>
<td>Acting as agent in a limited number of simple contested matters</td>
<td>0</td>
<td>0.0%</td>
<td>6</td>
<td>11.5%</td>
</tr>
</tbody>
</table>

No respondents answered “provision of legal advice”
This question was only asked of respondents who approved of paralegals providing services in family law
Alberta n=17, rest of Canada n=52
Multiple response data

2.3.5.3 Respondents’ comments on access to justice for self-represented litigants

Finally, respondents were asked whether they had any other comments about self-represented litigants or access to justice in family law matters. These comments were coded and are presented in Table 2.8.

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3 These responses include respondents’ comments in answer to a request that they identify any other measures, beyond the potential measures identified in the survey, that they believed would improve self-represented litigants’ use of the court system.
### Table 2.8
Respondents’ comments on self-represented litigants and access to justice in family law matters

<table>
<thead>
<tr>
<th>Comment</th>
<th>Alberta</th>
<th>Rest of Canada</th>
</tr>
</thead>
<tbody>
<tr>
<td>Funding of legal aid should be increased</td>
<td>5</td>
<td>4</td>
</tr>
<tr>
<td>Efforts to accommodate self-represented litigants only encourage people to represent themselves</td>
<td>3</td>
<td>1</td>
</tr>
<tr>
<td>The use of paralegals is dangerous as they do not have the training lawyers have</td>
<td>2</td>
<td>1</td>
</tr>
<tr>
<td>Judges should make more frequent awards of costs against / take a hard line with self-represented litigants</td>
<td>2</td>
<td>4</td>
</tr>
<tr>
<td>Funding of mediation should be increased / greater use of mediation should be made</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>Self-represented litigants cost represented clients more money / make legal processes more difficult for represented clients</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>Counsel should be mandatory when the parenting of children is at issue / self-representation on matters relating to children can result in inappropriate orders because of self-represented litigants’ inability to participate fully in the hearing</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>The simplification of court processes sacrifices fairness / undermines the integrity of the system</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Self-represented litigants cause delays</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Mediation should be mandatory in cases involving self-represented litigants</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Self-represented litigants are a very significant problem / should be banned</td>
<td>2</td>
<td></td>
</tr>
<tr>
<td>Court processes should be simplified to make counsel more affordable</td>
<td>2</td>
<td></td>
</tr>
<tr>
<td>The current culture of conflict must be changed</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>Difficult self-represented litigants should not be given audience in court</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>Courts are perceived as too kind to self-represented litigants, frustrating represented litigants</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>Courts are perceived as biased against self-represented litigants</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>Self-represented litigants should not be accommodated, court should be a last resort</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>Self-represented litigants increase the cost to the system / overload the system</td>
<td>3</td>
<td></td>
</tr>
<tr>
<td>Self-help guides are a waste of time because they do not teach self-represented litigants to be lawyers</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>An inquisitorial approach would be helpful</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>It is the responsibility of government to provide adequate</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>Comment</td>
<td>Alberta n</td>
<td>Rest of Canada n</td>
</tr>
<tr>
<td>------------------------------------------------------------------------</td>
<td>-----------</td>
<td>------------------</td>
</tr>
<tr>
<td>legal representation, requiring lawyers to work pro bono or for legal aid is a cop-out for government</td>
<td></td>
<td>1</td>
</tr>
<tr>
<td>Paralegals could provide limited services, under a lawyer’s supervision</td>
<td></td>
<td>1</td>
</tr>
<tr>
<td>Some self-represented litigants cause harm to everyone</td>
<td></td>
<td>1</td>
</tr>
<tr>
<td>Issues about parenting aren’t designed to be litigated by self-represented litigants</td>
<td></td>
<td>1</td>
</tr>
<tr>
<td>The justice system must be completely overhauled, family law disputes do not belong in court</td>
<td></td>
<td>1</td>
</tr>
<tr>
<td>It is unfair to represented parties that their lawyer must spend time educating self-represented parties</td>
<td></td>
<td>1</td>
</tr>
<tr>
<td>Preparing materials in plain language undermines the credibility of the author / government</td>
<td></td>
<td>1</td>
</tr>
<tr>
<td>Judges must be mindful of the impact on represented parties of their efforts to assist self-represented parties</td>
<td></td>
<td>1</td>
</tr>
<tr>
<td>A mediation-litigation hybrid approach would be helpful</td>
<td></td>
<td>1</td>
</tr>
<tr>
<td>Accommodating self-represented litigants undermines the role of counsel</td>
<td></td>
<td>1</td>
</tr>
<tr>
<td>Judges should have training in mediation</td>
<td></td>
<td>1</td>
</tr>
<tr>
<td>Enough information should be provided to self-represented litigants so that they can’t rely on the judge and gain a significant advantage</td>
<td></td>
<td>1</td>
</tr>
<tr>
<td>All documents should be translated into other main languages</td>
<td></td>
<td>1</td>
</tr>
</tbody>
</table>

Alberta n=12, rest of Canada n=28

Respondents’ comments mostly fell into one of six general themes: government should invest more heavily in legal aid and mediation; self-representation should be discouraged; the use of paralegals should be discouraged; the justice system should not be reformed to accommodate self-represented litigants; the justice system should be reformed to accommodate self-represented litigants; and, the judiciary should be more strict with self-represented litigants and more sensitive to the needs of litigants with counsel.

Respondents who believe that self-representation should be discouraged or that self-represented litigants do not belong in the justice system provided comments such as these:

*Self-represented litigants should be banned.*

*Our profession is bending over backwards to accommodate self-represented litigants and trying to make the system more accessible to them which creates problems.* …
The more that is done to accommodate [self-represented litigants], the more it will be considered acceptable and the more we will have. Not a good state of affairs.

Self represented parties result in more adjournments and court appearances, which increases the length of court lists and clogs of the court system due to appearances and hearings that keep being rescheduled. …

Others cautioned against the effects of self-representation or permitting self-representation in specific family law disputes, particularly those concerning the parenting of children:

… In my opinion, when someone cannot afford to retain counsel and is not eligible for legal aid assistance, they … fail to access justice at all which can then result in orders for support, parenting arrangements which do not adequately or accurately reflect the reality or what is best for the child since there was not full participation by everyone involved.

Contested family law matters dealing with parenting arrangements and guardianship decisions … are compromised by self-represented litigants who do not have access to legal advice or judicial mediation. These decisions have long term implications for the children who are the subject of them. … Parenting time issues were not designed to be litigated in court by self-represented parties.

… The use of an amicus, mandatory involvement of counsel (legal aid?) and the involvement … of counsel where children involved are NECESSARY.

Respondents opposed to the reform of the justice system to address the needs of self-represented litigants or who thought that the effects of reform are harmful to the system itself made comments such as these:

… We need to maintain the integrity of the family law and not further water down rules of court and evidentiary requirements.

I'm concerned that if we improve [self-represented litigants] use of the court system that more will do it. I don't know if that is what we should be striving for. Are we going to start letting people do their own surgeries because they can't afford a doctor, or think they know where their appendix is?

I think the focus should be on providing more legal aid funding for those who can’t afford a lawyer … [rather] than making the litigation process more simple – fairness is often sacrificed when things are made more [simple] – sometimes complexity is needed to ensure fairness.
Respondents in favour of reform recommended the increased use of mediation or the adoption of alternate approaches to in-court dispute resolution, such as the adoption of an inquisitorial approach or a mediation-litigation hybrid. Others had specific suggestions for reform, including these:

... It would make more sense to simplify the litigation process when parties have counsel to decrease the cost and make representation more affordable.

We need to radically rearrange the system. Court is a bizarre place to resolve family law disputes and must be a last option, not a first. We must stop pouring 95% of funding into the least efficient, most destructive element of family justice.

... Some kind of mediation service needs to be made available farther down the line after interim orders have been made or final orders are not working. This would at least weed out the matters that have some chance of resolution prior to trial. ...

Comments on the need to increase funding for mediation and legal aid were the most common suggestion of respondents from both Alberta (n=5) and the rest of Canada (n=4). One respondent said that efforts to encourage lawyers to do pro bono work or accept legal aid retainers seek to displace what is essentially a government obligation:

Requiring lawyers to do pro-bono work, amicus curiae work, or legal aid work is a cop-out for governments who should be spending more money on the legal system... The volunteerism and generous nature of lawyers is not a replacement for government commitment to public legal aid, nor is putting more vague, general resources on the internet. ...

