

It's Time For Justice

Change Family Law In Canada. Now.

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FELDSTEIN FAMILY
LAW GROUP
PROFESSIONAL CORPORATION

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Toronto - Markham - Mississauga

It's Time For Justice

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Why am I publishing *It's Time For Justice*? Why am I devoting time and resources to this? For the same reason the Canadian Bar Association and the Law Commission of Ontario, among others, are reporting on family law. Because Canadians have been discussing access to justice for decades and we have made barely any progress. The time for talk is past; the time for action is now.

This spring, a panel of exceptional lawyers and other experts reported on family law, looking from the highest levels in the judicial system at the lack of access to justice. There are details on page 4. The Canadian Bar Association held its *Envisioning* conference in Vancouver, covering family law and more.

My report looks at it from the battlefields; from inside the case meetings and the mediation sessions and the court rooms. The problems are well known to those inside the legal world, but less known to the politicians responsible for our laws, and the journalists responsible for explaining just about everything to just about everyone. It is only when Canadians go through the process of separation and divorce that gaps, cracks and disconnects become obvious.

It's Time For Justice is a call to action.

It's Time For Justice is intended to inspire thought and then actions by a wide variety of Canadians interested in family law, specifically:

- To prompt politicians to review laws and make new ones.
- To cause change.
- To encourage journalists to hold family law stakeholders, and especially politicians, to account.

It's Time For Justice is based on my two decades of experience in Ontario, primarily practising family law. *It's Time For Justice* often deals in broad strokes and generalities, and there are always exceptions to the rules. The examples are not the only way a situation may unfold, and *It's Time For Justice* is not intended to be legal advice. Laws vary from province to province.

In *It's Time For Justice*, for the most part, the names, titles, and circumstances used are real, especially when referring to professionals in family law. For the privacy of some individuals, and especially children, modified initials and pseudonyms may be used and circumstances may be altered.

Many aspects of family law are emotional, and many people are sensitive about social circumstances and about language. We will write about husbands and wives, boys and girls, men and women, married couples, and so on. Canada is a pioneer in formal and informal same-sex relationships, including marriage, and more often than not, rules for same-sex relationships are the same as for heterosexual couples. When circumstances warrant, we will explain differences.

And Quebec has some unique rules.

Comments and reaction to *It's Time For Justice* are particularly welcome.

This is Edition One of a six-edition series, intended to be published quarterly.

Andrew Feldstein

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Andrew Feldstein

Andrew Feldstein is the Managing Partner of Feldstein Family Law Group, with offices in the Greater Toronto Area, and headquarters in Markham.

Mr. Feldstein graduated from Osgoode Hall Law School in 1992. Prior to focusing exclusively on family law, Mr. Feldstein's legal practice



covered many different areas, including Corporate Commercial in addition to family law.

One of Mr. Feldstein's fundamental objectives at Feldstein Family Law Group is to help his clients separate and divorce smoothly, efficiently, and fairly; meeting goals mutually set out by him and his clients.

Mr. Feldstein's overall philosophy is to help his clients get on with their lives with a minimum of animosity and bad feelings.

He was honoured in 2010 with an inaugural appointment to the Dispute Resolution Officer (DRO) Panel for Newmarket Family Court. This appointment was made by the then-Senior Family Justice for Ontario, The Honourable Madame Justice Mary J. Hatton, and the Regional Senior Judge for the Central East Judicial Region of Ontario, The Honourable Mr. Justice Michael Brown. This panel supports the family law court process by aiding couples in attempts to resolve their issues before their case proceeds before a Judge. Mr. Feldstein was selected for this appointment because of his vast experience with and successful ability to resolve complex family law

issues using alternatives to the traditional court methods, including the collaborative family law process.

Mr. Feldstein actively supports students, education and the profession by volunteering for the Osgoode Hall Law School Mentor Program. His dedication to Osgoode Hall Law School students has resulted in extremely positive student feedback. He is the Chair of the Articling Committee at Feldstein Family Law Group.

Many media outlets have interviewed him. He believes it's important for the public to understand the impact of family law, because all Canadians have been touched by the effects of separation and divorce.

Mr. Feldstein is a member of:

- The Law Society of Upper Canada
- The Ontario Bar Association (OBA)
- The Canadian Bar Association National Council 2008-2012
- An OBA committee on family law reform, which made submissions to the Law Reform-Commission of Ontario (2009)
- The Canadian Bar Association
- The Association of Family and Conciliation Courts (AFCC)
- The AFCC Public Information Forum Working Group (2009)
- The AFCC Partnership Subcommittee of the Public Information Forum Working Group (2009, chair)
- The York Region Law Association
- The Newmarket working committee to improve the court process
- The Markham Board of Trade

Mr. Feldstein enjoys an active lifestyle, which includes time with his children, skiing, and playing tennis. He loves attending a variety of live sporting events, especially professional tennis and the Toronto Maple Leafs.

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The quiz on family law

In winter 2013, I was on *In The Know*, a Rogers Community Television program broadcast throughout York Region. It is a television program with a strong, self-confident interviewer, Emily Anonuevo, not afraid to admit she did not know it all. She happily agreed to a quiz to test her knowledge of Canadian family law. We repeated the quiz on *Daytime* (Rogers Mississauga) and we've done variations on radio programs, too. See how you do.

