

reaching equal justice report:
an invitation to envision and act

equaljustice

balancing the scales



THE CANADIAN
BAR ASSOCIATION
L'ASSOCIATION DU
BARREAU CANADIEN

INFLUENCE. LEADERSHIP. PROTECTION.

reaching equal justice report: an invitation to envision and act

November 2013 © Canadian Bar Association 865 Carling Avenue, Suite 500, Ottawa, ON K1S 5S8
Tel.: (613) 237-2925 / (800) 267-8860 / Fax: (613) 237-0185
www.cba.org

ALL RIGHTS RESERVED

No portion of this paper may be reproduced in any form or by any means without the written permission of the publisher. This report was prepared by the Access to Justice Committee and has not yet been approved as official policy of the Canadian Bar Association.

Printed in Canada. Disponible en français.

The CBA would like to acknowledge the work of the Access to Justice Committee members who have generously dedicated their time and commitment to the issue of envisioning and reaching equal justice in Canada. Our gratitude goes to Dr. Melina Buckley, John Sims, QC, Sheila Cameron, QC, Amanda Dodge, Patricia Hebert, Sarah Lugtig, Gillian Marriott, QC, and CBA's Project Director, Gaylene Schellenberg.

The Committee acknowledges, with thanks, funding generously provided by The Law for the Future Fund.

ISBN: 978-1-927014-11-0

reaching equal justice: an invitation to envision and act

Report of the CBA Access to Justice Committee



THE CANADIAN
BAR ASSOCIATION

L'ASSOCIATION DU
BARREAU CANADIEN

INFLUENCE. LEADERSHIP. PROTECTION.

table of contents

AN INVITATION TO ENVISION AND ACT.....	5
INTRODUCTION.....	9
Recognizing the Power of Words.....	10
PART I – WHY CHANGE IS NECESSARY	14
People’s Perceptions and Experiences of the Justice System Today	14
Consultations with People Living in Marginalized Conditions	15
On the Street Perceptions.....	22
What Unrepresented Litigants Tell Us.....	24
What We Know and Don’t Know about Access to Justice	32
Prevalence of Civil Legal Problems and Patterns of Resolution.....	32
Differential Impact of Access Denied.....	34
Private Market Legal Services	36
Public Legal Services	37
Exponential Growth of Pro Bono	40
Unrepresented Litigants.....	42
Courts and the Civil Justice System	44
Internationally – How are we Doing?	46
Complexity in Law and Legal Process	47
Low Relative Spending on the Justice System.....	48
So Much to Learn	49
The Case for Fundamental Change	49
Everyone Experiences Legal Problems	50
Direct Relationship between the Courts and Democracy.....	50
Growth in Poverty and Social Exclusion	50
Poor Public Policy.....	51
Costs of Inaccessible Justice	52
Return on Investment for Legal Aid Spending.....	53
Why Tinkering is Insufficient.....	56
PART II – EQUAL JUSTICE STRATEGIES	58
Envisioning Equal Justice.....	58
Finding the ‘Soul’ of Reform	58
Equal and Inclusive Justice.....	59
Designing a People-Centered Justice System	60
A Participatory Justice System	61
A Standard for Meaningful Access to Justice	61
A Dual Focus on Prevention and Resolution.....	62
One System, Many Paths	62
Learning Institutions, Organizations and Systems.....	63
Building a Bridge to Equal Justice	63
Facilitating Everyday Justice	64
Law as a Life Skill.....	64
Legal Health Checks.....	67
Effective Triage and Referral to Navigate the Paths to Justice.....	70
Inclusive Technology Solutions.....	74

Transforming Formal Justice	82
Global Trends and Strategies	82
Transcending the SRL Phenomenon.....	83
Court-based Triage and Referral	84
Court Specialization	85
Courts as Learning Organizations	86
Expanding Judicial Functions.....	87
Supporting Court Innovation: Technology and Rules	89
Re-centring Courts	91
Re-inventing the Delivery of Legal Services.....	92
Limited Scope Retainers.....	94
Team Delivery of Legal Services.....	95
Reorienting The Practice of Law	97
Regenerating Public Legal Services	104
Bridging the Public-Private Divide	113
Law Schools, Legal Education and Law Students	118
PART III – MAKING THE EQUAL JUSTICE VISION REAL.....	124
Access to Justice is a ‘Wicked Problem’	124
Is a ‘Superhero’ Required?.....	125
Building Public Engagement and Participation	126
Changing the Conversation	126
Increasing Public Participation	128
Building a Coherent Civil Justice System: Collaboration and Effective Leadership.....	130
Collaborative Skills, Processes and Structures	132
Lessons from the US Access to Justice Commission Experience.....	132
Access to Justice Commissioners.....	135
Building the Capacity for Justice Innovation	137
Keys to Justice Innovation.....	137
HilL’s Innovating Justice Model	140
Filling the Justice Innovation Gap.....	140
Access to Justice Metrics	142
Strategic Framework for Access to Justice Research.....	145
Reinvigorated National/Federal Government Role.....	147
CBA as an Access to Justice Leader	149
EPILOGUE: Imagining 2030	151
PART IV – THE EQUAL JUSTICE INITIATIVE	162
Project Description, Acknowledgements and Reflections	162
Resources	169
Appendix A	169

An invitation to envision and act

Dear Colleagues,

A moment of opportunity is at hand: a moment created by a broad consensus on the need for significant change to improve access to justice, and an evolving consensus on the central directions for reform. This report is an invitation to act, to seize that opportunity. Each of us has a responsibility to contribute to our shared vision of equal access to justice across Canada, from sea to sea to sea.

The term *we* refers to all of us, to affirm the important role and obligation of all justice system stakeholders, including the public, to contribute to equal justice. To refer to the authors, members of the Canadian Bar Association (CBA) Access to Justice Committee, the *Committee* is employed.

Our understanding of the prevalence of legal problems and the severe and disruptive impact of unresolved legal problems has grown exponentially over the past two decades. But we have yet to fully translate that knowledge into action. Many organizations are dedicating a tremendous amount of energy and limited resources to new approaches to improve access to justice. Still, we have been unable to knit this work together to make substantial gains.

I sense here a tremendous level of commitment to making meaningful change in access to justice. That deep commitment is necessary because this will take long term sustained effort. I was reminded recently that Martin Luther King's famous speech did not start with "I have a plan". Of course he had a plan but he first needed to persuade people that change was needed and that things could get better. I hope we leave here with a shared sense of the dream and a commitment to do what we can to make it come true... we need a shared understanding of what success would look like.

So I ask: Is there a widespread firm belief that there is an urgent need for significant change? Do we have the dream and is it widely shared? If not, I doubt we will accomplish very much.

Justice Thomas Cromwell
Keynote Speech at CBA Envisioning Equal Justice Summit
April 2013

To mobilize and take advantage of this moment, we first need to convey the abysmal state of access to justice in Canada today. We need to make visible the pain caused by inadequate access and the huge discrepancies between the promise of justice and the lived reality of barriers and impediments. Inaccessible justice costs us all, but visits its harshest consequences on the poorest people in our communities. We need to illuminate how profoundly unequal access to justice is in Canada. We cannot shy away from the dramatic level of change required: in a very fundamental sense we live in “a world thick in law but thin in legal resources”.¹ We need to radically redress this imbalance.

This report and the summary report published last summer provide a strategic framework for action, to set a new direction for the national conversation on access to justice. They are meant to present our current state of knowledge about what is wrong, what types of changes are essential, and the steps and approaches we might take to overcome barriers to equal justice. The objective is to bring together and render the key ideas concrete, to enable and encourage action.

Both reports are designed to engage, rather than dictate or provide ‘the answer’. The goal is to enlarge and change the conversation about access to justice to invite and inspire action.

Our greatest challenge is to simultaneously focus on individual innovations and the broader context of the interdependence of all aspects of access to justice. Collaboration works best when based on a shared understanding of the problem and a shared vision of the end goals. Our central animating principle must be envisioning a truly equal justice system, one that provides meaningful and effective access to all, taking into account the diverse lives that people live.

We have a lot of work to do and that work needs to be shared over a broader segment of the legal profession and other justice system personnel than are currently engaged in the access project. While there are some signs of exhaustion, regeneration is in the air. At the CBA Envisioning Equal Justice Summit in April 2013,² we witnessed and participated in a radically different conversation, an energized and optimistic conversation about equal access to justice. The reports build on this important breakthrough.

We are poised to make gains at this juncture, but need to travel a little farther for the momentum already achieved to become an irresistible force and take over. As Justice Cromwell of the Supreme Court of Canada said in his Keynote Address at the Summit, this is a critical moment.