Respondents proposing that the judiciary be more strict with self-represented litigants and more sensitive to the needs of litigants with counsel made comments such as these:

... The Courts are unduly “kind” to [self-represented litigants] and the level of frustration on the part of the REPRESENTED litigant only grows over time. There is a perceived sense of bias AGAINST them on the part of the REPRESENTED litigant. ...

... I believe that there must a willingness on the part of the judiciary to penalize (mainly in terms of costs) unreasonable and willfully ignorant behaviour on the part of self-represented litigants.

Cost consequences against [self-represented litigants] when it seems clear [that person is frustrating] the process ...
Judges need to be aware of the impact on the party with legal representation when they appear to assist the self-represented litigant.

[Self-represented litigants would be improved by] providing appropriate information to the self-represented litigant, and then holding self-represented parties to appropriate standards in relation to documentation, evidence and argument, so that they understand they cannot rely on the judge … to bend over backwards to assist them, thereby gaining a significant advantage.

2.4 The resolution of family law disputes by mediation

Respondent lawyers were asked in what percentage of their family law cases is the case ultimately resolved by a variety of specific means, including through court at a hearing or conference and through court by trial; these results are presented in Figure 2.14. A substantial majority of the cases of respondents in Alberta (73.5%) and in the rest of Canada (66.2%) are ultimately resolved through negotiation by counsel, mediation and collaborative settlement processes; a smaller but significant share of respondents’ cases are resolved by the parties themselves or through arbitration (20.1% of the cases of Alberta respondents and 16.8% of the cases of respondents from the rest of Canada). However, the results with respect to the resolution of disputes through the courts are of particular significance:

- 18.1% of the cases of respondents from Alberta and 25.9% of the cases of respondents from the rest of Canada are resolved partially or wholly with the assistance of a judge at an interim hearing or case conference.

- Only 3.8% of the cases of respondents from Alberta and 8.7% of the cases of respondents from the rest of Canada are resolved by trial.
An almost equal number of respondent lawyers from Alberta (71.9%) and from the rest of Canada (73.7%) said that, in the centre where they primarily practice, there is a requirement that individuals commencing a family law proceeding attend an information session on the value of mediation. Almost all respondents from Alberta (95.7%) and a significant majority of respondents from the rest of Canada (83.3%) said that this information session is held in a group rather than an individual setting.

Although almost all respondent lawyers who refer cases to mediation said that they *always* or *sometimes* screen for domestic violence (90.3% of Alberta respondents and 96.8% of respondents from the rest of Canada), 83.3% of respondents from outside Alberta said that they *always* do so, compared to 54.8% of Alberta respondents; these results are presented in Figure 2.15. The majority of Alberta respondents who screen for domestic violence (75%) use neither a list of standardized questions nor a standardized form, which contrasts significantly with the practice of respondents from the rest of Canada of whom 28.9% use a list of standardized questions and 10% use a standardized form; see Figure 2.16.
Respondent lawyers from Alberta said that they refer an average of 43.5% of their cases to mediation, compared to 35.6% of respondents from the rest of Canada. Respondents were asked about the proportion of their cases referred to mediation that result in the complete resolution, partial resolution or no resolution of the matters at issue. These results are presented in Figure 2.17.
Respondent lawyers from Alberta reported both a higher rate of full settlement (52.2%) or partial settlement (57.5%) of cases referred to mediation than respondents from the rest of Canada (50.7% and 48% respectively), and a lower rate of failed mediation (8.6%) than respondents from outside Alberta (18.6%).

Finally, respondent lawyers were asked whether they had any other comments regarding mediation; these responses are presented in Table 2.9.

<table>
<thead>
<tr>
<th>Comment</th>
<th>Alberta n</th>
<th>Rest of Canada n</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mediation is best / almost always best for families</td>
<td>2</td>
<td>2</td>
</tr>
<tr>
<td>Mediation is best for parenting issues / should be used more for parenting issues</td>
<td>2</td>
<td>1</td>
</tr>
<tr>
<td>Mediation works and should be used more</td>
<td>2</td>
<td>1</td>
</tr>
<tr>
<td>Mediation should be mandatory / more frequently required by the court</td>
<td>1</td>
<td>4</td>
</tr>
<tr>
<td>Always recommend as an alternative to court</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>Difficult to get parties / opposing counsel to agree to subsidized mediation program</td>
<td>1</td>
<td></td>
</tr>
</tbody>
</table>
### Comment

<table>
<thead>
<tr>
<th>Comment</th>
<th>Alberta n</th>
<th>Rest of Canada n</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mediation works best when the parties are informed about the law and the available options</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>There should be some form of non-adversarial dispute resolution early in every court proceeding</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>The attitude of opposing counsel is the most challenging barrier to entering mediation</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>There aren’t enough trained mediators</td>
<td>3</td>
<td></td>
</tr>
<tr>
<td>Parties are more likely to stick with a settlement they have made themselves</td>
<td>2</td>
<td></td>
</tr>
<tr>
<td>Government-run mediation is backlogged and inefficient</td>
<td>2</td>
<td></td>
</tr>
<tr>
<td>Mediation is not very effective for the resolution of support and property issues</td>
<td>2</td>
<td></td>
</tr>
<tr>
<td>Mediators are sometimes too focused on finding compromise and don’t spend enough time on background or the dynamics of the parties’ relationship</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>Mediation is recommended to parties but the parties don’t follow through</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>Mediation is only available through court</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>Mediation is no longer available through court</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>The success rate of mediators who are family law lawyers is higher than that of mediators who are not</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>Mediation is rarely beneficial and just creates delay</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>Financial disclosure must be made before mediation starts</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>Mediation must be available in other languages</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>Mediation has replaced four-way meetings between parties and counsel and results in additional costs being incurred</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>Mediation doesn’t work when a party is not prepared to compromise</td>
<td>1</td>
<td></td>
</tr>
</tbody>
</table>

Alberta n=8, rest of Canada n=25

Respondent lawyers’ comments about mediation as a dispute resolution technique were generally positive; many reflected a preference to attempt mediation rather than litigation, including comments such as these:

*It is a real shame that mediation is not used more for parenting disputes. …*

*I believe that [mediation] is almost always the best resource for families.*

*I recommend mediation to my clients 100% as an alternative to court. If I am in court on a family law issue I really feel that I failed somewhere.*
[Mediation] remains a work in progress but is valuable, and should be more aggressively required and used across the country. If the parties themselves cannot understand the need/value the Court should require it more stringently.

I think [mediation] is the most beneficial path for the parties. They create their own solutions to their issues and are more likely to adhere to them.

Essential service, mostly successful.

… I believe that mediation is the most effective form of dispute resolution for family cases – in terms of cost but also in client satisfaction and durability of result …

Only two comments were critical of mediation as a dispute resolution process:

[Mediation] is rarely beneficial and often just creates an additional delay towards resolution.

Mediation has been used of late to replace, at first instance, negotiations between parties and counsel. By doing so, parties are incurring costs that may otherwise have been obviated had they attempted the old-school four way meeting.

Respondents’ other concerns generally addressed: supply issues, such as a lack of trained mediators or the termination of court-based programs; prerequisites to mediation, such as financial disclosure and an attitude geared toward compromise; the reluctance of opposing counsel to engage in mediation; and, a belief that some disputes, namely those concerning parenting, are more suited to mediation than other disputes, such as support and the division of property. One respondent commented that if government and the judiciary are committed to mediation, they perhaps need to demonstrate their commitment in a more tangible manner:

Judges and the courts need to put their money where the government’s mouth is – KICK OUT OF THE COURTS PARTIES WHO OUGHT TO BE IN MEDIATION AND ADR! No use to pay lip service to ADR, only to have judges say to parties who should be out of court: “Well, we are already here, so we might as well address it here…”
3.0 Summary and conclusions

This report presents an analysis of a survey of judges and lawyers attending the National Family Law Program in Whistler, British Columbia between 13 July and 17 July 2014. This report compared the views of judges and lawyers practicing in Alberta with those practicing in most of the rest of Canada; no responses were received from judges and lawyers practicing in Nunavut and Prince Edward Island.