1. If you can prove that your spouse was unfaithful, you can get more money in spousal and child support payments. Part of Family Law is punishing bad behaviour.
2. To get evidence of an affair and help the court save time, you can hack into your spouse's email, snoop around, and use copies to prove your points.
3. If you and your common-law spouse have children together (common-law means you are not married), you won't have to pay child support.
4. If you and your spouse argue a lot, it is easier if one of you (to keep the peace in the house) moves out of the matrimonial home ASAP.
5. It's OK to complain about your spouse on Facebook and Twitter because they are personal and the courts do not have access to them.
6. If your spouse cleans out the joint account, the court will order repayment of the money.
7. It's OK to take a break from the stress and go on vacation, if a friend loans you the money.
8. If your car gives out during your divorce proceedings and you have to replace it, it's OK to buy a new Mercedes or Audi because you got a great deal on it.
9. If your parents gave you a gift of \$100,000 and you used it to pay off the mortgage, you can get that \$100,000 back because your parents intended the money for you, not your ex-spouse.
10. If your former spouse is not paying child support, you can withhold access to the children.

ANSWERS - The answers below are not intended as legal advice. They do point out the variables in family law. These topics and more will be covered in greater depth in upcoming editions of *It's Time For Justice*.

1. Because Canada has no-fault divorce, this is false. 2. Similar to question 1, no-fault divorce means the court does not want this evidence, so false. Plus the Ontario Court of Appeal created a new tort, called the tort of intrusion upon seclusion, so your spouse can even sue you for snooping. 3. False. Child support is required in common law marriages across Canada, although other support varies by province. You'll have to pay child support even if you never see the child. 4. It may be easier in the short-term, so true applies, but it is bad strategy in a divorce, as it may affect your claim for custody. 5. This answer is false, for two reasons. It is a bad idea to complain, and your spouse can tell the court what complaints you did put on social media. Plus Facebook and Twitter postings can harm the children, if they have access or are told about postings. 6. Circumstances vary by the particular situation. The spouse who takes the money may be required to return it to the joint account. 7. Optics are important and it depends on the circumstances. If the cost of the vacation is high and you have been complaining about the lack of money to pay child support, the court is likely to view it negatively. But if the price is reasonable – for instance it just covers air fare to stay at someone's vacation home for free – the vacation may not be viewed negatively. So true or false, depending. 8. Similarly to 7, courts look negatively at large expenditures before the division of assets is agreed upon, so false would apply if it was a new expensive car, but a moderately priced, safety-checked used car would probably be OK. 9. "Extra" money given to one spouse that then goes to the family home, whether from a gift, a business bonus, or any other source, remains as part of the value of the house, as you cannot exclude a part of the matrimonial home, so false. Other gifts that go to one spouse and not the other can probably remain with the recipient if careful records are kept before and during marriage. 10. Because divorce law is concerned with the best interests of the children, the answer is false. Children won't be deprived of visits with a parent even if that parent is not paying child support.

PART A - Problems

Most obvious roadblocks to family law justice

Here are a dozen of the biggest roadblocks

FEAR - Fear of losing or not seeing your children. Fear of not having enough money after separating to live yourself and provide for any new family, while meeting obligations to your original spouse and children.

COST - The separation and divorce process costs too much, so you can't afford the cost of separating.

TIME - Separation and divorce takes too long. While the pain is dragged out, the bills increase.

COMPLEXITY - Separation and divorce has too many components: actions, reports, briefings, meetings, outside experts, documents, etc.

CONFUSION - It turns out that, often, words don't mean what you might expect.

PARTICIPANTS - There are a lot of participants, including lawyers, of course, but also social workers, mediators, judges, court clerks, expert witnesses, and more.

DISLIKE AND MISTRUST OF THE SYSTEM - One or both of the spouses do not want to be part of a judicial system they feel is unfair, too expensive, etc.

NOT COMMITTED TO SEPARATING - One or, perhaps surprisingly, both, does not really want to split, but the process has started and they don't feel they can back out.

CULTURALLY OR PERSONALLY EMBARRASSED - People still feel stigmatized by divorce, and back away from the full involvement needed for economy and efficiency.

ADULTERY, MENTAL AND PHYSICAL CRUELTY - People still believe these are the only grounds for divorce. They don't want to accuse the other party of this kind of behaviour, nor admit to failing themselves. They don't realize Canada has no-fault divorce.

INTRUSION - Some parties are offended by the questions asked by lawyers and judges, and the disclosure required by the law, thinking that questions being asked are "none of your business."

SELF REPRESENTATION - Some of these factors contribute to a person's decision to skip hiring a lawyer, at least part of the time, and instead represent themselves. This almost always leads to greater expense and a longer time before resolution.

It's Time For Justice

What access to justice means

***It's Time For Justice* is mostly about access to justice in family law.**

This includes separation and divorce, child support, child custody and access, spousal support, division of assets, and similar rights and obligations under the laws of Canada and the provinces and territories. These are the main aspects of family law in Canada.

By access to justice in family law, I mean eight interwoven concepts that I outline beginning on page 7. They should be examined, rethought, and revised, all with the goal of making it easier for Canadians to feel justice is being served.

For decades, progress in family law has been slow, notwithstanding the best of intentions. Judges, social workers, court officials and lawyers have been trying to improve family law, especially in the interests of children.

In the spring of 2013, The Canadian Forum on Civil Justice and its related National Action Committee on Access to Justice in Civil and Family Matters issued four reports, which can be read at <http://www.cfcj-fcjc.org>.