The CBA has already pledged to take action and continue to play its role in contributing to equal access to justice. Members of the Committee have taken this on as a personal challenge

¹ Gillian K Hadfield, “Higher Demand, Lower Supply? A Comparative Assessment of the Legal Resource Landscape for Ordinary Americans” (2010) 37 Fordham Urban Law Journal 129 at 151.

² The CBA Committee held the Envisioning Equal Justice Summit in April 2013 in Vancouver, a national event bringing together over 250 people working for equal justice from every province and territory, as well as international guests.

and we urge you to join us. The challenge is to each think of our roles in the justice system more expansively, each working to produce the best possible results for our individual clients, the individual case, in our association or institution, and simultaneously working to produce the best possible justice system. In a riff on the idea of thinking globally, acting locally, the Committee asks you to **think systemically, act locally.**

Though we are all busy, we can integrate this change in perspective, to work simultaneously on the matter at hand while contributing to broader systemic goals. At first this may appear to conflict with our professional duties to give one hundred percent to the individual client or matter. Yet we know that zero-sum thinking is almost always false: few situations are truly either/or. For lawyers, this challenge can be seen as an extension of our professional duty as officers of the court. By thinking systemically and acting locally, we can create real space for justice innovation.

Rather than simply reading this report, the Committee asks you to engage with it. Consider the targets proposed and the change-oriented ideas and ask yourself: **what can I do, either myself or working with others, to contribute to equal access to justice?** Every contact between an individual and the civil justice system is an opportunity for either disempowerment or empowerment, a moment to reinforce inequality and social exclusion or to create equality and inclusion.

As craftily stated in a slogan brainstormed during the Summit's closing plenary, we need to just(ice) do it!

Thank you,
CBA Access to Justice Committee

Introduction

Through the Equal Justice Initiative, the CBA Access to Justice Committee considers four systemic barriers that are blocking efforts to reach equal justice and proposes means to overcome them. The barriers are:

- Lack of public profile
- Inadequate strategy and coordination
- No effective mechanisms for measuring change
- Gaps in our knowledge about what works and how to achieve substantive change

The initiative focuses on human justice, on people law – legal issues, problems and disputes experienced by people (including small businesses), especially those that involve essential legal needs. We understand *essential legal needs* to be those arising from legal problems or situations that put into jeopardy the security of a person or that person's family's security – including liberty, personal security, health, employment, housing or ability to meet the basic necessities of life and extending to other urgent legal needs. Of course, the justice system has an impact on corporations, organizations and institutions, and access issues can arise for these bodies as well, but they are outside of the scope of this report.³

The Equal Justice Initiative focuses for the most part on the civil justice system, touching only indirectly on criminal law matters. The Committee recognizes that reaching equal justice engages both civil and criminal justice issues and the interconnection between the two. The focal point is on non-criminal matters because substantive change in the civil justice system has a particular urgency and timeliness, and current initiatives in this area are especially fragmented and under-resourced. There is no hard and fast dividing line, however, and some proposals made here are also relevant to the criminal justice system.

³ The CBA Legal Futures Initiative considers some of these broader issues.

Learn More: about the Equal Justice Initiative

See Part IV of this report for a project description, acknowledgements of the many individuals and organizations who contributed, and Committee members' reflections.

This report sets out the Committee's proposed strategic framework for reaching equal justice. Based on research and consultations, the framework contains a series of 'targets' reflecting an emerging consensus on what must be done in 31 key areas. The targets are framed as measurable, concrete goals to be achieved at the latest by 2030. Inspired by other multi-sectoral change movements, including the United Nations Millennium Development Goals and approaches used by the environmental movement, the Committee decided to set long range targets for achieving equal justice across Canada. One strong factor influencing this decision is that time will be required to build capacity to evaluate whether reforms work. Part of the change process is increasing our shared capacity for learning and adaptation. The Committee proposes specific timelines for each target, but recognizes that the time needed will differ across regions – certain targets will be more easily achieved in some places than others.

Each target includes milestones (interim goals), as well as actions that can begin right now. The milestones and actions are indicative rather than comprehensive, a starting point rather than a detailed guide. They propose a way forward, recognizing that more detail is required and should be developed over time by those working most closely on the particular target.

While different organizations and individuals may debate the specifics, the targets reflect what the Committee understands to be a general consensus among those working for equal justice as to the

type of action required. Achieving these targets will require individual, coordinated and collaborative efforts – no target falls to a sole justice system player.

This report also gathers together what the Committee has learned over the course of its Initiative and shares it with all individuals and organizations engaged in justice innovation and committed to equal justice. It is a resource for the implementation process, providing background information and detailed discussion relevant to each target. Wherever practicable, it includes examples of emerging good practices and insights from research and evaluations, as well as links to further information.

A summary version of this report was tabled in August 2013 at the CBA Canadian Legal Conference in Saskatoon.

The Committee solicits feedback to these proposals and looks forward to an active and engaged dialogue. At the end of each section is a link to provide your feedback on the targets, milestones and actions, your suggestions on specific innovations and ideas, and your commitment to become involved on the issues on which you are especially passionate. **Please join the conversation and take action!**

We have a window of opportunity that only comes along rarely - to put it simply, let's not blow it.

*Justice Thomas Cromwell,
Keynote Speech at CBA
Envisioning Equal Justice Summit,
April 2013*

The Committee's work complements the work of the National Action Committee on Access to Justice in Civil and Family Matters (National Action Committee). Under the stewardship of Justice Thomas Cromwell, the National Action Committee has created a strong awareness of the need for change. Its working group reports have identified a large range of initiatives that have potential

for increasing access to justice. The National Action Committee final report provides additional overall guidance, especially on implementing these suggested reforms. The CBA is a member and supporter of the National Action Committee process. Like all members, the CBA has an obligation to contribute what it can. It is anticipated that both the National Action Committee and CBA reports will assist in making the most of this critical opportunity to achieve the substantive change needed to reach equal justice across Canada.

Contemporaneous to the CBA Equal Justice Initiative is the CBA Legal Futures Initiative, a comprehensive examination of the future of the legal profession in Canada. It examines business structures and innovations, legal education and training and ethics and regulation of the profession. Its mandate is to develop original research, consult widely with the profession and other stakeholders and ultimately create a framework for ideas, approaches and tools to assist the legal profession in adapting to future changes. The Legal Futures Initiative identifies access to justice as a foundational value underlying its work.