The survey asked respondents a number of questions regarding their experiences with and opinions of self-represented litigants in family law matters and the effects of self-represented litigants on case outcomes, the resolution of family law disputes other than by trial, and, in light of the public debate provoked by Bill C-560, their views of and experiences with shared custody and shared parenting.

3.1 Summary of survey findings

Of the 167 valid responses analyzed in this report, 22 were provided by judges and the rest were provided by lawyers. The greatest number of respondents by province practiced in British Columbia, Alberta, Ontario and Nova Scotia; eight or fewer responses were received from judges and lawyers practicing in each of Manitoba, Newfoundland and Labrador, Quebec, Saskatchewan and Yukon. Almost 75% of respondents identified as female.

Survey respondents tended to be very experienced and have practices that focused on family law matters. Judges responding to the survey had been appointed for an average of 11.3 years and an average of 63% of their cases in the preceding year had involved family law disputes. Lawyers had been practicing for an average of 19.5 years and an average of 85% of their cases in the preceding year had involved family law matters.

3.1.1 Resolution of parenting disputes

Respondents were asked how their family law cases involving questions about parenting decisions and the distribution of children’s time tended to resolve.

- 41.6% of the family law cases of Alberta respondents resulted in a form of shared custody, meaning the equal or near-equal distribution of children’s time between their parents, compared to 47.4% of the cases of respondents from the rest of Canada.
• Thinking of their family law cases over the past five years, 76.5% of respondents from Alberta and 76.7% of respondents from the rest of Canada said that the number of their cases resulting in a form of shared custody had increased substantially or increased somewhat.

• 77.8% of the family law cases of respondents from Alberta resulted in a form of shared parenting, meaning that both parents are involved in making parenting decisions, compared to 64.9% of the cases of respondents from the rest of Canada.

• 9.9% of the cases of respondents from Alberta resulted in a parent having only limited contact with the children, compared to 13.7% of the cases of respondents from the rest of Canada.

• 1.4% of the cases of respondents from Alberta resulted in a parent having no contact with the children, compared to 3.2% of the cases of respondents from the rest of Canada.

Respondents were then asked whether they supported or opposed two key aspects of Bill C-560.

• 81.8% of Alberta respondents, compared to 76.3% of respondents from the rest of Canada, supported changing the language used to described post-separation arrangements for the care of children in the Divorce Act from “custody” and “access” to “parental responsibilities,” “parenting time” or similar terminology.

• 26.5% of Alberta respondents and 22.3% of respondents from outside Alberta supported amending the Divorce Act to create a presumption of shared custody.

3.1.2 Self-represented litigants

Respondents were asked a variety of questions, based on the instruments used in the surveys of Alberta judges by Boyd et al. (2014) and of Alberta lawyers by Bertrand et al. (2012), about their experiences with and views of self-represented litigants.

• 80.7% of Alberta respondents and 76.5% of respondents from the rest of Canada said that there are much more or more self-represented litigants now as compared to three years ago.

• Respondents from Alberta said that 22.5% of their family law cases in the past year had involved at least one self-represented party for part of the
process and that 15% had involved at least one self-represented party for all of the process. Respondents from outside Alberta said that 20% of their family law cases had involved at least one self-represented party for part of the process and that 10% had involved at least one self-represented party for all of the process.

- A substantial majority of all respondents believe that added challenges arise in family law cases involving a self-represented litigant because such litigants have unrealistically high expectations for the outcome of the case, are more likely to take unreasonable positions based on principle or are more interested in the fight than the result. Respondents from Alberta were more likely than other respondents to say that these challenges always or usually arise; respondents from the rest of Canada were more likely to say that these challenges sometimes arise.

- A substantial majority of respondents believe that settlement is less likely or much less likely in cases involving at least one self-represented litigant. More respondents from Alberta than from the rest of Canada said that settlement is much less likely in such cases; more respondents from the rest of Canada said that settlement is less likely.

- A substantial majority of all respondents believe that added challenges arise in family law cases involving a self-represented litigant because of the litigant’s lack of familiarity with the applicable legislation, the rules of court and court processes, and the law of evidence.

- Over one-half of all respondents believe that self-represented litigants obtain results in respect of child support, spousal support and the division of property that are worse than the results the litigants would have had if they had been represented by counsel. A small proportion of respondents believe that self-represented litigants obtain results in respect of parenting arrangements that are better than the results the litigants would have had if represented by counsel (15.6% of Alberta respondents and 3.7% of respondents from the rest of Canada).

Respondents were also asked a series of questions to obtain their views on various means of improving self-represented litigants’ use of the court system, including a list of specific measures, increasing the use of paralegals in family law disputes and the unbundling of lawyers’ services.

- Only two measures attracted the support of more than two-fifths of respondents from Alberta and the rest of Canada, a requirement that self-represented parties attend an information session on the law and court
processes and providing such litigants with plain language guides to court and trial processes.

- The measure supported by most respondents from Alberta (57.1%), that mediation prior to trial be mandatory when at least one party is self-represented, was supported by only 23.5% of respondents from the rest of Canada.

- When asked to identify the measures most likely to improve self-represented litigants' use of the court system, requiring self-represented parties to attend an information session on the law and court processes, was selected by the majority of Alberta respondents as their first choice (29.2%), and by the majority of respondents from the rest of Canada as one of their third choices (14.1%). Providing plain-language guides to court and trial processes was selected by the majority of Alberta respondents as their second choice (12.7%), and by a majority of respondents from the rest of Canada as their first choice (21.1%) and as another third choice (14.1%).

- Slightly more lawyer respondents from Alberta (63.3%), compared to lawyer respondents from the rest of Canada (59.8%), said that they provided services on limited-scope retainers. A greater proportion of Alberta lawyers (86.7%) said that they were aware of other lawyers providing services on such a basis, compared to lawyer respondents from the rest of Canada (75.6%).

- Respondent lawyers from Alberta were more likely to have dealt with a self-represented litigant who had retained counsel for limited purposes than respondent lawyers from the rest of Canada. The most common limited purpose reported by all respondent lawyers was legal advice. The least common limited purpose reported by lawyers from Alberta was preparing written arguments, and the least common limited purpose reported by lawyers from outside Alberta was conducting research.

- Approximately one-half of respondents from Alberta (54.8%) and the rest of Canada (50%) supported the use of paralegals to provide services in family law cases.

- Among those who supported the use of paralegals, most Alberta respondents said that paralegals could prepare court forms and other documents and assist with the identification and disclosure of documents (70.6% each). Most respondents from outside Alberta (65.4%) said that paralegals could perform the former task and 59.6% said they could perform the latter.
• Preparing court forms and other documents (65.4%) and assisting with the identification and disclosure of documents (59.6%) were the only tasks that received the support of more than one-half of respondents from the rest of Canada. Other tasks which received the support of more than one-half of Alberta respondents were preparing parenting schedules (52.9%), identifying documents for filing in court (52.9%), and calculating child support and children’s special expenses (52.9%).

3.1.3 Resolution of family law disputes by mediation

Respondent lawyers were asked a series of questions about the resolution of their family law cases intended to determine: the prevalence of dispute resolution mechanisms other than litigation; if and how the presence of domestic violence is assessed among clients referred to mediation; and, lawyers’ success in resolving disputes by mediation.

• The substantial majority of respondent lawyers’ cases are resolved by negotiation through counsel, mediation and collaborative settlement processes.

• 3.8% of Alberta lawyers’ family law cases are resolved by trial, compared to 8.7% of the cases of lawyers from the rest of Canada. A further 18.1% of Alberta lawyers’ cases are resolved with the assistance of a judge at a hearing or conference, compared to 25.9% of the cases of lawyers from the rest of Canada.

• Only 2.5% of Alberta lawyers’ family law cases, and 1.2% of the cases of lawyers from the rest of Canada, are resolved through arbitration.

• About one-fifth of all lawyer respondents’ family law cases are resolved by mediation.

• Negotiation through counsel was the most common means by which lawyers’ family law cases are resolved, reported by 38.3% of lawyer respondents from Alberta and 41.4% of lawyers from the rest of Canada.