The reports are:

- Report of the Court Process Simplification Working Group
- Report of the Access to Legal Services Working Group
- Report of the Prevention, Triage and Referral Working Group
- Report of the Family Justice Working Group

The Canadian Forum on Civil Justice (CFCJ) is “a national non-profit organization that has been dedicated to advancing civil justice reform through research and advocacy since 1998. CFCJ strives to make the civil justice system more accessible, effective and sustainable by leading

and participating in projects that place the citizen at the center of our civil justice system.”

The National Action Committee acknowledges that Canadians have been having the same conversation for decades. People need to act on recommendations. The Action Commit-

“I do not believe there is adequate access to justice within the broad legal system today. Specifically in family law, the lack of access to justice is a travesty.”

tee, various other experts, and I all agree we must quickly and efficiently determine what needs to be changed, decide how it should be changed, even if only a few steps at a time, and then change it.

Judges do not make laws. *It's Time For Justice* is aimed at politicians and civil servants, who are the people able to turn

needed changes into bills for passing in federal and provincial parliaments or into new rules or regulations for proclamation. Politicians and civil servants can also change attitudes and approaches by governments.

Family law lawyers, divorcing spouses, individual judges, court administrators, expert witnesses, social workers, mediators and arbitrators, and professional bodies all need to participate. Quickly and efficiently.

What am I advocating?

I want to reinforce, strengthen, or change many areas of family law, as now practised and administered in Canada, and particularly in Ontario. I cannot do this by myself, and am looking for help.

The role of politicians and journalists

In this and future editions of *It's Time For Justice* to be published over the next 18 months, I will put forward my own ideas and I will ask for ideas from people inside and outside the legal world. With respect, I urge politicians and journalists to adopt two roles here, even though we do not normally think of politicians and journalists as being “family law stakeholders.”

Politicians and journalists who want to make Canada a better place in which to live are key to successfully improving access.

First, we need ideas. Part of the job of politicians is to think of improvements in how Canada is governed. I'm nudging you towards thinking of better family law governance. Everyone in Canada is affected directly or indirectly by family law.

Part of the job of journalists is to think up ways Canadian life can be improved. Good journalists go interview people and do their own analysis, and run stories that lead to positive change. The news pages, the feature pages, and the comment pages, whether print, broadcast or web pages, are all involved.

Second, Canada needs new or revamped laws. For a lot of my ideas from *It's Time For Justice* to come into play, laws must be changed, and that's where politicians come in.

I urge politicians to come into this discussion not as “whipped members” with a yea or nay as ordered by a party leader. Instead, please act as the elected representative, federal or provincial, of the men and women, and the children, of your ridings and of the entire country.

Just because 9-year-olds can't vote doesn't mean the local MP, MPP, or MLA does not represent them when laws about their parents' split and their futures are being improved, or stalled.

Federal and provincial members are all involved. *The Divorce Act* is federal, but it applies only to married couples. But division of property for married couples is governed by provincial law. If you did not get married and are counted as common law, then child custody, child access,

child support and spousal support are all provincial. Earlier this year, British Columbia made major changes in its laws affecting common-law couples, to very mixed public reaction. The law is often not popular, and can be very complicated.

Decades ago, the federal parliament was full of lawyers, and it would be safe to assume there was a high overall level of understanding of the legal system, including family law. Today, the number of lawyers has dropped to about 40 out of 308 MPs, meaning 75 per cent of federal MPs are not lawyers.

Many of the 75 per cent will need help understanding legal issues and the benefits of changes. And many won't spot the unanticipated consequences arising from a lack of legal care and precision.

It's Time For Justice is written to build understanding among individual politicians.

I work hard at explaining family law to Canadians, via interviews with print, radio, television, and internet journalists. I write my own print and video blogs, as do many of the firm's other lawyers, at www.separation.ca. I write for *The Huffington Post's* Divorce Section, and for legal industry professional magazines. This initiative has its own site, at www.itstimeforjustice.ca.

I've learned Canada has some journalists who understand legal issues very well. Some journalists are also lawyers. But many Canadian journalists, just like many politicians and probably most Canadians, do not have an accurate view of family law in our country. Often, they think family law in Canada is more similar to US laws than it actually is. Our federal *Divorce Act* covers all of Canada; Americans have state-by-state laws. But division of family property in Canada is provincial.

We don't have alimony and community property, but we do have same-sex marriage and divorce. And we have no-fault divorce, so adultery only rarely becomes a factor in a Canadian divorce.

The Canadian divorce process

Here's how Canadian divorce works, in theory, if not always in practice. A couple decide to separate and, if married, get divorced following the rules of the federal *Divorce Act*. They agree on the date of separation, and from that date, they "live separate and apart" for at least a year. During this year, they agree, with or without the help of lawyers, on child support, based on written federal guidelines, and usually spousal support and other matters.

They agree on child access, custody and other matters based on federal laws. Provincial laws come into play when dividing assets acquired during the marriage. They usually write all this down in a document called a separation agreement. If both parties agree everything is settled, the process is called an uncontested divorce, and papers are filed. Often, no one needs to go to court.

Paperwork, sometimes including the separation agreement, is sent to the Court (federal or unified). A judge needs to be satisfied that

reasonable child support will be paid and other arrangements for children are satisfactory. If so, a couple will be formally divorced a year from the date of separation, upon application. There is a 31-day wait for a certificate of divorce, which influences when a divorced person can remarry.

If it is a common-law arrangement, provincial law applies, with differences from province to province. Ontario usually follows federal guidelines on child and spousal support, while some other provinces do not. B.C. has recently changed many common-law marriage rules.