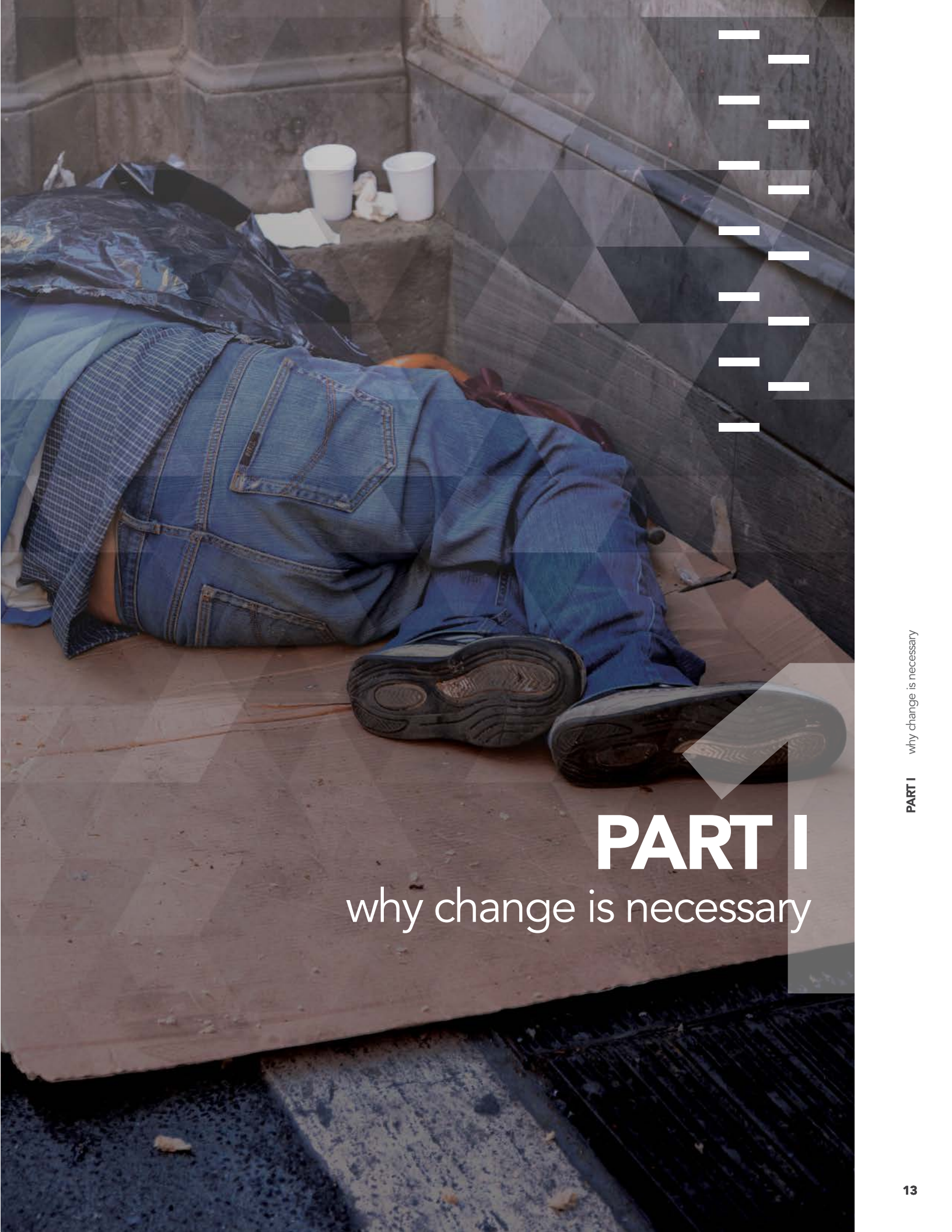
Recognizing the Power of Words

Words are the tools of the justice system's trade, yet finding the right words is not always easy. This is especially true in choosing words to refer to groups of people. We often refer to people involved in the justice system as 'clients' or 'users,' but the Committee has opted to instead employ 'people' wherever feasible to avoid reducing the individual's role in the justice system to a passive category of recipient of services.

A particular challenge is finding an elegant, inclusive way to refer to groups of people who have been or continue to be excluded from systems, structures and institutions, including the justice system. It is difficult to find language that recognizes the diversity of identity, experience and social situation without creating an 'us-them' distinction, or, alternatively, ignoring the reality of different needs, capacities and perspectives. It is important to recognize this tension between language that is inclusive and language that reinforces disadvantage. Our approach is to use the phrase "people living in marginalized conditions"

or “situations of disadvantage”. While not a perfect solution, nor one that always works in constructing intelligible sentences, it reflects the Committee’s intention to show respect by separating the person, who is always a person, from the social and economic situation in which they live, while recognizing that this situation can and often does have an impact on their justice system experiences.

In the report, particularly in the proposed targets, the Committee uses the term “Canadians” to refer to all people living in Canada regardless of their citizenship status.



PART I

why change is necessary

Why change is necessary

Public confidence in the justice system is declining.⁴ This was apparent during the consultation phase of the CBA Envisioning Equal Justice Initiative.⁵ People interviewed randomly ‘on the street’, and in meetings with marginalized communities consistently described the justice system as not to be trusted, only for people with money, arbitrary, difficult to navigate and inaccessible to ordinary people. The Committee’s findings are not unique. Two recent surveys of people who represented themselves in civil courts concluded that the experience usually led to reduced confidence in the justice system⁶ as have other public consultations over the past few years.⁷

⁴ See, for example: Julian Roberts, *Public Confidence in Criminal Justice: A Review of Recent Trends (2004-2005)* (report prepared for Public Safety and Emergency Preparedness Canada, 2004); see also, www.angus-reid.com/polls/47831/most-canadians-dissatisfied-with-the-state-of-the-justice-system/; and www.angus-reid.com/polls/48758/british-columbians-dissatisfied-with-current-state-of-justice-system/.

⁵ To benefit from the views of people living in marginalized conditions, the Committee held regional consultations with community organizers familiar to those communities. It also worked with Pro Bono Students Canada and law student volunteers to approach people randomly on the street, in different parts of the country, with similar questions. See paper prepared by Amanda Dodge for the CBA Envisioning Equal Justice Initiative, for a summary of the input received from regional consultations regional consultations (Ottawa: CBA, 2013): www.cba.org/CBA/Access/PDF/Community_Voice_Paper.pdf

⁶ See, Rachel Birnbaum, Nick Bala, Lorne Bertrand, “The rise of self-representation in Canada’s family courts: The complex picture revealed in surveys of judges, lawyers and litigants” (2013) 91 Canadian Bar Review 67 (Birnbaum study); Julie Macfarlane, *The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants* (May 2013) (Macfarlane study).

⁷ See, for some examples: www.lss.bc.ca/assets/aboutUs/reports/legalAid/legalAidPollReport08.pdf; www.legalaid.on.ca/en/news/June-2006b.asp; and www.legalaid.ab.ca/media/Documents/2006/LegalAidAlberta_NewsReleaseNov2006.pdf.

While there is generally low public awareness about legal aid, opinion polls have shown that when asked more detailed questions, people express strong and consistent support for providing adequate publicly funded legal aid. Polls have shown overwhelming support (91-96%), with 65-74% expressing the view that legal aid should receive the same funding priority as other important social services.⁸ Canadians believe justice systems must be accessible to all to be, in fact, just – and publicly funded services are required to get to equal justice. The current lack of confidence in our justice system suggests instead a perception that justice is inaccessible and even unfair.

People’s Perceptions and Experiences of the Justice System Today

Our change strategies and priorities must be grounded in people’s experiences of the justice system today. Amanda Dodge pointed out in her presentation at the CBA’s Envisioning Equal Justice Summit⁹: “when we gather to dialogue and strategize about increasing access to justice, if we do so without listening to the voices of those we are trying to serve, we risk developing ineffective measures, as well as the legitimacy of our efforts.”

This report reflects the Committee’s commitment to a people-centered justice system by bringing in the public voice from the outset. The nine ‘stories’ in this section illustrate typical experiences with the justice system. The stories are composites of many people’s experiences, rather than exact events experienced by a particular person. They allow us in some small way to “come face to face with the anxiety and desperation of ordinary citizens who look to our legal system for their fair share of decent treatment.”¹⁰ The stories highlight the complex nature of legal problems and deeply rooted underlying causes. They show non-legal dimensions of the situation that often exist prior

⁸ See: www.lss.bc.ca/assets/aboutUs/reports/legalAid/legalAidPollReport08.pdf.

⁹ *Supra* note 2.

¹⁰ Laurence H Tribe, Senior Counselor for Access to Justice, US Department of Justice, *Keynote Remarks at the Annual Conference of Chief Justices* (Vale CO: July 26, 2010).

to contact with the justice system but which must also be confronted. Recent consultation reports and studies have confirmed the widespread nature of barriers to meaningful access to the justice system, but nothing is more compelling than stories like those happening to real people every day.

This section also summarizes consultations: these include the Committee's focus group consultations with people living in marginalized conditions; 'on the street' interviews organized by the Committee and those conducted in a separate initiative of the Canadian Forum on Civil Justice. Altogether, 161 people participated in the CBA sessions. In addition, the findings from two recent studies of people who represented themselves in civil courts are reviewed.

Consultations with People Living in Marginalized Conditions

As part of the CBA's Envisioning Equal Justice Initiative, the Committee worked with community partners in Calgary, Saskatoon, Toronto, Montreal and the Maritimes to hold 13 consultation sessions. These focus group sessions were held exclusively with people living in marginalized conditions: low-income adults and youth; racialized groups; single mothers; and people with disabilities. The conversations focused on two questions: what happens when access to justice is denied and what happens when it is afforded. The results were profound and often shocking, and sadly replicate the perspectives, experiences and themes heard in other recent public hearings and town hall sessions in Ontario, Manitoba and British Columbia.¹¹

The consultation outcomes are reported under four themes of what the Committee heard: legal rights are just on paper; justice systems cannot be trusted; justice is person-dependent, and justice systems are difficult to navigate.

¹¹ See Dodge, *supra* note 5. For the townhall sessions, see Ontario Bar Association, *Getting It Right: The Report of the Ontario Bar Association Justice Stakeholder Summit* (Toronto: OBA, 2007); Manitoba Bar Association, *Town Hall Meeting on Access to Justice: Report and Summary* (Winnipeg: MBA, 2011): www.cba.org/manitoba/main/PDF/Town%20Hall%20Meetings%20on%20Access%20to%20Justice%20Final%20Report%20and%20Summary.pdf; L.T. Doust, *Foundation for Change: Report of the Public Commission on Legal Aid in British Columbia* (Vancouver: March 2011).

Learn More: Perceptions of (In)Justice - What we heard

- Legal Rights are Just on Paper
- Justice Systems Cannot Be Trusted
- Justice is Person-Dependent
- Justice Systems are Difficult to Navigate

Legal Rights are Just on Paper

"It always feels like, oh, that's the law and there's nothing you can do about it."
Aboriginal woman, Saskatoon

"It's just too hard; I guess all you can do is pray."
Aboriginal woman, Saskatoon

"Once you finally get there and you get an order, there is nobody there to enforce it. This is what I needed. Now that I have an Order, it's not being respected and there is no one to do anything."
Single mother, Moncton

"To me, legal rights are an unfulfilled promise."
Person with disability, Toronto.