• Almost all lawyer respondents said that they always or usually screen for domestic violence when referring a case to mediation. However 85.1% of respondents from outside Alberta, compared to 54.8% of Alberta respondents, said that they always screen for family violence and 35.5% of Alberta respondents said that they sometimes screen for family violence, compared to 11.5% of respondents from the rest of Canada.
• Of those who screen for domestic violence, the majority of respondent lawyers from Alberta (75%) and the rest of Canada (59.8%) do not use a standardized screening device such as a list of questions or a form. One-quarter (25%) of Alberta lawyers screen with standardized questions, compared to 29.3% of respondents from the rest of Canada who use such questions and a further 11% who use a standardized form.

• Respondent lawyers from Alberta reported that 52.2% of their cases referred to mediation result in a full settlement and that 57.5% result in a partial settlement. These rates are higher than those reported by lawyers from the rest of Canada, who said that 50.7% of their cases result in full settlement and 48% result in a partial settlement. The proportion of cases resulting in no settlement was higher in the rest of Canada (18.6%) than in Alberta (8.6%).

3.2 Conclusions and recommendations

The findings from the present study highlight a number of differences between respondents from Alberta and the rest of Canada. With regard to the resolution of parenting disputes, respondents from Alberta reported that fewer of their cases resulted in shared custody in comparison to respondents from the rest of Canada, while a substantially higher proportion of Alberta cases resulted in shared parenting than cases in the rest of Canada. Further, a slightly higher proportion of Alberta respondents supported changing the language used to describe post-separation parenting arrangements in the Divorce Act and amending the Divorce Act to create a presumption of shared custody.

With regard to self-represented litigants, Alberta respondents reported that a higher proportion of their cases in the past year had involved a self-represented litigant than cases from the rest of Canada. Further, a considerably higher proportion of Alberta respondents said that self-represented litigants achieve results related to parenting arrangements that are better than litigants with legal counsel in comparison to participants from the rest of Canada. Alberta respondents were also substantially more likely to support mandatory mediation prior to trial when at least one party is self-represented than were respondents from the rest of Canada.

Lawyers from Alberta were considerably less likely to say that they always screen for family violence when referring a case to mediation than were lawyers from the rest of Canada, and a higher proportion of lawyers in Alberta who do screen for family violence reported that they do not use a standardized screening device. The proportion of cases referred to mediation that do not result in a settlement was higher in the rest of Canada than in Alberta.
3.2.1 Alberta and the rest of Canada

The Province of Alberta is unique among Canada’s provinces and territories in many respects, and the demographic and juridical traits that set Alberta apart are likely at least partly responsible for the differences in the views of Alberta respondents and respondents from the rest of Canada discussed in this report.

3.2.1.1 Demographic and other trends

Alberta is firstly a wealthy province, with the second highest average income among Canada’s provinces and territories, the highest rate of employment and one of the highest rates of net population growth.4

- In 2012, residents of Alberta has the second highest median income in the country at $94,460 per year, compared to the Canadian average income of $74,540 (Statistics Canada, 2014a).5

- In 2013, Alberta’s unemployment rate was 4.6%, compared to the Canadian average rate of 7.1% and its rate of employment was 69.7% compared to the Canadian rate of 61.8% (Statistics Canada, 2014b).6

- Alberta experienced population growth rates significantly higher than the national average between 2010 and 2014, exceeded by only Yukon and Northwest Territories in 2010, 2011 and 2014 (Statistics Canada, 2014c).7

Between 1 July 2013 and 30 June 2014, Alberta also experienced the highest rate of interprovincial migration with a net gain of 38,717 persons, a significantly higher positive rate than all other provinces and territories, as shown in Table 3.1 (Statistics Canada, 2014d), and its population is expected to grow from 4.0 million in 2013 to between 5.6 and 6.8 million by 2038 (Statistics Canada, 2014e).

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4 The data included in this section were published prior to the recent slow down in the oil and gas sector in Alberta. The current economic climate has since had a negative effect on the numbers presented.

5 Only Yukon (median income = $94,360) and Northwest Territories ($106,710) had similar or higher median incomes in 2012. However, in 2013 the population of Yukon at 36,700 was less than 1% of that of Alberta (4,025,074), and the population of Northwest Territories (43,537) was only slightly more than 1% of that of Alberta.

6 Saskatchewan performed better than Alberta in 2013, with an unemployment rate of 4.0% although its employment rate was slightly lower at 67.2%.

7 In 2014, the national growth rate was 1.1%, and the three provinces and territories with the highest growth rates were Yukon (3.2%), Alberta (2.9%) and Saskatchewan (1.7%).
### Table 3.1
Canadian interprovincial migration, 1 July 2013 to 30 June 2014

<table>
<thead>
<tr>
<th>Province / territory</th>
<th>Interprovincial migration</th>
<th>Net gain</th>
<th>Net loss</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alberta</td>
<td>38,717</td>
<td></td>
<td></td>
</tr>
<tr>
<td>British Columbia</td>
<td>2,267</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Manitoba</td>
<td>(4,827)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>New Brunswick</td>
<td>(4,077)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Newfoundland and Labrador</td>
<td>(2,205)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Northwest Territories</td>
<td>(781)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Nova Scotia</td>
<td>(2,172)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Nunavut</td>
<td>440</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Ontario</td>
<td>(13,980)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Prince Edward Island</td>
<td>(957)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Quebec</td>
<td>(13,339)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Saskatchewan</td>
<td>1,222</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Yukon</td>
<td>(308)</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Historically, the strength of Alberta’s economy and the availability of well-paid work in the oil and gas sector were responsible for Alberta’s high rate of immigration; the province enjoyed rates of growth in the 20 to 44 year old age groups that were well above the national average, as shown in Figure 3.1, and the median age of its residents is among the lowest in the county (Statistics Canada, 2013).

Figure 3.1
Demographic growth in Alberta and Canada by selected age groups in 2013

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8 The recent downturn in Alberta’s economy due to the drop in the price of oil has led to increased rates of unemployment and increased migration out of the province.

9 In 2013, the median age of Alberta’s population was 36.0 years, compared to the national median age of 40.2 years. Only Northwest Territories and Nunavut had lower median population ages, at 32.4 years and 25.4 years respectively.
Secondly, as a whole, Albertans tend to be far more politically Conservative than the rest of Canada. In the six general elections held between 1997 and 2011, a significantly higher proportion of Albertans voted for right-leaning parties than voters elsewhere in Canada, as shown in Table 3.2; Albertans were consistently among the provinces least supportive of centrist and left-leaning parties.\(^{10}\)

### Table 3.2
Percentage of valid votes cast in the thirty-sixth to forty-first Canadian general elections by province and political affiliation

<table>
<thead>
<tr>
<th>Election year</th>
<th>Percentage of Alberta votes cast for right-leaning parties</th>
<th>Provinces with the next highest percentages of votes cast for right-leaning parties</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>%</td>
<td>1st</td>
</tr>
<tr>
<td>1997</td>
<td>69.1</td>
<td>BC</td>
</tr>
<tr>
<td>2000</td>
<td>58.9</td>
<td>BC</td>
</tr>
<tr>
<td>2004</td>
<td>61.9</td>
<td>SK</td>
</tr>
<tr>
<td>2006</td>
<td>65.2</td>
<td>SK</td>
</tr>
<tr>
<td>2008</td>
<td>65.0</td>
<td>SK</td>
</tr>
<tr>
<td>2011</td>
<td>67.0</td>
<td>SK</td>
</tr>
</tbody>
</table>

Provinces with the next highest percentages of votes cast are listed in order of largest to least percentages.

Thirdly, in terms of family life, in 2013 more Albertans were living in married relationships (40.2%) than the Canadian average (38.2%), fewer were living in unmarried relationships (7.9% in Alberta compared to 9.3%) and, in 2011, fewer were heading lone-parent families (14.5% compared to 16.3%) (Statistics Canada, 2012, 2014e). Although fewer Albertans (4.9%) are divorced compared to the Canadian average (5.2%), the divorce rate in Alberta has been higher than the Canadian average from 1998 to 2008, as shown in Table 3.3, which may be attributable to a higher rate of remarriage in Alberta (Kelly, 2012; Statistics Canada, 2014f).