That's the theory. The reality is quite a bit different. Many obstacles can block the simplicity. The real challenge is reaching agreement. Negotiations can take place in court, not necessarily in the form of a genuine trial, but there are a lot of alternatives before entering a court house.

There can be negotiations without legal help. Lawyers can help negotiate. Mediators can become involved, or there can be a combination of mediation and arbitration.

The difference: separation v. divorce

Divorce is not the only option when you decide to end your marriage or relationship. You may choose to separate but not divorce, meaning you may end your relationship without applying to the court for approval or without seeking the services of a lawyer (unless disagreements make it necessary).

You may choose to divide your assets and decide on custody, access and support issues in an informal agreement or through the services of a lawyer, mediator or arbitrator, who will help draft a more formal and final separation agreement.

If one of you decides to remarry, a formal divorce order must be obtained. Once that is done, all other corollary issues may possibly be left alone, as agreed in the separation agreement.

For couples without a legally valid marriage (instead, are "living common-law"), there

is in most of Canada no formal property division process that must be followed upon termination of the relationship. B.C. is an exception. All that is essentially required is that you separate. If your relationship was three years or less, and you do not have children together, you can simply move out and take any belongings that you owned or acquired during the relationship with you.

If, on the other hand, the relationship was of a longer duration during which time you purchased numerous assets together (houses, cars, etc.) and had children together, then you may want to seek the services of a lawyer, mediator or arbitrator to help you resolve your issues. These may include dealing with all the claims (child custody and access, support, claims for a trust interest in property, etc.) relating to separation.

PART B - Solutions

Eight ways to improve access to justice

1/ Everyone deserves legal representation

Canadians should never be forced to completely represent themselves in family court, without the benefit of legal assistance, preferably from a family lawyer. Complete self-representation should end. I will explain more in Editions Two and Four.

TRUE STORY

A woman decided to separate, hired a lawyer, and started the process. Her husband was not interested in separating, but instead of hiring a lawyer to help him make his case, he ignored court orders and represented himself, mostly ignoring the separation process. Eventually the judge “struck the pleading,” which meant the husband could not participate, and the wife was awarded what she wanted.

2/ Children come first

Judges have it right when their priority is “the best interests of the child.” Children are not weapons to be used to fight the other spouse.

TRUE STORY

One judge was listening to a discussion about visitation rights for the father, who wanted to be with his child every other weekend, and one evening a week. The mother wanted the father to have no access, because it would dig into “mommy’s time.” The judge ruled in favor of the father, based on the judge’s belief that spending time with both parents was in the child’s best interests.

3/ Cases take too long

The old expression “Justice delayed is justice denied” is true. Every month’s delay in family court is a big proportion of the life of a child. There are two problems. The first and foremost problem is the delay-filled judicial system. And the second problem is that often, one or both spouses move at too slow a pace.

TRUE STORY

A lady came into my office, saying she and her husband needed to separate. “We aren’t getting along. I think he should move out of the house, but he refuses. We’re arguing all the time, and it’s just an awful place for the kids.”

And here’s where justice is delayed. I’m not allowed to bring a motion in family court to force him out of the house until after we have a case conference. And if I apply today, I’ll probably get my case conference scheduled four or five months from today. And the motion to force him to move out will take another month to two months after that. I don’t get to open my mouth to get him out of the house for six or seven months from the get go. Meanwhile, everyone suffers, especially the children.

4/ Show Canadians that justice is being done

Justice must be seen to be done. Open courts are fundamental to the Canadian judicial system, and they make our country great. But openness needs to be balanced. B.C. has taken some steps to ensure privacy, and other provinces should follow. More details at www.itstimeforjustice.ca.

TRUE STORY

In most of Canada, the papers filed in a divorce proceeding are on the public record, and one of the first papers required is an accurate statement of the financial position of each party. In Ontario, anyone can go to the court house and get a copy of these statements. Whether or not there’s a record kept of the person requesting information varies. But the result is that a reporter or a business rival can get a lot of information to use for published gossip or a business takeover. What is more important? The public’s right to know or Tie Domi’s children’s right to not have their father’s adultery with Belinda Stronach reported in the media, as it was on September 26, 2006? I believe this invasion of privacy is simply wrong, as it is very damaging to children.

5/ Don't inspire other crimes

- a) Family law must close the doors to other potential crimes and abuses, such as fraud and identity theft. The openness of personal financial and business records made public in many family law cases makes it easy for identity thieves to find out confidential information in many other provinces.
- b) In some separations there are accusations of physical abuse against children or a spouse, sometimes sadly true and sometimes a fraudulent tactic to incite parental alienation.

TRUE STORY:

In regard to fraud, the documents in a divorce can include such personal information as bank balances and mortgage records. We're told to shred our personal files, but our open court system functions as an information smorgasbord for potential fraudsters. And you might never know the court was the source of the information leak.

I remember visiting a client in jail where he was sharing a cell for more than a week with sex offenders, because his wife falsely accused him of not only sexually assaulting her, but also assaulting their children. Eventually the charges were dropped, he was released, and the police apologized for taking so long to investigate and completely clear him, acknowledging that he, in fact, was the victim.

6/ Don't inspire emotional abuse

The open emotions expressed in family law hearings, as parent attacks parent and even in-laws attack in-laws with words, make it easy for children to be emotionally abused throughout the separation and divorce process, and for decades afterwards.