The vast majority of community members acknowledged that the law affords rights and protections, but felt those rights and protections were not honoured or accessible. When asked about legal rights, most participants stated plainly that they did not feel they had any legal rights.

It seemed that as a person's marginalization increased, so did the distance to being able to enforce their legal rights. The primary barrier to feeling as though one could access legal rights was, not surprisingly, a lack of financial resources.

Community members identified many other barriers to accessing legal rights and protections. Commonly mentioned were literacy and language barriers, disabilities (both physical and mental), racial discrimination and level of education. Lack of knowledge seemed to be the greatest initial hurdle to enforcing legal rights. Lack of knowledge and

information also aggravated the *emotional impact* of going through justice processes.

The community members recognized that impediments sometimes depend on the individual. They pointed to certain personality characteristics, like tenacity, or attitudes, such as optimism, as determinative of whether someone would pursue legal rights and protections.

When community members were asked whether the law would protect them from abuses of power, or hold a person in authority accountable for breaking the rules, the most common response was to *laugh out loud*. They pointed to significant barriers to holding authority figures to account: they did not know how to make a complaint; they did not know where to go; there was not enough information about how to do it; they did not think they would be believed or taken seriously; they thought they would be intimidated and made to feel stupid; and they were afraid.

Justice Systems Cannot Be Trusted

“If you believe in the system and think it will help you, you’ll get burned.” **Aboriginal woman, Saskatoon**

“Justice is to protect us, not to abuse us. It has been used to overpower or manipulate us.” **Aboriginal woman, Saskatoon**

“I feel intimidated and bullied by the legal system.” **Domestic violence survivor, Calgary**

A strong message heard throughout the consultations is that, inherently, the system is untrustworthy and broken. Several people reported feeling betrayed and abused by the justice system.

The brokenness of the system was evident in the frustrations expressed by community members. Both parties to disputes and adjudications reported that the systems had failed them: offenders and victims, applicants and respondents. Neither side felt the system was fair or had worked for them. There was a sense that they had to find justice on their own.

Excessive and harmful delay was often cited as a frustration. The system itself creates delay. Community members described having to attend court for repeated adjournments, to wait many months to be heard in court, to miss work for repeated court appearances and to wait for legal aid’s help. Delay is a frustrating barrier to enforcing legal rights and attaining some measure of justice.

Second, delay is created by community members’ lack of information. Insufficient guidance wastes their time. Often the delay is harmful, leading to negative consequences in other areas of their lives.

Some community members defined justice as the right to be heard. Many reported that they were not afforded an opportunity to tell their stories. Even when they did get a chance to tell their story, they often felt they were not believed or taken seriously.

One clear concern was that the justice system does not recognize or understand the social and personal realities of the people living in marginalized conditions progressing through it.

This results in other sorts of problems. One, the system and its actions actually perpetuate or aggravate the problems that got people involved in the system initially.

The second problem created by the system’s ignorance of the social and personal realities of people living in marginalized conditions is that it has a “spiraling and multiplying”¹² effect, so

¹² Doust, *ibid* at 21. The feedback outlined in this section is also supported by recent academic research on civil legal needs. See, Ab Currie, “Legal Problems of Everyday Life” in Rebecca Sandefur, ed, *Access to Justice, The Sociology of Crime, Law and Deviance* (Bingley, UK: Emerald Group Publishing, 2009); Ab Currie, *National Civil Legal Needs Studies 2004 and 2006* (Ottawa: Justice Canada, 2006); Ab Currie, “A National Survey of the Civil Justice Problems of Low and Moderate Income Canadians: Incidence and Patterns” (2006) 13:3 *International Journal of the Legal Profession* 217; Legal Services Corp, *Documenting the Justice Gap in America: The Current Unmet Civil Legal Needs of Low-Income Americans* (Washington, DC: Legal Services Corporation, 2005); Carol McEown, *Civil Legal Needs Research* (Vancouver: Law Foundation of British Columbia, 2008); Pascoe Pleasence, Nigel Balmer, Tania Tam, Alexy Buck and Marisol Smith, *Civil Justice in England and Wales: Report of the 2007 English and Welsh Legal Needs Study* (London: Legal Services Commission, 2008); Legal Services Agency, *Report on the 2006 National Survey of Unmet Legal Needs and Access to Services* (Wellington, New Zealand: Legal Services Agency, 2006); Ipsos Reid for the Legal Services Society, *Legal Problems Faced in Everyday Lives of British Columbians* (Vancouver: LSS, 2008).

Eugene's story

At thirty years of age, Eugene lives in a bachelor apartment in northern British Columbia. He is schizophrenic, a disabling medical condition that is hard to control even with medication, and he cannot hold a job. He receives income assistance from the provincial government but his rent subsidy is not enough, as rent is high and there are few rental units in town. He dips into his food budget for rent, and then goes to the food bank.

Eugene hasn't seen his father since his parents divorced several years ago. His mother lives in Vancouver, like him, on a fixed income. He almost never sees his sister in Ontario, who won't return his phone calls because he owes her a lot of money.

Two months ago, some friends came over to visit with a couple of other guys Eugene didn't know. Later, Eugene realized that someone stole the cash he had in an envelope on the shelf to pay his rent and for food. When his rent was due, his landlord said he would give him 30 days grace, but he would have to pay two month's rent at the end of the 30 days, or he would be evicted. Eugene called his income assistance worker but she said there was nothing she can do.

The 30 days are almost up and Eugene only has enough money for one month's rent. His landlord gave him a paper saying he must move out. The stress has triggered his condition, and he can often not get out of bed in the morning. His income assistance worker told him legal aid doesn't help with landlord-tenant disputes, but gave him a toll-free number for legal help. He called the number, but was embarrassed when he didn't really understand what the person told him, and hung up. Right now he is waiting for the police to come and kick him out of his apartment.

problems spread to other areas of their lives, often worsening them significantly.

Lastly, community members often felt that the remedies they obtained from the justice system were not meaningful or trustworthy. For example, women in particular reported enduring the delay, frustration and trauma of family courts only to obtain an order that was meaningless, as not enforced.

Justice System is Person-Dependent

“Having [the] right person is key.” *Person with disability, Toronto*

“[I]t depends on the person ... have they had experience, sensitivity training, do they or don't they know what [they] need to do[?] Sometimes [I] go to family law clinic and [it] depends on whether the nice lawyer shows up...” *Deaf woman, Durham*

“Some judges are terrific, some have no patience, some want to listen ... others just want to get through [it].” *Deaf woman, Waterloo*

“With lawyers you get the good with the bad, some who care, some who don't.” *Deaf man, Toronto*

When community members discussed their satisfaction or dissatisfaction with the justice system, it often reflected on the particular justice professional they encountered. Whether the service or experience was effective, fair or compassionate depended on the *individual*, be it the judge, lawyer or police officer. A frequently repeated phrase was ‘it's the luck of the draw’.

There were some commendations but more complaints about the quality and compassion of the justice professionals.

There were positive comments about judges being open-minded and good listeners, and making fair decisions. However, more often concerns and criticisms were expressed.

Judges were not fully trusted and sometimes viewed as biased. Many community members felt pre-judged when they walked into the courtroom. Some identified factors seemingly unrelated to their case that affected its outcome, such as judge's relationship with the lawyers before them.

The consensus was that having a lawyer increased the likelihood of having help and guidance through the process. Without a lawyer, marginalized community members felt left to flounder. However, whether a lawyer was helpful or effective, whether legal aid or private, was again seen as the ‘the luck of the draw’. It seemed that the ‘good ones’ are the minority; frequently the comment was that if you get a good lawyer, you're ‘lucky’.

Many community members expressed dissatisfaction with legal aid lawyers. They complained about poor service, delay, lack of caring, a focus on just wanting to ‘do deals’, lawyers not wanting to listen and not wanting to fight for them. Community members often believed the cause of the poor service was that legal aid lawyers were overworked and underpaid.

Regarding legal aid's scope of service, community members complained about the limits in service provision, including low financial eligibility guidelines⁵, and that the services were always reactive, not proactive.

Community members clearly distinguished between legal aid and private lawyers, and generally had a higher opinion of private lawyers. There were repeated comments that when lawyers were paid more money, they were more likely to fight for and do a better job for clients. Private lawyers were perceived as more effective and acting more quickly than legal aid lawyers. Private lawyers were perceived as friendlier with judges than legal aid lawyers and thus more likely to get their way in court.