### Table 3.3
Divorce rate per 100 marriages in Alberta and Canada between 1998 and 2008

<table>
<thead>
<tr>
<th>Year</th>
<th>Total divorce rate per 100 marriages Alberta</th>
<th>Total divorce rate per 100 marriages Canada</th>
</tr>
</thead>
<tbody>
<tr>
<td>1998</td>
<td>39.0</td>
<td>36.1</td>
</tr>
<tr>
<td>2000</td>
<td>41.5</td>
<td>37.6</td>
</tr>
<tr>
<td>2002</td>
<td>41.9</td>
<td>37.6</td>
</tr>
</tbody>
</table>

\(^{10}\) For the purposes of this comparison, we have defined right-leaning parties as including the Christian Heritage party, the Progressive Conservative Party, the Reform Party, the Canadian Reform Conservative Alliance Party and the Conservative Party. We have defined left-leaning parties as including the Marxist-Leninist Party, the New Democratic Party and the Communist Party, and centrist parties as including the Liberal Party and the Green Party. These data are available at www.elections.ca.
When Albertan families break down, a greater proportion are involved in court proceedings than those in British Columbia, Nova Scotia and Ontario (Kelly 2012). Data available for the federal 2010/2011 fiscal year shows that about 1.6% of the population of Alberta were involved in active divorce cases compared, for example, to 0.8% of the population of Ontario; see Table 3.4 (Kelly 2012).

### Table 3.4
Percentage of population engaged in active divorce cases in selected provinces in 2010/2011

<table>
<thead>
<tr>
<th>Province</th>
<th>Population</th>
<th>Active divorce cases</th>
<th>Proportion of population engaged in active divorce cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alberta</td>
<td>3,732,573</td>
<td>29,496</td>
<td>1.6</td>
</tr>
<tr>
<td>British Columbia</td>
<td>4,465,925</td>
<td>24,732</td>
<td>1.1</td>
</tr>
<tr>
<td>Ontario</td>
<td>13,135,063</td>
<td>53,222</td>
<td>0.8</td>
</tr>
<tr>
<td>Nova Scotia</td>
<td>942,073</td>
<td>5,354</td>
<td>1.1</td>
</tr>
</tbody>
</table>

Calculation of percentage of population engaged in active divorce cases assumes two parties per case.

Data for the federal 2008/2009 fiscal year shows that 3.2% of Albertans were involved in general family law cases, compared to 2.6% of Ontarians, and that Albertans are more likely to be involved in cases before the provincial court than residents of Nova Scotia and Ontario, as shown in Tables 3.5 and 3.6 (Canadian Centre for Justice Statistics, 2010).

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11 The original study also included data from Northwest Territories, Nunavut and Yukon. Only data from the most populous jurisdictions are presented in this report.

12 “Family law cases” includes cases related to family breakdown and parenting in which claims are made other than, or in addition to, claims under the federal Divorce Act. The Divorce Act is inapplicable to unmarried persons and does not provide for the division of property accumulating during married or unmarried relationships. These matters are usually addressed in provincial legislation.
Table 3.5
Percentage of population engaged in active family law cases in selected provinces in 2008/2009

<table>
<thead>
<tr>
<th>Province</th>
<th>Population</th>
<th>Active family law cases</th>
<th>Proportion of population engaged in active family law cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alberta</td>
<td>3,595,777</td>
<td>71,485</td>
<td>4.0</td>
</tr>
<tr>
<td>British Columbia</td>
<td>4,349,412</td>
<td>70,301</td>
<td>3.2</td>
</tr>
<tr>
<td>Ontario</td>
<td>12,882,625</td>
<td>166,777</td>
<td>2.6</td>
</tr>
<tr>
<td>Nova Scotia</td>
<td>935,865</td>
<td>15,028</td>
<td>3.2</td>
</tr>
</tbody>
</table>

Populations given are estimates of Statistics Canada for 2008. Calculation of percentage of population engaged in active family law cases assumes two parties per case. Participants in the original study also included Northwest Territories, Nunavut and Yukon.

Table 3.6
Percentage of population engaged in active family law cases before the superior and provincial courts in selected provinces in 2008/2009

<table>
<thead>
<tr>
<th>Province</th>
<th>Active family law cases</th>
<th>Cases before the superior court</th>
<th>Cases before the provincial court</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alberta</td>
<td>71,485</td>
<td>42,114</td>
<td>29,371</td>
</tr>
<tr>
<td>British Columbia</td>
<td>70,301</td>
<td>29,484</td>
<td>40,817</td>
</tr>
<tr>
<td>Ontario</td>
<td>166,777</td>
<td>112,580</td>
<td>54,197</td>
</tr>
<tr>
<td>Nova Scotia</td>
<td>15,028</td>
<td>10,897</td>
<td>4,131</td>
</tr>
</tbody>
</table>

Participants in the original study also included Northwest Territories, Nunavut and Yukon.

3.2.1.2 Legislation on domestic relations

Finally, although the federal *Divorce Act* applies throughout Canada, there are aspects of the Alberta legislation on domestic relations that set it apart from many of the other provinces. Compared to the other provinces, Alberta has adopted fairly innovative legislation in terms of the care and control of children after separation, but the province’s generally right-leaning political attitudes are likely responsible for its conservative matrimonial property legislation and in the limited nature of the rights extended to unmarried people involved in “interdependent” relationships.
The care of children after separation

The Alberta Family Law Act\textsuperscript{13} discusses the care and control of children after separation in terms of parents who are guardians, exercise powers of guardianship and have parenting time with a child under a parenting order, and people who are not guardians who have contact with a child.\textsuperscript{14} A very similar approach is taken in British Columbia’s Family Law Act,\textsuperscript{15} and it is likely not coincidental that the Family Law Acts of Alberta and British Columbia are the newest provincial statutes on the care of children. The domestic relations legislation of Saskatchewan,\textsuperscript{16} Manitoba,\textsuperscript{17} Ontario,\textsuperscript{18} Newfoundland and Labrador,\textsuperscript{19} Nova Scotia,\textsuperscript{20} Prince Edward Island\textsuperscript{21} and New Brunswick\textsuperscript{22}, on the other hand, all address the distribution of parenting rights in terms of custody and access, the language used in the federal Divorce Act.\textsuperscript{23}

In Alberta, British Columbia, Nova Scotia and Prince Edward Island, parents are presumed to be the guardians of their children during their relationship and after separation, subject to conditions that are easily met for parents cohabiting in traditional relationships.\textsuperscript{24} In Saskatchewan, New Brunswick and Nova Scotia, parents are presumed to have joint custody of their children. In Manitoba, Ontario, Newfoundland and Labrador and Prince Edward Island, however, custody after separation vests in the parent with whom the child ordinarily resides subject to an agreement or order to the contrary.

The division of property after separation

The Alberta Matrimonial Property Act\textsuperscript{25} applies only to married spouses and provides that property acquired during the marriage may be divided between spouses in shares fixed at the discretion of the court, with property brought into the marriage, inheritances, gifts from third parties, court awards and insurance proceedings usually remaining the property of the owning spouse.\textsuperscript{26}

\begin{itemize}
\item \textsuperscript{13}Family Law Act, SA 2003, c. F-4.5
\item \textsuperscript{14}Alberta Family Law Act, ss. 21, 32, 35
\item \textsuperscript{15}Family Law Act, SBC 2012, c. 25
\item \textsuperscript{16}The Children’s Law Act, SS 1997, c. C-8.2
\item \textsuperscript{17}The Family Maintenance Act, CCSM, c. F20
\item \textsuperscript{18}Children’s Law Reform Act, RSO 1990, c. C.12
\item \textsuperscript{19}Children’s Law Act, RSNL 1990, c. C-13
\item \textsuperscript{20}Maintenance and Custody Act, RSNS 1989, c. 160
\item \textsuperscript{21}Custody Jurisdiction and Enforcement Act, RSPEI 1988, c. C-33
\item \textsuperscript{22}Family Services Act, SNB 1980, c. F-2.2
\item \textsuperscript{23}Although the domestic relations legislation of Ontario, Nova Scotia, New Brunswick, Saskatchewan, and Prince Edward Island also addresses the guardianship of children, guardianship in these provinces generally means guardianship of children’s property.
\item \textsuperscript{24}Alberta Family Law Act, s. 20
\item \textsuperscript{25}Matrimonial Property Act, RSA 2000, c. M-8
\item \textsuperscript{26}Alberta Matrimonial Property Act, ss. 7, 8
\end{itemize}
A similar partnership of acquests regime, restricted to married spouses, applies under Ontario’s *Family Law Act*, the *Family Law Act* of Newfoundland and Labrador and Prince Edward Island’s *Family Law Act*. Partnership of acquests regimes are also provided for in the property-related provisions of the British Columbia *Family Law Act*, and in the legislation of Manitoba and Saskatchewan, but apply equally to married and unmarried spouses.