TRUE STORY

Even adults can be hurt, as was reported by numerous media, in the recent separation of Michael and Christine McCain, where Mr. McCain hired psychiatrists to try to prove his wife Christine was mentally ill, an extraordinarily mean-spirited and vindictive action.

7/ End the winner/loser mentality

We need to start thinking not of winning or losing, but of creating a satisfactory outcome for our clients, letting them keep as much of their money as possible for themselves and the children, instead of forcing high lawyer bills. The reality in family law is that everybody is going to lose. The real goal should be limiting how much you are going to lose. If a couple wants to be good to one another, and be fair to one another, they can probably reach a deal quite quickly, and save money. An expensive high conflict dispute arises when one person acts unreasonably and the other side must fight.

TRUE STORY:

I was representing the husband against a wife who had publicly stated that her goal was to bankrupt him. As the case proceeded to his advantage, her behaviour became vicious, and she said she was going to burn down the family home, rather than have it sold. Her pleadings were struck, meaning the judge ruled the wife had no standing. And she had such large legal bills, including a costs award making her pay her husband's legal bills, that she ended up with nothing, living in poverty.

“We are not back in the old country anymore. We are not even in the old Canada, anymore.”

8/ Canadian culture is changing

And eighth, all of us in the separation and divorce world must constantly learn more about changes in Canadian culture and how to adapt. We must maintain our broadly

pluralistic, open, honest, and non-discriminatory Canadian way of life, while accepting some appropriate values brought by newcomers, or even older values renewed by our First Nations people.

Couples from elsewhere must recognize that Canadian principles of equality and justice protect them when getting divorced.

TRUE STORY

I have participated in healing circles in court when invited by a judge. The healing circle unquestionably helped get the case settled more quickly and with less animosity.

Legal costs and access to justice

When one, the other, or both partners of a couple are unhappy in their relationship, they often start thinking of separation and divorce.

If there are no children of the relationship, their first worry is often the huge legal bill they've been led to expect, based on gossip magazines and TV shows.

If there are children, their first thoughts are commonly, "when will I get to see my kids?", "where will my kids live?", "can I afford to provide a good life for them?", and "will I be able to support myself and my family?" And part of that support question is "will I be able to afford the legal bills?"

Those huge headline-sized divorce bills are fairly rare in Canada. There's usually a reason for a \$100,000 per spouse divorce. But even normal or common legal bills are "big" in the minds of people paying them. Many journalists believe divorce is expensive; reader comments on internet news stories about divorce usually contain an example of a reader's own high divorce expenses.

At Feldstein Family Law Group, we all keep careful track of our time, and, like most lawyers at most law firms, we all charge by the hour. The more hours we spend on your divorce, the higher the bill. In the legal world, charging by the hour is standard practice, and the amount of that hourly fee is based on education, experience, and expertise.

Lawyers are well educated. When lawyers are educated in Ontario, most start with a university undergraduate degree, and then apply to a law school. They attend law school for three years to get their law degree, but cannot practise immediately. Students then write the bar admission exams and most spend ten months "articling" at a law firm, assisting the lawyers, learning more of the real world of law, and getting paid. Because of a Canadian shortage of articling opportunities, some students will soon be able to by-pass

articling and instead take more school courses. So, our level of education, combined with the difficulty of what we do, dictates in some ways our pay scales.

At our firm, we believe in articling, and we carefully select our articling students. They must demonstrate a serious interest in family law by their course choices and extra-curricular activities. They must have the skills of empathy, negotiation, common sense, and flexibility mixed with firmness. They need imagination, to come up with innovative ways of getting people to agree.

A separation agreement is a "deal" formed by give and take. Students we recruit must behave as if they can grow into deal-making, peace-making lawyers.

But many divorces are what we call high conflict, and the lawyers who join us must be tough and also know how to litigate.

That means not just anyone with a law degree can be a good family law lawyer.

Articling to gain experience is a process we know works well. Six out of our last nine articling students joined the firm after being called to the bar.

Another factor related to our fees is the importance of what we do and the expertise it takes to do it well.

A divorce transforms couples' lives, returning them to opportunities blocked by marital unhappiness. A separation agreement and the divorce process is extremely important, and the laws are difficult to understand. The importance, combined with the difficulty, affects our fees.

Lastly, experience affects our fees. In most law firms, the hourly rate of each lawyer is based in part on the number of years since they were admitted to the bar. What they do within the firm, and what types of clients they handle, plays a part, too.

Factors that can control costs

Whenever there's a divorce story in the paper or on a web site, the letters to the editor and the comments sections are packed with diatribes accusing divorce lawyers of charging too much.

Those people are partly right. Divorces can be expensive, but those people are also usually looking at the wrong culprit, at least in Canada. In my two decades as a divorce lawyer, I've learned to use my best efforts to control costs, and most of my colleagues are very aware of our duty as lawyers to treat clients fairly, while doing the best possible job.

Ethical lawyers don't run up the hours, but invoices do climb. They can run up when someone is using the children as pawns or not providing proper financial disclosure as required by law.

Controlling costs starts to work when the client, and the client's spouse, cooperate with each other, and with their lawyers.

Canadians hear of high profile divorces with legal fees up in the \$100,000 and even quarter million dollar range. A few of these can skew the average divorce cost. But being famous is not required to create invoices higher than necessary.

Three factors, all quite common, are the most obvious reasons for higher invoices.

Factor one in making costs jump is deciding to become adversarial. When someone decides "to teach that so-and-so a lesson," we know costs will soar on both sides and the kids will suffer.