In spite of these generally negative observations, several marginalized community members had positive experiences. There was some discussion about how more ‘good’ lawyers, those committed to social justice, were needed. Community members believed that greater financial reward in other areas of the profession was the main reason

Phuong's story

Phuong was in her local drugstore in Canora, Saskatchewan. It was hot and she wasn't feeling well. She had spent the night before in the emergency room with her sick daughter.

Her first mistake was to use her cloth shopping bag instead of the store basket. She forgot to get a basket at the door, and was rushing to get back to her daughter. Her second mistake was not to double check the bag at the checkout. Two prescriptions were tucked in a side pocket and she forgot to pay for them.

The security guard and the policewoman who came later to arrest her did not believe that she was exhausted and just forgot. She can't understand it, as she buys all her prescriptions at this store and always pays.

Her friend says to call legal aid in Saskatoon, but they won't help as she wouldn't likely go to jail for this. As a personal support worker, she has no money for a lawyer, but there are no lawyers in her community anyway. She goes to court on the day it says on her papers, and a nice young woman introduces herself as the crown prosecutor. Phuong agrees to plead guilty even though she didn't mean to steal – in Vietnam, it is very frightening to be involved with the police. She received a conditional discharge with six months' supervised probation.

A while later, Phuong's boss asks all employees to update their papers for a criminal record check. Phuong has worked for this agency for five years and her clients all love her so she thinks if it comes up, she'll just explain what happened to her manager. But the results go directly to the management office, and Phuong is fired on the spot. Her manager says the company would be sued if they let someone who had shoplifted go into elderly people's homes.

Phuong has no references to show Canadian experience and can't find another job. Employment Insurance declines her benefits because she was fired due to theft. The relative who sponsored her to come to Canada would have to pay for anything she gets from welfare, so she won't consider applying for welfare. She thinks of ending her life, but wonders who will care for her daughter.

there were too few social justice oriented lawyers, but they were aware that such lawyers existed.

Justice System is Difficult to Navigate

“They’re supposed to be there to help you, but that’s not what happens. If you’re asking for help, it’s because there’s something wrong with you.” **Single mother, Montréal**

“I feel alone and I don’t know who I am supposed to contact.” **Single mother, Moncton**

“It is overwhelming ... you feel incapacitated.” **Single mother, Moncton**

“It is the stress of all the steps prior to getting to the step where you can even act out your rights, and you get so frustrated with process.” **Deaf woman, Toronto**

Community members consistently complained that the justice system is confusing and difficult to navigate. They pointed out that ignorance of one’s legal rights renders them useless. Information is not readily available. They were unsure where to go for help or which forms to use. People are not directed to the right place and often have no one to guide them. They reported feeling like they were ‘running in circles’ as systems are not integrated; they are in ‘silos’.

Many community members reported that lack of information, help and direction exacted an emotional toll. They described how scary and intimidating it is not to know what is happening, what the options are, what possible outcomes might be, and so on. They mentioned the anxiety, fear, frustration, discouragement and stress involved in progressing through justice systems, encountering seemingly endless obstacles. They also talked about their need for emotional support.

Community members described a justice system that is simply overwhelming, too complex, too complicated. They talked about the many steps involved in pursuing a right or protection, such as obtaining information, translating the information, paying the fee, finding an advocate, arranging for an interpreter, and then tackling the legal issue and

the opposing party. It seems a Herculean effort is required to deal with a formalistic, lengthy and daunting process, something they said was very discouraging and often insurmountable.

Other barriers to navigating the system were fear of facing the opposing party, desire for privacy (concerns about the Court or tribunal being a public forum, and lawyers speaking openly about their cases in an open hallway), poverty and financial constraints, transportation, child care, interpretive services and arranging and funding accommodation.

These difficulties and barriers to navigating the system are so frustrating, upsetting and discouraging that many community members said they would ‘just give up’ rather than tackle those challenges. When they described experiences where they *did* pursue their legal rights or protections, it was often framed as a fight against the odds.

Glynnis' story

Glynnis' life is a story of abuse and neglect. Both of her parents grew up in residential schools and had serious problems with alcoholism. Glynnis left her northern Alberta First Nation community when she was 14 and has lived outside of Fort Smith, NWT, ever since. She doesn't read or write very well, but held decent jobs until the last couple of years. Her daughter Destiny was born when she was 20. Destiny is well cared for, excels in school and loves her mother very much.

Glynnis has a criminal record; her last offence was possession of a narcotic about 15 years ago. She has continued to use marijuana for years to dull the pain of her past. Recently, she has not been able to keep a job and has started trafficking marijuana to make ends meet. She knows she cannot keep trafficking or she could lose her daughter but her social assistance, about \$1100 a month, is not enough for her and Destiny to live on. Recently, police noticed adults and young people coming and going from her house. She has been charged with trafficking.

Glynnis appeared in court without a lawyer and pled guilty to possession of marijuana for purposes of trafficking. She was later sentenced by a Territorial Court judge to three months' imprisonment with one year probation. The pre-sentence report described her painful childhood, difficulties in school, problems with drugs and alcohol, mental health struggles and the positive parenting she has provided to her daughter. It didn't mention her First Nations ancestry or what services her First Nation might provide. The legal aid lawyer at the sentencing hearing was very busy and did not ask her much. The judge concentrated on the fact that young people, including her daughter, had been exposed to her drug operation and sentenced her to 18 months in jail.

Glynnis has had no contact with her band since leaving Alberta, and never thought she'd have access to treatment programs, either through her First Nation or in her small town. She now lives in a women's correctional centre in Fort Smith, over 700 hundred kilometres from Destiny, who is in a group home in Yellowknife. Glynnis has heard girls at the home are involved in drugs or maybe prostitution. She feels worthless and helpless to make things better. She is now using the harder drugs available in the institution.

Learn More: about Canadians' Perceptions and Experiences of the Justice System

Click here for the full [Envisioning Equal Justice Community Consultation report](#)

Other Resources:

Ontario Bar Association (2007):
["Getting It Right: The Report of the Ontario Bar Association Justice Stakeholder Summit"](#)

Baxter, Jamie Albert Yoon, "The Geography of Civil Legal Services in Ontario: Report of the Mapping Phase of the Ontario Civil Needs Project" (2011):
www.lsuc.on.ca/WorkArea/DownloadAsset.aspx?id=2147486236

Manitoba Bar Association, "[Town Hall Meeting on Access to Justice: Report and Summary](#)" (2011): <http://www.cba.org/manitoba/main/PDF/Town%20Hall%20Meetings%20on%20Access%20to%20Justice%20Final%20Report%20and%20Summary.pdf>

L.T. Doust, "[Foundation for Change: Report of the Public Commission on Legal Aid in British Columbia](#)" (March 2011).

The Law Society of British Columbia: [2010 Law Society Commissioned Public Opinion Poll of Lawyers and Effectiveness of Law Society](#).

Ipsos Reid, "Albertans Satisfied with Lawyers" (May 18, 2010):
www.lawsociety.ab.ca/files/home/Ipsos_Reid_Release_18May2010.pdf

Mary Stratton and Diana Lowe, Public Confidence and the Civil Justice System: What we know about the Issues (Toronto: CFCJ, 2006):
www.cfcj-fcjc.org/sites/default/files/docs/2006/cjsp-confidence-en.pdf

On the Street Perceptions

Working with Pro Bono Student Canada volunteers, the Committee conducted random interviews with people on the street to ask for their views on whether there is access to justice in Canada, if they would know what to do if they had a legal problem and what they thought a truly accessible system would look like. The Canadian Forum on Civil Justice implemented a similar project and shared their interviews with the Committee. What these people have to say is surprising and affirming, discouraging and inspiring.

First, people were asked to talk about the "dark sky": what a lack of access to justice really looks and feels like. Some of what was said includes:

"Horrible! The rich get off. If you have money you can walk." **Older man, Toronto**

"My husband and I are middle income so we have access to a justice system. Those who can't afford access to lawyers do not have access to a justice system." **Middle aged woman, Victoria**

"You see it every day on the news. The richer you are the more you get away with, and that's just not fair. That's what the judicial system you'd hope would be out of everything, fair." **Middle aged man, Windsor**

"Often people with fewer resources experience more persecution, marginalization and injustice, and that's not fair. That's something I would really like to see change in the world." **Young woman, Victoria**

Interestingly, compared to the representatives of communities living in marginalized conditions who participated in the focus groups, people interviewed on the street had less experience with and demonstrated limited knowledge of the justice system. For example, they held false impressions about the availability of publicly funded legal resources.

Anna's story

Fleeing violence from her husband in Mexico, Anna and her two daughters arrived in Ottawa to claim asylum. She has 15 days to prepare the government forms, find a home, get her girls into school and hire a lawyer. She has one friend in Ottawa, who helps Anna to apply for legal aid. She is approved and given a list of local lawyers.