Deferred community of property regimes, restricted to married spouses, are provided for in New Brunswick’s *Marital Property Act* and Nova Scotia’s *Matrimonial Property Act*, and were provided in British Columbia’s recently repealed *Family Relations Act*.

**Unmarried relationships**

Under the Alberta *Adult Interdependent Relationships Act*, persons who have cohabited for at least three years, or a lesser period of time if the persons have a child together, as well as other cohabiting persons, including care-giving relatives, who have entered into adult interdependent partner agreements, are adult interdependent partners for the purposes of certain benefits, including the right to apply for spousal support under the *Family Law Act*.

No other province has civil union or domestic partnership legislation similar to Alberta’s *Adult Interdependent Relationships Act* and the domestic partnership legislation that has sprung up in the United States in the context of the same-sex marriage debate. Alberta’s legislation is of particular note for these recitals in its preamble, the first of which was repealed on 14 May 2014:

WHEREAS it is recognized in Alberta as a fundamental principle that marriage is a union between a man and a woman to the exclusion of all others; and

WHEREAS the Legislature of Alberta affirms that a spouse is a person who is married; …

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29 *Family Law Act*, RSPEI 1988, c. F-2.1  
30 *The Family Property Act*, CCSM, c. F25  
31 *The Family Property Act*, SS 1997, c. F-6.3  
32 *Marital Property Act*, SNB 2012, c. 107  
33 *Matrimonial Property Act*, RSNS 1989, c. 275  
36 Alberta *Adult Interdependent Relationships Act*, ss. 3, 7; Alberta *Family Law Act*, ss. 56, 57  
37 *Statutes Amendment Act*, 2014, SA 2014, c. 8
Neither Alberta’s *Family Law Act* nor its *Matrimonial Property Act* include preambles regarding the governments’ view on the nature of marriage.

### 3.2.2 Conclusions

#### 3.2.2.1 Shared custody and shared parenting

With respect to the resolution of parenting disputes after separation, fewer of the family law cases of respondents from Alberta resulted in a form of shared custody, defined in this report as the equal or near-equal distribution of children’s time between separated parents, compared to the cases of respondents from the rest of Canada. Although almost the same proportion of Alberta respondents (76.5%) and respondents from the rest of Canada (76.7%) said that the number of their cases resulting in shared custody has *increased substantially* or *increased somewhat* in the last five years, respondents from Alberta were more likely than respondents from the rest of Canada to say that the number had *increased somewhat* or *stayed the same*, as shown in Figure 2.3, and the proportion of respondents from the rest of Canada who said that the number *increased substantially* was about a third greater than the proportion of Alberta respondents. These results may be a function of Alberta’s generally more conservative political and social values but are more likely a consequence of the geographic separation of parents owing to lengthy periods of site-based work in the oil patch\(^{38}\) or the interprovincial relocation of separated parents to take work in the province, making shared custody arrangements difficult if not impossible to implement.

However, Alberta respondents also reported a significantly higher rate of cases resulting in shared parenting, defined in this report as the equal or near-equal distribution of decision-making between separated parents, than respondents from the rest of Canada. The difference in the views of Albertans may result from the child-centred nature of the province’s *Family Law Act* and its presumption that both parents are the guardians of their children, during their relationship and after its dissolution. This presumption of guardianship and the general reluctance of Alberta courts to remove guardianship or a right of access from a parent may explain the lower rate of cases resulting in limited contact or no contact between the child and a parent reported by Alberta respondents compared to those from the rest of Canada.\(^{39}\) The data obtained from British Columbia respondents, whose province has legislation substantially similar to

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\(^{38}\) Typical site-based rotations include 7 days on-site/7 days home, 10 days on-site/4 days home and 21 days on-site/8 days home. Rotations with a greater number of days on-site provide significantly higher pay rates.

that of Alberta with respect to parental guardianship and the care of children, showed the same pattern of results relative to those from respondents from the rest of Canada, as shown in Figure 3.2.

**Figure 3.2**
Resolution of parenting disputes in respondents’ family law cases

![Graph showing resolution of parenting disputes in respondents’ family law cases](image)

- Shared parenting: Alberta n=34, British Columbia n=52, rest of Canada n=71; Missing cases=10
- Limited contact: Alberta n=33, British Columbia n=53, rest of Canada n=73; Missing cases=8
- No contact: Alberta n=32, British Columbia n=52, rest of Canada n=71; Missing cases=10

### 3.2.2.2 Amending the Divorce Act

Although a significant majority of all respondents were in favour of amending the *Divorce Act* to change the language used to describe the post-separation care of children from “custody” and “access” to alternative terminology such as “parental responsibilities” and “parenting time,” a slightly larger proportion of respondents from Alberta supported the proposed amendment than respondents from the rest of Canada. The higher rate of support may stem from the present use of such alternative terminology by Alberta’s *Family Law Act* and either an established preference for such language or a preference toward eliminating the dissonance between federal and provincial terminology. Respondents from British Columbia, whose legislation uses similar alternative terms, demonstrated a similarly elevated level of support for the proposed amendments, as shown in Figure 3.3.
A significant majority of all respondents were opposed to amending the *Divorce Act* to create a presumption of shared custody. Although the proportion of Alberta respondents (73.5%) opposed to such an amendment was only slightly lower than respondents from the rest of Canada (77.7%), the difference in the views of Albertan respondents assumes somewhat more significance when compared to the results from respondents in provinces with more than 10 respondents, namely British Columbia (79.2% opposed), Ontario (80.8% opposed) and Nova Scotia (85.7% opposed), as shown in Figure 3.4. The views of Alberta respondents regarding a presumption of shared custody may reflect a positive view of the presumption of parental guardianship in Alberta’s *Family Law Act* or a reaction to the conflict suggested by Albertan’s comparatively higher rate of court involvement in family law matters and their higher divorce rate.

Interestingly, the comments provided by respondents from Alberta both in support of and opposed to such an amendment, presented in Table 2.1, tended to concern conflict and power imbalances between parents or be neither child- nor parent-centred, while the comments of respondents from the rest of Canada tended to concern the best interests of children, as shown in Figure 3.5.
Figure 3.4
Whether respondents support amending the language of the Divorce Act to create a presumption of shared custody

Alberta n=34, British Columbia n=53, Ontario n=26, Nova Scotia, n=14; Missing cases=3

Figure 3.5
Whether respondents' comments on the amendment of the Divorce Act to establish a presumption of shared custody concerned conflict between parents, focused on the interests of children or focused neither on the interests of parents nor children

Alberta n=25, rest of Canada, n=103
Multiple response data
Findings from the survey indicated that over three-quarters of all respondents thought that there are more self-represented litigants now than there were three years ago, with lawyers and judges from Alberta being even more likely to report this than legal professionals from the rest of Canada. Further, while a substantial majority of all respondents said that added challenges arise in cases involving a self-represented litigant, Albertans were more likely to say that these challenges always or usually arise than respondents from the rest of Canada. These challenges are frequently related to litigants’ lack of familiarity with the applicable legislation, the rules of court and court processes and the law of evidence. Alberta judges and lawyers were also more likely to say that settlement is much less likely in cases involving at least one self-represented litigant than respondents from the rest of Canada.

More than one-half of all respondents thought that self-represented litigants obtain outcomes that are worse than litigants with legal representation with respect to child support, spousal support and the division of property. When asked what might improve self-represented litigants’ use of the court system and promote settlement of their cases, the most common measures supported by respondents was a requirement that self-represented litigants attend an information session on the law and court processes and providing these litigants with plain language guides to court and trial processes. Respondents from Alberta were more than twice as likely to support mandatory mediation when at least one party is self-represented than were respondents from the rest of Canada.

Lawyers from Alberta were slightly more likely to report that they provide services on an unbundled basis than were lawyers from the rest of Canada; they were also more likely to say that they were aware of other lawyers providing these services. The most common unbundled service that lawyers reported providing was legal advice. The availability of legal services on an unbundled basis could be a more affordable alternative for self-represented litigants than full representation, and could serve to promote case settlement by ensuring that these litigants have the benefit of some legal advice.