Factor two resulting in high divorce costs is taking unreasonable positions. One party may decide to refuse the kinds of child access that are accepted practice, and it will take lots of time, and therefore money, on both sides, to sort it out.

Factor three is not being forthcoming in financial disclosure right from the start. Business owners have been known to undervalue the business to keep the spouse's share low when there is division of assets. But the spouse's valuator may come up with an accurate higher valuation, and this leads to disputes and more expenses not only from accountants and valutors, but from lawyers for both spouses. The end result is higher costs.

Beware of going to trial

It's rare that a divorce case goes to trial for any reason other than animosity and some desire to "teach that so-and-so a lesson."

And each side optimistically thinks they can pay their lawyer out of the extra money the judge will award to them.

As a reality check for clients thinking of going to trial, I ask my clients for a \$50,000 deposit for a five day trial. There are usually two days of preparation required for each day of trial. Then, I call the opposing lawyer and suggest he or she ask for a similar deposit. When the squabbling couple see the deposit requests, it often pushes them back into negotiating for an agreement without having the burden of a trial weighing on their wallets.

People need to appreciate how expensive a trial is, and put their animosity behind them.

Making changes will be hard

Change is not easy, but it is possible, when politicians have the motivation.

The British Columbia government has removed the words "access" and "custody" from its *Family Law Act*.

"The new *Family Law Act* does not use the adversarial terms 'custody' and 'access.' It replaces them with a new model of parenting after separation which prioritizes a child's entitlement to proper parenting and meaningful time with each parent over a parent's right to control the child's upbringing and to control the child's time with each parent," writes Vancouver-based family law lawyer Marla Gilsig.

It's Time For Justice future editions will have more detail about these changes. For now, it looks as if B.C. will speed up what we have been calling child access and child custody disputes. Speeding things up is in the best interests of the child and has the possibility of reducing the hours billed, thus cutting costs.

But the B.C. law changes have also caused common-law couples, who consciously chose not to get married, to feel they have had rights taken away from them, without adequate consultation.

Ways to change fees to improve access

There are several conceivable ways to reduce legal fees in a divorce, but they have varying degrees of practicality and likelihood of being implemented.

Reducing the hourly rate

Lawyers may choose voluntarily to reduce their overall hourly rate, but this is unlikely. We have a great deal of specialized education and must do a good job or our clients will suffer. We also perform a valuable service.

In the legal profession, we have a tradition of what we call *pro bono*. Many lawyers accept cases at very reduced or completely forgiven fees, but then charge full rates for other work.

Work in teams

Lawyers may do more work in teams, with different lawyers at different billing rates, which keeps clients' costs down.

At Feldstein Family Law Group, where we have a dozen family law lawyers, we are able to have a lower-fee lawyer perform some more process-oriented tasks.

Our large number of family law lawyers has additional advantages over a sole practitioner or a multi-practice firm with only one or two family law lawyers. We have regular staff meetings and regular lawyer meetings, and these let us discuss out of the ordinary situations. Insights and the experiences of other family law lawyers give us and our clients some of the benefits of team structure.

Plus, in an emergency or on short notice, we can send a family law lawyer to attend a motion or assist in filing papers, when time matters and the client's regular lawyer is unavailable.

Market forces may drive down fees

Market forces based on demographics and social

trends are going to change the divorce law business, and the result is going to be fewer divorces relative to the population. We will explore this topic more in a future edition of *It's Time For Justice*, but several elements are in play.

Changing demographics mean changing supply and demand

A population pyramid is a graphic of horizontal bar graphs that shows the number of men and the number of women at each age. As each year goes by, the bar representing each age rises up the chart. The widest part of a population pyramid now covers the Baby Boomers, from about age 45 to 54.

This "widest" group includes the people who probably got divorced a few years ago, when they were 29 to 44.

The bars covering 20 to 44 today are noticeably narrower, meaning there are fewer people now in the age groups where divorce normally takes place, and it will drop further.

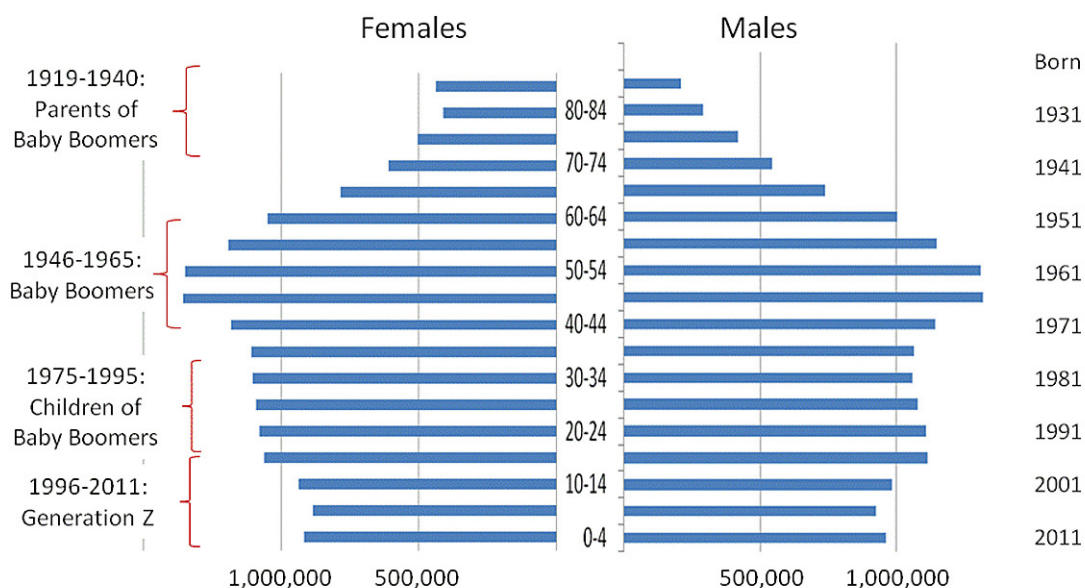
The increase in same-sex relationships will lead to more same-sex marriages, and this in turn will result in more same-sex divorces, but no one can predict how many.