Her hearing must be within 45 days of her claim being referred to the Board (60 days from her arrival). When she meets her lawyer, she's told to get more paperwork from Mexico to back up her claim that she was in danger there. She writes to the local police force and her family for help. Meanwhile, she is not entitled to work and has no money, so she applies for social assistance.

Her lawyer says she and her girls will need to go to Montreal for the hearing. The social assistance office won't help with travel costs, and if she can't go, her claim will be called "abandoned" with no appeal. Finally, she gets some work "under the table", enough to pay for the bus fare. Still, the Board member in charge rejects her claim – the documents from Mexico didn't arrive in time.

She has no right of appeal, because Canada has designated Mexico as a 'safe' country. She could seek 'leave' to have the Board's decision reviewed by the Federal Court, but will need a Federal Court judge to give her a 'stay of removal' until the other application is heard. As her legal aid certificate only covered the hearing in Montreal, she must reapply for legal aid. Her lawyer says funding was recently cut that would have paid her to provide an opinion about the merits of the case to legal aid. As that program no longer exists, Anna would have to pay the lawyer.

The legal aid application is denied on the basis of "insufficient merit". Anna and her girls are deported back to the situation they fled in Mexico.

However, some people had a good idea of what they would do when confronted with a legal problem:

“Generally, these are government matters; I would get in touch with the provincial government responsible. I would want to make sure my voice was heard, and whoever I talked to was the correct individual.” **Middle aged man, Windsor**

“I would try to get someone to mediate the problem and come to a win-win situation.” **Middle aged woman, London**

“I have prepaid legal expense insurance that I prepay monthly. I would just call, and they would get back to me within one business day.” **Middle aged man, London**

At the same time, many recognized that resources make the difference between access or lack of access to justice, and said this was unfair and unacceptable. The majority of people interviewed reported that they would be entirely lost as to what to do if they had a legal problem.

“If I had a justice problem? I wouldn’t know what to do.” **Young woman, Saskatoon**

“Where would I go? I don’t know.. (long pause). My MP?” **Middle aged man, Windsor**

“I don’t think many people know where to go or what to do to get access to justice.” **Middle aged man, Ottawa**

“I would go to a lawyer, a free lawyer, I can’t afford a lawyer, and I would agree with him on the spot... If I had a problem, where would I go for help? The government of Canada.” **Young man, London**

“I would talk to my mother and get her opinion, and then I would call the police... I just know to call the police.” **Young woman, London**

People were also asked what justice should be, the ‘blue sky’ picture:

“Justice is ensuring everyone gets equal rights and benefits within the country no matter what race, gender, religion and sexual orientation.”

Young man, Toronto

“Anyone in any circumstance should be treated fairly and equal to any other person.” **Young man, Toronto**

“It should be equally as important as our health care. You just don’t know when you could have a legal problem and need access to justice.”

Young woman, Toronto

Everyone interviewed and consulted held high expectations of what accessible justice should be. Some assumed these ideals are already met, but most knew they are not.

What Unrepresented Litigants Tell Us

The justice system is not proficient at directly surveying client or user satisfaction with their experiences on an ongoing basis, and then learning from it. This is a significant shortfall. Strides have been made by several legal aid programs, public education and information services and governments when introducing recent access programs. New initiatives and pilot projects often have included a user satisfaction evaluation component. Several law societies have also recently conducted surveys on client satisfaction with legal services. Results of these surveys are generally positive; people often express satisfaction when asked about particular services or resources that they have used. But these surveys rarely measure the impact of services on outcomes or in meeting policy goals such as speedy resolution.¹³

¹³ A 2010 Alberta Law Society study found that 91% of people who had recently retained a lawyer were satisfied with the ‘good cost value’ of the experience (presentation by Susan Billington, Policy and Program Counsel, Law Society of Alberta, to International Legal Ethics Conference, July 2012). The Ontario Civil Needs study also noted a widespread public perception that legal fees are prohibitively expensive, but also that 30% of the study’s target population with a civil legal problem found free service, and another 20% had paid less than \$1000 for help:

Jill's story

When Jill and her ex husband decided to get a divorce, she went to legal aid in Fredericton, NB. Jill was eligible for assistance, but was told there would be a long wait to meet the legal aid lawyer and another long wait after that for a court date. Jill didn't have time to wait, so decided to stay with the lawyer who had helped her in the past, knew her case already and had fought hard for her. Meanwhile, her ex got a legal aid lawyer. The divorce took over three years and \$30,000, as her ex contested every step of the proceedings and a long wait was involved to get back to court each time.

That wasn't the end. Later, her ex stopped paying child support. Jill decided to represent herself, but the judge wouldn't hear her without a lawyer. She went back to legal aid, and again was found to qualify financially. But, the province won't help people proceeding under the federal Divorce Act rather than provincial laws. As she was divorced, Jill had no choice but to proceed under the Divorce Act. Her ex still had a legal aid lawyer: he was "grandfathered in" because he had help in the earlier proceedings.

Jill's lawyer agreed to take the case, which now involved an application to reduce child support and change the custody agreement. The three children were refusing to see their father so he was seeking custody.

Some family members were able to help Jill, and she will have to repay them over time. But, Jill calls her experience with justice and the legal aid system a "let down." She knew her ex had extra income from under the table jobs and had hidden his farm income and buildings by putting them in her son's name, but how could she prove those things. She says someone other than a working mother making minimum wage needs to find out where the support payer is working, and ensure all income is disclosed.

Two recent in-depth studies of unrepresented litigants in courts in several provinces look at services and resources from a different perspective and paint a dramatically different picture. The Committee uses the term unrepresented litigants to refer to people who go to court without the benefit of legal counsel because the majority of these people would prefer to be represented but cannot access a lawyer's services. The more common practice is to refer to this group as self-represented litigations (SRLs for short). In this report the two terms are used interchangeably. This section summarizes what these recent studies learned about the experience of unrepresented litigants. The next section reports more broadly on what we know about the increased number of unrepresented litigants and the reasons for this phenomenon.

In the first report, Drs. Rachel Birnbaum, Nicolas Bala, and Lorne Bertrand studied unrepresented litigants in family courts¹⁴ (Birnbaum Study). The authors combined four interrelated surveys: one of judges, two of family law lawyers in Ontario and Alberta, respectively; and one of family law litigants in Ontario. While each group had a different perception of the causes and consequences of being self-represented, there were some common themes.

Judges, lawyers and litigants were united in the belief that unrepresented litigants fare worse in court and experience poorer outcomes compared to those who have access to lawyers.

A majority of self-represented litigants (67%) reported that navigating the court system was difficult or very difficult. 49% believed the lack of a lawyer made the process slower or much slower, though a significant portion (31%) felt that lack of representation did not slow down resolution. Many believed that lawyers for the opposing party usually made problems for the self-represented in court

R. Roy McMurtry, Chair, *Listening to Ontarians, Report of the Ontario Civil Legal Needs Project* (Toronto: the Ontario Civil Legal Needs Project Steering Committee, 2010) at 57. See also: www.lawsociety.bc.ca/newsroom/2010lawsocietycommissionedpoll_table.pdf.

¹⁴ *Supra* note 6. Their results are published in the Canadian Bar Review, "The Rise of Self Representation in Canada's Family Courts: The Complex Picture Revealed in Surveys of Judges, Lawyers and Litigants". The discussion following in this section summarizes their findings.

worse than they need to be.

From the perspective of represented litigants, 72% reported that they expect a much better outcome as a result of having a lawyer, and many expected the court process takes less time with a lawyer than if they had been unrepresented. Comments from represented litigants about the court process and the value of having a lawyer included:

"There is a lot of information available for people to learn about the court system but reading all of that information is just too much. I might as well go to law school to learn all of these things. I am happy that I decided to get a lawyer." **[female]**

"Custody of my children is an important matter and I would not trust myself if I had to be self-represented. My lawyer handles things for me and explains the system to me which is definitely easier." **[female]**

(No significant differences were identified between male and female litigants on these issues.)

Judges express concerns about whether SRLs experience fair outcomes, including that they tend to be "unable to articulate their case" or "fail to address the issues that are probative". In addition, judges commented that unrepresented litigants "are often overwhelmed by their emotions" and generally tend not to explore all possible scenarios. Both judges and lawyers expressed particular concerns about the inequalities experienced by SRLs who were victims of domestic violence.