Another mechanism that might serve to provide self-represented litigants with some measure of legal assistance is the use of licensed paralegals to provide limited legal services in certain family law disputes. A slightly higher proportion of respondents from Alberta supported the provision of legal services by paralegals than did respondents from the rest of Canada.
3.2.3 Recommendations

The findings obtained in the present study lead to a number of recommendations regarding the language used to describe parenting arrangements after separation, addressing the needs of self-represented litigants and their increasing involvement in the family law proceedings, and resolving family law disputes through mediation:

- Given the strong support among survey respondents for amendments to the terminology for the post-separation arrangements for the care of children in the Divorce Act, as well as the fact that some provinces have already changed the terminology used in their legislation, the federal government should consider enacting such amendments independent of another private member’s initiative such as Bill C-560.

- Since a majority of survey respondents agreed that family law cases are less likely to settle before or during trial when one or both parties are self-represented, work should be undertaken to promote the awareness and availability of unbundled legal services among the members of the family law bar. These services would be more affordable for self-represented litigants than full representation and would likely result in more timely settlement of cases and fewer family law trials. Further research needs to be conducted on litigant satisfaction and the outcomes of cases where services are provided on an unbundled basis.

- Given that a substantial majority of respondents said that challenges arise in cases with self-represented litigants because of their unfamiliarity with the applicable legislation, the rules of court and the law of evidence, plain language guides in these areas should be drafted and made readily available to these litigants.

- As a substantial proportion of survey respondents said that self-represented litigants should be required to attend an information session on the law and court processes, consideration should be given to developing and instituting such sessions. These sessions should be evaluated to determine their effectiveness in promoting case settlement and decreasing the number of trials.

- Given that a majority of Alberta respondents thought that mediation prior to trial should be required in cases where at least one party is self-represented, the feasibility and effectiveness of such a program, either by
rule or by invocation of one party like BC’s Notice to Mediate regulation,\textsuperscript{40} on case settlement should be investigated by Alberta Justice.

- In light of the mixed views of respondents to the notion of licensed paralegals providing some services in family law cases, consideration should be given to introducing pilot programs involving the provision of various services by paralegals. It would be essential that these programs be evaluated to determine the extent to which they provide a cost effective and efficient means of settling family law disputes.

- Given that a majority of lawyers who refer cases for mediation said that they screen their family law clients for domestic violence, but relatively few said that they use standardized questions or a standardized form for this purpose, educational efforts should be made to raise the awareness among members of the bar of the availability of standardized instruments and the benefits of using them, as well as instruction on how to administer and interpret them.

\textsuperscript{40} BC Reg. 296/2007, regulation to \textit{Law and Equity Act}, RSBC 1996, c. 253.
References


Glossary

**Missing cases:** The number of responses on individual questions that are not available. The most common reason for missing cases in survey data is that the respondent chose not to answer a particular question.

**Multiple response data:** Multiple response data refers to questions in which respondents are allowed to choose more than one answer. In tables where multiple response data are presented, the percentages presented for individual items will total more than 100.

**N and n:** N refers to the total number of responses received to a survey while n refers to a subset of the total responses that may be selected for specific data analyses. For example, if 100 men and women respond to a survey, then N = 100. If 30 of those respondents identify as women, then n = 30 women and n = 70 men.

**Range:** The lowest and highest responses to a question.

**Response rate:** The percentage of completed surveys returned out of the total number distributed to potential respondents.
Appendix A:

National Family Law Program 2014
Survey of Participants
National Family Law Program 2014: Survey of Participants

This survey addresses three subjects: shared parenting; dispute resolution and mediation; and, self-represented litigants. The results of this survey will be presented at the National Family Law Program in Whistler, British Columbia, and the results may also be used as part of broader research initiatives being conducted by Dr. Rachel Birnbaum of the University of Western Ontario, Professor Nicholas Bala of Queen's University and Mr. John-Paul Boyd of the Canadian Research Institute for Law and the Family. The survey questions on shared parenting and dispute resolution are brief and should take no more than five minutes to complete. The survey questions on self-represented litigants will take about twenty minutes to complete. This portion of the survey is intended to obtain the views of mental health professionals, lawyers and judges, and to follow up on a similar survey conducted in 2011 to assess any changes. Please answer the questions in this survey with regard to your family law cases. The data collected in this survey will only be expressed in aggregate form and as such cannot be used to identify individual respondents. The survey is completely voluntary, no identifying information is being collected about you and all data are collected and stored in Canada. This project is being conducted by the Canadian Research Institute for Law and the Family. If you have any questions, comments or concerns about this survey, please contact Ms Joanne Paetsch by e-mail at paetsch@ucalgary.ca or by telephone at (403) 216-0340 or 1-888-881-4273 (toll-free).

DEMOGRAPHIC INFORMATION

What is your sex?
- Male
- Female

What is your primary profession?
- Judge
- Court Services and Administration
- Lawyer
- Non-lawyer Mediator
- Other Legal Services Provider
- Psychologist or psychiatrist
Social Worker
University or College Professor
Other, please specify... ____________________

How many years have you practiced your present primary profession?

In the past year, what percentage of your cases have been family law matters?

In which province or territory do you practice?
- Alberta
- British Columbia
- Manitoba
- New Brunswick
- Newfoundland and Labrador
- Northwest Territories
- Nova Scotia
- Nunavut
- Ontario
- Prince Edward Island
- Quebec
- Saskatchewan
- Yukon
SHARED PARENTING

In what percent of your family cases where there are children is the resolution:

- Some form of "joint physical custody," "shared custody" or "shared residence" (the children spend at least 40% of their time with each parent)?

- Some form of "joint legal custody," "mutual guardianship" or "joint guardianship" (the parties share decision-making responsibilities or their decision-making responsibilities are divided or in a parallel parenting arrangement)?

- The children have only limited contact with one parent?

- There is no provision for the children's contact with one parent?

Do you support the amendment of the Divorce Act to use different language than "custody" and "access," such as "parental responsibility," "parenting time," or other similar terms?

- Yes
- No

Please explain.

Over the past five years, has the portion of your family cases where there is some form of "joint physical custody," "shared custody" and/or "shared residence" (the children spend at least 40% of their time with each parent),

- Increased substantially
- Increased somewhat
- Stayed about the same
Do you support the enactment of legislation to amend the Divorce Act to create a presumption of equal care or residential time?
- Yes
- No

Please explain.

Do you have any other comments regarding parenting arrangements or joint custody?

DISPUTE RESOLUTION AND MEDIATION

In what percentage of your family cases is the case ultimately resolved by:
- Arrangements made by the parties themselves?
- Negotiation involving lawyers?
- Completely or partially through mediation?
- Collaborative family law?
- Arbitration?
- Completely or partially through court, with some reliance on a judge at interim hearing or conference?
Completely or partially through court, with some reliance on a judge after trial?

| In what percentage of your cases in which there is a dispute over parenting are the following used: |
| Assessment by government-paid mental health professional, usually including interviews with children? |
| Assessment by a mental health professional paid by the parties, usually including interviews with children? |
| Children’s lawyer? |
| Judicial interview of children? |
| Non-evaluative views of the child report (usually prepared by social worker or lawyer, sometimes called Voice or Views of the Child Report)? |
| Evaluative views of the child report (prepared by a mental health professional)? |

| In the principal centre where you practice/preside, is there access to: |
| Government-supported or -subsidized mediation? |
| Private Mediators? |

| In the principal centre where you practice/preside, is there a requirement that individuals who are commencing family litigation attend an information session that discusses the potential value of mediation? |
| Yes | No |
| ○ Yes |
| ○ No |
If yes, is it conducted on an individual basis or in a group setting?
- Individual basis
- Group setting

In what percentage of your family cases is mediation attempted for some or all of the issues?

Of the cases in which mediation is attempted, in what percentage of cases does it result in resolution of:
- Some of the issues?
- All of the issues?
- None of the issues?

Of the cases in which mediation is attempted regarding a parenting plan, in what percentage of cases does the mediator:
- Meet the child?
- Make other arrangements for ensuring that parents have independent information about the child’s wishes and views (i.e., not from their own conversations with the children)?

If you refer cases for mediation, do you screen cases for domestic violence?
- Always
- Sometimes
- Never
If you do screen for domestic violence, do you ask standardized questions or use a standardized form?
- Yes, I ask standardized questions
- Yes, I use a standardized form
- No

Do you have any other comments regarding mediation or family dispute resolution?