Supply and demand economics usually means that a lower demand (fewer people getting divorced), results in discounts in fees in order for lawyers to get the business.

The number of lawyers is growing, increasing competition for those declining numbers of divorce cases. Being a lawyer can be a great career, and over the past few decades more and more people have joined our profession. But more lawyers across the whole legal profession is not necessarily a positive development as far as family law is concerned.

Here's why.

Population pyramid for Canada, 2011



This Population Pyramid is a version offered by the University of Ottawa, based on information the University itself uses.

Canada's law schools have been somewhat restrictive in the number of students admitted. Many Canadians leave Canada to get a law degree. We've seen the United States, the United Kingdom and Australia as popular places for Canadians to seek legal education.

The result is a glut of young lawyers and a lack of opportunities to articulate. The situation is so bad that some legal academics are urging that law students attend class for another year, rather than getting genuine experience working as articling students alongside lawyers.

It is realistic to expect that some of the increasing number of graduates who would traditionally head for the high-paying corporate and commercial law jobs in the giant towers of Canada's biggest cities will discover those opportunities are declining, too. Instead of joining a firm, they'll hang out a shingle as sole practitioners,

some as family law lawyers, without other more experienced family law lawyers to guide their development and help them gain experience. Mix more young lawyers looking for work with fewer potential clients, and we can expect the downward pressure on hourly rates to continue.

Make someone else pay

Lawyers at our firm quite often see parents paying for their adult children's divorces.

But it really isn't accurate to count having these people pay for a divorce as reducing costs. It just moves the costs back one generation, and probably affects inheritances.

When parents do pay, it is common for one or both of the parents, on one side or both, to become involved in negotiating the separation agreement, and usually the degree of conflict escalates.

Make legal aid pay

There are problems with hiring a legal aid lawyer to handle your separation and divorce.

First, the income level that allows you to hire a legal aid lawyer is so low that the vast majority of people with even low-paying jobs will not qualify. Politicians are responsible for this situation, because it is the politicians who have failed to increase the legal aid threshold as inflation has eaten away at pay cheques.

Why politicians have failed to make legal aid available to more people, and to pay reasonable rates to legal aid lawyers, is the subject of debate.

There are several schools of thought. Most legal aid cases today involve petty crime, and some believe increasing legal aid would just help out more of these low-level criminals. Most middle class people rarely have legal issues that require a lawyer for more than writing a will or buying a house, but everyone is concerned about health and most about education. This means the politicians allocate tax dollars to placate, (or serve the interests of, depending on your point of view) the majority of potential voters. Legal aid loses out. Another theory is that since the court system is starved for resources in many ways, increasing legal aid will leave other stakeholders without the extra money they need. And, for the most part, the lawyers working for legal aid are criminal lawyers, not family lawyers.

What about insurance?

Insurance is not a lot of help in divorces. There's very little insurance individuals can buy to cover their own legal bills.

What little family and individual legal insurance exists is more to cover the legal costs of a dispute with a neighbor or appealing a municipal government decision. I've never been involved with a separation or divorce where my fees, or the opposing lawyer's fees, were paid by insurance. Given that divorce affects 38 per cent of Canadians, the wide range of legal fees for a divorce and the delays in our court system, the premiums for

divorce insurance would likely be higher than many could afford.

Some union contracts do include divorce coverage, and as far as I can find, the only union with this coverage is the CAW. But the CAW contract has various levels of coverage, and apparently legal coverage is not part of all contracts. When that coverage is available for a divorce, it covers up to 12 hours at \$110 per hour for CAW lawyers or for lawyers with whom CAW has an arrangement. The contract also covers some fees for other family law matters. But the CAW total allowance is \$1,320.

Skip lawyers

Partly because of the cost of legal services, and partly for other reasons, many people skip hiring a lawyer.

Known as self-represented litigants, they are growing in numbers and they are at the heart of a lot of expensive situations. There are so many self-represented litigants that they are expected at family court, and family courts make special arrangements. There are publications and guidance available for them.

In the second edition of *It's Time For Justice*, scheduled for release late this fall, we'll look in greater depth at self-representation.

I can tell you now that full self-representation by one partner or both is not good for either spouse. The person being self-represented will suffer from lack of skills and knowledge, and this means the case will drag on. And the other spouse will face legal bills for the extra hours involved. This does not mean that the couple should not do a considerable amount of work themselves.

If spouses are interested and willing to do more research and paperwork themselves, there are lots of opportunities. For example, the parties themselves can track down official copies of marriage licenses, mortgage papers, deeds and transfer documents, children's health records and birth certificates, and copies of wills that covered inheritances.

Bring in a mediator

Family law lawyers in Ontario, and in some other jurisdictions, are required to tell their clients about the possibility of picking a mediator to handle some of the negotiations.