There were greater distinctions in the survey responses about how well SRLs are treated by judges. Most lawyers (57% in Ontario and 77% in Alberta) believe that self-represented litigants are treated "very well" by the judiciary. They report their own clients' perception that judges generally tend to favour unrepresented litigants. However, only 14% of the self-represented and 9% of the represented litigants believe the self-represented are very well treated. On the other hand, only a relatively small percent of each group feel that self-

Winsome's story

At 75 years of age, Winsome worked as a housecleaner for most of her adult life in the Yukon. She has lived alone since her husband died ten years ago and rarely sees her daughters. She owns the small home where she and her husband raised their children, and has a fixed income that just covers her monthly expenses. She saves what she can.

Winsome recently co-signed a car loan for her grandson, who needs a car to get to work and take his four kids to school and daycare. The used car dealer asked Winsome to sign some papers, and she assumed it must be OK, though she didn't really understand what they said. The dealer and her grandson were in a hurry.

Now, her grandson is behind in his payments, and Winsome is told that if she doesn't pay \$2500 immediately, the car dealership will repossess the car and "commence proceedings" to sell her home to get the money owed. Her grandson promises it won't happen again. Her daughters have their own financial stresses and tell her not to pay and hope for the best.

Winsome doesn't know who to call. Her friends say it costs hundreds of dollars just for a lawyer to write a letter. One friend gives her a website address that she says will help, but Winsome has never operated a computer. She has a toll free number for legal information, but after Winsome waits a long time, she doesn't understand what the person tells her to do. She is embarrassed to ask again. In the end, she writes a cheque for \$2500 and mails it to the company. She is left with about \$500 in her savings account and is terrified this will happen again.

represented litigants are “not well treated at all” by judges.

Some of the comments from those who were unrepresented and who expressed concerns about treatment by judges as a result of not having a lawyer include:

“Judges can be very disrespectful to litigants who do not have lawyers. For example, they raise their voice and use rude names. I was so surprised that a judge was allowed to call me a name.” **[male]**

“I hope they [judges] do [treat us fairly] but I don’t know. ... they [judges] treat them [self-represented] differently cause don’t all lawyers know each other and the judges?” **[male]**

“It seems to depend on the judge. Some judges are friends with some lawyers, and if they are friends with that lawyer, they’ll be gentler with their client.” **[male]**

“It’s about the judge’s character, not about you. That’s what I learned early on, to not take things personally cause otherwise you will go crazy.” **[female]**

Some comments from represented litigants reflected similar perceptions about the treatment of the self-represented by judges, which may have influenced their decisions to seek representation:

“...probably not treated too well. My friend was in court before and she didn’t have [a] lawyer and she’s the one who told me to get one, so maybe she felt disadvantaged.” **[female]**

“I have previous experiences as self-rep, judge did not listen to me.” **[female]**

The Birnbaum study also found that unrepresented litigants reported that available self-help materials had limited value. Those surveyed recognized that

many family litigants did not have the education or literacy skills to benefit from these materials and that some had disabilities that prevented them from using them.¹⁵

The second study led by Dr. Julie Macfarlane of the University of Windsor Faculty of Law (Macfarlane study) is a scathing indictment of the justice system, and critically important, if uncomfortable, reading for all judges, justice system personnel and the legal profession.¹⁶

The study involved interviews with over 250 individual SRLs. Participants were broadly representative of the general population. Most were older, had some post-secondary education and an annual income of under \$50,000. Over 60% of those interviewed were appearing in court on family law matters, 18% on other civil matters and 13% on small claims matters. More than half the SRLs started with counsel but were unrepresented at the time of the interview (almost always for financial reasons). Over 100 interviews were also conducted with counter staff at court registries, clerks (and some managers) at the courthouses, staff at court programs serving SRLs and duty counsel.

The study details what Macfarlane refers to as the ‘arc’ of the SRL experience: from optimism to disillusionment, and from bad to worse. She includes some telling quotes from the SRLs surveyed:

“No more fairy tales about having access to a justice system.”

“I am here because I have no other option. I am just a mom, trying to figure this out. It was so complex, daunting, intimidating.”

“I didn’t think that it would come down like a deck of cards. It’s an extremely sharp game... I became a bundle of nerves.”

¹⁵ *Ibid.*

¹⁶ Macfarlane, *supra* note 6.

Monique's story

Monique separated from her husband, a difficult controlling man with bipolar disorder, in 2006. She was relieved when he left, and could not face negotiating with him to get a divorce. The bills continued to come in – credit cards, lines of credit and the mortgage. Her husband provided no financial support. As a 66 year old accounting clerk in Montreal, Monique struggles to pay the bills.

In 2010, Monique borrowed \$1000 from her daughter to see a lawyer for a divorce, but after the initial consultation, she did not follow up. She slipped into a depression and had to push herself to get through each day. She also feared what would happen if her husband was served with divorce papers.

Monique tried to keep up with the minimum monthly amounts required, borrowing from one credit card to cover the minimum payment on another. She also borrowed money from her adult children, though she found it embarrassing. By 2012, she was seriously in debt and behind in all payments.

A letter from her bank arrived, saying her mortgage was in arrears and they were going to foreclose. Monique and her son went back to the lawyer. The lawyer dealt with the bank and stopped the foreclosure. He assisted Monique in negotiating a deal with her husband and a separation agreement was signed. Monique found a bank that gave her a mortgage in her own name. But just before this was completed, a review of the property registry uncovered that her husband had been sued on a business debt in 2010 and a judgment was registered against the marital home for \$25,000. Monique needs to start a court action to attempt to remove this from her house.

The whole thing seems insurmountable. Monique's stress increased and her health declined. After seven years of struggling, she is no farther ahead. She has borrowed over \$40,000 on credit lines and from family since the separation, trying to stave off bankruptcy. Her husband has since retired and his health is declining. She sits alone at home and cries, waiting for the next foreclosure notice.

“My expectations? I can’t even remember my expectations anymore. My life just fell apart.”

“When I took the forms in to the court, the clerks told me that I had filled the forms in wrongly. I burst into tears. The journey from my home to the courthouse was a 150 mile drive and a ferry ride.”

“...as a person with a chronic illness it has been challenging to learn about court procedures and laws. I chose to represent myself because I am on a fixed income and can no longer afford counsel. I have spent all my life savings and more on a five-year divorce process.”

“When you read information on the Internet and then it refers you to something else – which refers you to something else – by this time you are overwhelmed. It is endless mayhem.”¹⁷

Most participants in this study had distressing experiences at legal hearings and felt they had been poorly treated by judges and opposing lawyers. They reported feeling embarrassed and humiliated and that they were the targets of an overwhelming bias. It is important to recognize that these perspectives are one-sided. In the Birnbaum Study, the authors point out that it is difficult to assess the validity of these concerns and some SRLs engage in inappropriate conduct, requiring strong direction from the court, or may be overwhelmed and misunderstand what has happened. While it is important to keep these cautions in mind, they cannot be used to discount these negative experiences or as a reason to ignore these widespread concerns. Both Birnbaum and Macfarlane studies underscore the importance of including all voices, particularly those who come to the justice system for help, in addressing access to justice issues.

The main findings of Macfarlane’s research include:

- Some SRLs began with a reasonable sense of confidence; others began with trepidation.

However within a short time almost all the SRL respondents became disillusioned, frustrated, and in some cases overwhelmed by the complexity of their case and the amount of time it was consuming.

- While online court forms appear to offer the prospect of enhanced access to justice, many forms are complex and difficult to complete, and SRLs often find they have made mistakes and omissions.
- There has been some progress towards developing user-friendly and simplified court forms, but far too little.
- A law student [employed by the researcher] tried to apply for a divorce in the three provinces and found that even with legal training, the forms were confusing, contained terminology she did not understand, and required an enormous amount of work and concentration.
- Court guides are an important step to assist SRL’s to complete forms and understand court procedure but are too often written in a confusing and complex manner.
- SRLs who anticipated that the proliferation of on-line resources would enable them to represent themselves successfully became disillusioned and disappointed once they tried to work with what is presently available on-line. On-line resources often require some level of understanding and knowledge to make the best use of them.
- The study data also shows that no matter how comprehensive and user-friendly (standards we are far from meeting), on-line resources are insufficient to meet SRL needs for face-to-face orientation, education and other support. Enhanced online technologies can be an important component of SRL programming – for example sites developed specifically for SRL’s using interactive technology – but cannot provide a complete service.
- Staff working on the court counters and information services are asked to distinguish between offering legal information and advice. Both SRLs and court staff consistently complain about this distinction, at best unclear and at worst practically unworkable. The present situation places an unfair burden on court staff required to make constant determinations of how much

¹⁷ *Ibid* at 51-64.

information they can provide to frustrated SRLs. This leads to inconsistent applications and creates a barrier between SRLs and certain basic information if construed as 'legal advice'.