SELF-REPRESENTED LITIGANTS AND ACCESS TO FAMILY JUSTICE

In the past year, what percentage of your family law court cases have involved at least one self-represented litigant:
- for part of the litigation process?
- for all of the litigation process?

In the past year, in what percentage of your family law court cases have all parties been self-represented:
- for part of the litigation process?
- for all of the litigation process?

Do you think that there has been a change in the number of self-represented litigants now as compared to three years ago?
- Much more
- More
- About the same
- Less
Why do you think family law litigants are self-represented? (Please check all that apply)

- A. They cannot afford a lawyer and are not eligible for legal aid
- B. They initially had a lawyer but could no longer afford legal representation
- C. They think they know enough about family law to do it as well or better themselves
- D. They think they know enough about court processes to do it as well or better themselves
- E. They think the judge will favour a party who is self-represented
- F. They think lawyers will increase the adversarial nature or complexity of the court process
- G. They think lawyers will increase the time and cost of resolving the dispute
- H. They want to directly confront their former spouse or partner
- I. They think their knowledge of their spouse or partner gives them an advantage
- J. Other, please specify... ______________

If you think that more than one of the above applies, please identify (by letter) the three most common reasons why you think litigants are self-represented.

Most common reason

Second most common reason

Third most common reason

Do you think that men and women decide to self-represent for different reasons?

- Yes
- No
If one party is self-represented, does this increase the legal expenses of the party with counsel?
- Yes
- No
- Don’t know

If one party is self-represented, does this make settlement before trial (or before the end of trial) more likely or less likely than if all parties were represented by counsel?
- Much more
- More
- About the same
- Less
- Much less
- Don’t know

If all parties are self-represented, does this make settlement before trial (or before the end of trial) more likely or less likely than if one party had counsel?
- Much more
- More
- About the same
- Less
- Much less
- Don’t know
If all parties are self-represented, does this make settlement before trial (or before the end of trial) more likely or less likely than if all parties were represented by counsel?

- Much more
- More
- About the same
- Less
- Much less
- Don't know

Do you think that self-represented litigants generally receive fair treatment from opposing counsel?

- They are treated very fairly
- They are treated fairly
- They receive satisfactory treatment
- They are treated unfairly
- They are treated very unfairly
- Don't know

Do you think that self-represented litigants generally receive fair treatment from the judge?

- They are treated very fairly
- They are treated fairly
- They receive satisfactory treatment
- They are treated unfairly
- They are treated very unfairly
- Don't know
Do you think that self-represented litigants achieve better or worse outcomes in regard to:

<table>
<thead>
<tr>
<th></th>
<th>Better</th>
<th>No difference</th>
<th>Worse</th>
<th>Don’t know</th>
</tr>
</thead>
<tbody>
<tr>
<td>parenting arrangements than those with counsel?</td>
<td>〇</td>
<td>〇</td>
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<tr>
<td>child support and spousal support than those with counsel?</td>
<td>〇</td>
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<tr>
<td>the division of property than those with counsel?</td>
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</table>

Are there added challenges in court cases involving at least one self-represented litigant because:

<table>
<thead>
<tr>
<th></th>
<th>Always</th>
<th>Usually</th>
<th>Sometimes</th>
<th>Rarely</th>
<th>Never</th>
<th>Don’t know</th>
</tr>
</thead>
<tbody>
<tr>
<td>Self-represented litigants have unrealistically high expectations of outcome?</td>
<td>〇</td>
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<tr>
<td>Self-represented litigants are less likely to settle?</td>
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</tr>
<tr>
<td>Self-represented litigants are more likely to take unreasonable positions based on principle?</td>
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<td>〇</td>
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<td>〇</td>
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<tr>
<td>Self-represented litigants are more interested in the fight than the result?</td>
<td>〇</td>
<td>〇</td>
<td>〇</td>
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<tr>
<td>Self-represented litigants look to opposing counsel for information and advice?</td>
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<tr>
<td>Self-represented litigants are unfamiliar with hearing and trial processes?</td>
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<tr>
<td>Self-represented litigants are unfamiliar with the Rules of Court?</td>
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<tr>
<td>Self-represented litigants are unfamiliar with the law of</td>
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If you are a lawyer, do you provide services on a limited-scope retainer (unbundled) basis?

○ Yes
○ No

Are you aware of other lawyers in your jurisdiction providing services on a limited-scope retainer (unbundled) basis?

○ Yes
○ No

If you are not a lawyer, are you aware of lawyers in your jurisdiction providing services on a limited-scope retainer (unbundled) basis?

○ Yes
○ No
**How often do you deal with self-represented litigants who have:**

<table>
<thead>
<tr>
<th>Activity</th>
<th>Always</th>
<th>Usually</th>
<th>Sometimes</th>
<th>Rarely</th>
<th>Never</th>
<th>Don’t know</th>
</tr>
</thead>
<tbody>
<tr>
<td>Retained a lawyer for the limited purpose of representing them in court for all or part of the litigation process?</td>
<td>○</td>
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</tr>
<tr>
<td>Retained a lawyer for the limited purpose of preparing written arguments during the litigation process?</td>
<td>○</td>
<td>○</td>
<td>○</td>
<td>○</td>
<td>○</td>
<td>○</td>
</tr>
<tr>
<td>Retained a lawyer for the limited purpose of conducting legal research during the litigation process?</td>
<td>○</td>
<td>○</td>
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<td>○</td>
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</tr>
<tr>
<td>Retained a lawyer for the limited purpose of obtaining legal advice during the litigation process?</td>
<td>○</td>
<td>○</td>
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</table>

**Do you think that any of the following measures would improve self-represented litigants' use of the court system? (Please check all that apply)**

- A. Simplifying the rules of court
- B. Simplifying the rules of evidence and trial processes
- C. Simplifying the legislation governing family law matters, including the Divorce Act
- D. Providing plain-language guides to court and trial processes
- E. Providing plain-language guides to the rules of evidence
- F. Providing plain-language guides to the Divorce Act, the Child Support Guidelines, and the provincial legislation applicable in family law matters
- G. The court adopting an inquisitorial approach to the hearing of applications and trials when one party is self-represented
- H. The court adopting an inquisitorial approach to the hearing of applications and trials when all parties are self-represented
- I. The court appointing counsel as amicus curiae to facilitate the hearing / trial process when one party is self-represented
J. The court appointing counsel as amicus curiae to facilitate the hearing/trial process when all parties are self-represented

K. Requiring mandatory mediation following the commencement of an action whenever at least one party is self-represented

L. Requiring mandatory mediation prior to the trial of an action whenever at least one party is self-represented

M. The court adopting a mediation-litigation hybrid approach in which judicial mediation is attempted and a trial ensues if settlement cannot be reached when at least one party is self-represented

N. The court adopting a mediation-litigation hybrid approach in which judicial mediation is attempted and a trial ensues if settlement cannot be reached when all parties are self-represented

O. Requiring self-represented parties to attend an information session on the law and court processes

P. Other, please specify... ________________

If you think that more than one of the above applies, please identify (by letter) the three measures that you think are most likely to improve self-represented litigants' use of the court system.

First

Second

Third

Do you approve of licensed paralegals being permitted to provide limited services in family law cases?

○ Yes

○ No
If yes, what types of services do you think paralegals should be permitted to perform? (Please check all that apply)

- Preparation of court forms and other documents
- Preparation of affidavits
- Determining the documents which must be filed in court
- Explaining court procedures
- Assisting with identification and disclosure of documents in court proceedings
- Calculation of child support and special expenses
- Variation of child support
- Calculation of spousal support
- Variation of spousal support
- Calculation of property division
- Preparation of parenting schedules
- Variation of parenting schedules
- Provision of legal advice
- Acting as agent in uncontested matters
- Acting as agent in limited number of simple contested matters
- Acting as agent in all contested matters
- Other, please specify... ____________________

Do you have any other comments about self-represented litigants or access to justice in family law matters?

__________________________

Thank you very much for your participation. If you have any questions, concerns or additional comments, please contact Ms Joanne Paetsch by e-mail at paetsch@ucalgary.ca or by telephone at (403) 216-0340 or 1-888-881-4273 (toll-free).