In 2007, Warren Winkler, the Chief Justice of Ontario, wrote a paper covering the pros and cons of mediation.

After listing some instances when mediation would not work well, Mr. Winkler observed,

“The corollary to the general rule that some types of cases ought not to be mediated is that other types should always be mediated. These include wrongful dismissal cases, family law matters, and disputes in which there exists an imbalance in terms of financial resources or the ability to withstand delay, either occasional or deliberate on the part of the opponent.”

We are the stakeholders

On page 4 of this edition of *It's Time For Justice*, I listed just some of the stakeholders involved in separation and divorce in Canada. The complete list of stakeholders is longer, and includes everyone from couples themselves and their children to lawyers, judges, civil servants, immigration lawyers, accountants, employers, social workers, the teachers of children involved in divorce, mediators, uncles, aunts, cousins, grandparents, and step-parents.

Particularly important stakeholders are federal and provincial politicians, and journalists in the parts of Canada represented by these politicians.

Printed copies of *It's Time For Justice* have been sent to:

- All Members of Parliament
- All Members of the Senate of Canada
- All Members of the Ontario Provincial Parliament, the province where I practice
- The Premiers of all other provinces and territories
- The leaders of major parties in all provinces and territories
- The cabinet ministers and deputy ministers most related to divorce law in all provinces and territories
- A selection of the leaders of the Association of Family and Conciliation Courts, the interdisciplinary and international association of professionals dedicated to the resolution of family conflict

- Selected executives of the Canadian Bar Association, the Ontario Bar Association and the Advocates Society
- A selection of editors, producers, hosts, reporters and columnists in a wide range of Canadian media, across the country, including those I have met in interviews
- A selection of social workers, mediators, expert witnesses and others with whom I've worked
- Selected colleagues who practise family law, and some educators teaching family law
- Some of the people who contributed to this spring's Supreme Court of Canada study on Family Law
- Some of the people who contributed to the Canadian Bar Association's Envisioning Equal Justice Summit in Vancouver in April 2013
- People I think can make a difference, from a list we've been compiling for months

My intention with *It's Time For Justice* is to get these stakeholders to think about the step-by-step ways they individually can smooth the process. And then they should take action. What action, exactly, is up to them, as long as they remember “the best interests of the children.”

We do not need more 3-year studies and 5-year research projects.

To quote Elvis: “A little less conversation, a little more action please.”

Five actions I would like you to take

1/ Thank you for reading *It's Time For Justice* this far. If you would like more printed copies, send an email to Copies@itstimeforjustice.ca or look on www.itstimeforjustice.ca for the PDF downloadable file.

2/ We would like everyone who receives *It's Time For Justice* to talk about it with your colleagues, professional associates and personal friends. And, please, with your family.

3/ Please send your ideas to Comments@itstimeforjustice.ca . If you wish your comments kept confidential, please state that clearly. Otherwise, we may quote you in future editions.

4/ If you are a **politician**, please talk about *It's Time For Justice* with other politicians and public servants. Read the federal *Divorce Act*, and your provincial act. Talk with your constituents. Then send to us, to your party colleagues, to your friends in other parties, and to the journalists you know, your suggestions to improve access to justice, especially in family law.

Please don't stand back. Rather, stand up, please, and be counted.

5/ If you are a **journalist**, please report on *It's Time For Justice*.

On page 14, there is a broad list of categories of people to whom we have sent *It's Time For Justice*. What would they tell you if you interviewed them? Where would they and their thoughts fit into a story?

What are your own thoughts?

Coming up in future editions

EDITION TWO –

The good, bad and ugly of self-representation

- The range of roles of a lawyer today
- Cross-border and inter-provincial issues in family law and access to justice
- The separation team in mediation, case meetings, conciliation
- Rebuild, revise and revamp of *It's Time For Justice* based on reaction to Edition One

EDITION THREE –

The steps and stages from thinking about separation to actual separation, to finalized divorce, and then into the future

Overviews:

- Child custody
- Child access
- Child support
- Spousal support
- Division of property

A book we recommend:

Middle Income Access to Justice

It's Time For Justice is not an academic or peer reviewed publication.

Readers wishing to learn about the concept of access to justice in a more formal, foot-noted manner, covering many aspects of law in addition to family law, are referred to the excellent Canadian book, *Middle Income Access to Justice*.

Segments of this book are written by some of Canada's most insightful family law and other lawyers, and edited by Michael Trebilcock, Anthony Duggan and Lorne Sossin.

It's available at Amazon.ca in paperback for about \$30.

EDITION FOUR –

How lawyers charge, fees to be expected from other legal industry professionals, administrative charges, and more

- Legal system and court process charges that lead to billing “inside the system”
- Arrangements that you need now
- Arrangements that can be changed later
- The monitoring process

EDITION FIVE –

Privacy, lack of privacy, and the impact on personal life

- Privacy, lack of privacy, and the opportunities for crime
- How emotions affect access to justice
- Family law and its connection to wills and estates, real estate, criminal, labour, and other law

EDITION SIX –

Consensus and opinion from readers of Editions One to Five

- Quotes and transcripts from law makers, legal industry professionals, and media
- Drafts of new laws
- A timetable
- The monitoring process

The content of each edition is likely to change, as we learn more of the specific interests and needs of the readers of *It's Time For Justice*.

Please write to us with your comments and suggestions for topics to cover.

Comments@itstimeforjustice.ca



FELDSTEIN FAMILY
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PROFESSIONAL CORPORATION

It's Time For Justice

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