- Court and agency staff described an almost identical set of frustrations and challenges as SRL respondents. They also mirrored the primary frustrations and challenges of the SRLs. Court and agency staff work under enormous pressure in dealing with the growing SRL population and constantly changing court forms and procedures. These are very stressful jobs, for which they are often poorly trained and remunerated.
- Service providers universally recognized the frustrations of SRLs as a source of pressure on the justice system in general, and on court staff and judicial officers in particular.

Macfarlane's study is a call to action. It details the serious implications of SRLs' experience in attempting to access the justice system with inadequate information, assistance, representation and accommodation by the court system. These implications include: serious personal health issues, financial consequences (including giving up work to prepare for their court case or interference with their employment), social isolation due to the toll of navigating the justice system and failing faith in the justice system.¹⁸

She concludes that it is difficult to overstate the "depth of skepticism" about the justice system resulting from the direct experiences of SRLs. While accepting that "some of the most extreme reactions border on the paranoid", on the whole SRLs appraise their experience in a rational and balanced way in concluding that the justice system is "broken".¹⁹

¹⁸ *Ibid* at 108-110.

¹⁹ *Ibid*.

Learn More: about the Experiences of SRLs in Canada

Macfarlane study:

[The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants Final Report](#) (May 2013)

Birnbaum study: "The rise of self-representation in Canada's family courts: The complex picture revealed in surveys of judges, lawyers and litigants" (May 2013):

www.cba.org/cba_barreview/Search.aspx?VolDate=05/01/2013

Macfarlane et al, *Annotated bibliography of work on SRLs*:

www.representing-yourself.com/bibliography

Ann Sherman, *A Study of Self Represented Litigants in the Supreme Court of Prince Edward Island* (2008):

www.cliapei.ca/sitefiles/File/Project%20Files/SRL%20Report.pdf

Trevor Farrow, Diana Lowe, Bradley Albrecht, Heather Manweiller and Martha E. Simmons, *Addressing the Needs of Self-Represented Litigants in the Canadian Justice System* (Toronto: CFCF, 2012):

<http://www.cfcj-fcjc.org/sites/default/files/docs/2012/Addressing%20the%20Needs%20of%20SRLs%20ACCA%20White%20Paper%20March%202012%20Final%20Revised%20Version.pdf>

Macfarlane blog:

www.drjuliemacfarlane.wordpress.com/

Richard Zorza Access to Justice blog:

www.accesstojustice.net/

Some Tools for SRLs:

For international, national and provincial resources, visit The National Self-Represented Litigants Project:

www.representing-yourself.com/resourcesrl.html

American network and resources for self-representation, SelfHelpSupport.org:

www.selfhelpsupport.org/

What We Know and Don't Know about Access to Justice

We have little hard data about Canada's justice system – especially relative to what we know about our healthcare and education systems. Much of what we do know about the system is anecdotal – descriptions rather than measurements.

Canada's justice system: how does it measure up? Good intentions, usually, some promising reforms. But too many people still can't enforce basic rights.

An international surge in empirical research on the prevalence of civil justice problems, unmet legal need, and their impact on people's lives provides an important knowledge foundation. But we still know relatively little about what works to increase access to justice and how and why it does. Gaps in our knowledge hinder our progress in achieving equal access to justice.

In this section, the Committee draws together available data to provide a patchwork answer about the dimensions of access to justice problems in Canada. It is not comprehensive but rather a partial picture based on indicia of barriers.

Prevalence of Civil Legal Problems and Patterns of Resolution

The biggest evolution in our knowledge base comes from large scale civil legal problem surveys by Dr. Ab Currie and his international colleagues. These surveys tell us about the high incidence of civil legal problems and the fact that they have a "pervasive and invasive presence in the lives of many".²⁰ The results are similar over time and in various countries.

Over three years, **about 45%** of Canadians will experience a justiciable event,²¹ meaning that over the course of a lifetime almost everyone will

²⁰ *Supra* note 12. See, press release for *Listening to Ontarians*, *supra* note 13 www.lsc.on.ca/media/may3110_oclnreport_final.pdf

²¹ *Ibid.*

confront such a problem. Dame Hazel Genn, a pioneer in this field, defines a justiciable event as:

a matter experienced by a respondent which raised legal issues whether or not it was recognized by the respondent as being "legal" and whether any action taken by the respondent to deal with the event involved the use of any part of the civil justice system.²²

Civil legal needs arise frequently, touch on fundamental issues and can range from creating minor inconvenience to great personal hardship. The disruption caused by unresolved legal problems is significant and can cause cascading problems for individuals and families.

These surveys also draw an important link between unresolved legal problems and issues of health, social welfare and economic well-being, social exclusion and poverty. In addition to fostering problems in non-legal areas of life, people who experience one legal problem are much more likely to experience more than one, and this is especially true for people living on low incomes and conditions of disadvantage, as the stories in this section so vividly illustrate.

Vulnerable groups generally have more contact with the law than others. A broad-scale study by the Law and Justice Foundation of New South Wales found that **22% of people have 85% of legal problems**.²³ Canadian studies have made the same findings: legal problems tend to 'cluster', multiply, and have an additive effect and this pattern of cascading problems disproportionately impacts people living in marginalized conditions.²⁴ For every additional problem experienced the probability of experiencing more problems increases.

The surveys also provide an overview of the steps people take or do not take to deal with civil legal problems. Both the experience of legal problems and patterns of resolution are different for different

²² Dame Hazel Genn, *Paths to Justice: What people do and think about going to law* (Oxford: Hart Publishing, 1999) at 12.

²³ Christine Coumarelos, Deborah Macourt, Julie People, Hugh M. MacDonald, Zhigang Wei, Reiny Iriana & Stephanie Ramsey, *Legal Australia-Wide Survey: Legal Need in Australia* (Sydney: Law and Justice Foundation of NSW, 2012) at 14 [LAW Survey].

²⁴ Currie (2006), *supra* note 12.

Dave's story

Dave has two children, aged 7 and 5. Their mother, his common-law spouse Mona, aged 26, has not completed high school nor held a job and has had a drug addiction for many years. She kept telling Dave that she quit, but he didn't believe her. Dave works a full-time job in Dartmouth. He had someone in the apartment building keeping a watch on his family, he came home on his lunch hours, and was with the children every weekend while Mona stayed out late. He bought the groceries, cooked the meals and cleaned the house. He knew she wasn't capable of caring for the children alone.

One Friday, Dave refused to give Mona more money for partying, and she told him to leave. On Monday, she went to legal aid in Halifax and got a lawyer. She said she was the primary caregiver and wanted to claim custody of both children. Dave wanted legal advice but could not afford the \$5000 retainer charged by most law firms.

He was rejected at legal aid because he earned too much money. Legal aid gave him some pamphlets.

Dave was devastated when he was served with the papers. He approached Mona to talk about a custody agreement, but she knew she would get child support and the child tax benefit if she had custody. Dave raised his voice in frustration and Mona called the police, claiming he was threatening her. Dave spent the night in jail, and was released on the condition that he have no contact with Mona. That means he cannot arrange access except through the legal aid lawyer. It takes days to coordinate a visit, and even then Mona cancels about 50% of the time.

Working 50 hours a week in construction, Dave now spends his nights trying to figure out how to represent himself. He reads the materials from legal aid and talks to friends but he is exhausted and can't figure this out. He can't sleep, and he is very scared for himself and for his children

groups in society, between low income and middle income people.

Most justiciable problems are resolved outside the formal justice system. While positive outcomes can certainly be achieved outside the justice system, it is important to a fair negotiated result that the system be perceived as available and accessible to all parties to get the help they need and enforce their rights. In contrast, the justice system is currently poorly understood or perceived to be inaccessible by many people, and this perception in itself can be seen as a barrier to access. Vulnerable groups in particular may not respond to problems because of perceived or actual barriers to getting help, and research has shown that legal assistance results in better outcomes.²⁵

The surveys identify other barriers to finding solutions to civil legal problems, including:

- the complexities of the legal system;
- the qualification process for legal aid;
- too little legal aid coverage for civil legal problems;
- lack of knowledge about the legal system and resources available to support individuals, especially knowledge regarding how to access legal aid or affordable legal services and information;
- fear of becoming involved in the legal system, particularly for those who had previous experience with the civil or criminal legal system;
- the stress of pursuing resolution of legal problems;
- concerns about damaging relationships;
- being intimidated by the court system and generally afraid to take action;
- embarrassment and fear of stigmatization for having a legal problem; and
- fear of loss of privacy.²⁶

²⁵ Russell Engler, “Reflections on a Civil Right to Counsel and Drawing Lines: When Does Access to Justice Mean Full Representation by Counsel, and When Might Less Assistance Suffice?” (2010) 9 *Seattle Journal for Social Justice* 97 at 117; Rebecca Sandefur, “The Impact of Counsel: An analysis of the empirical evidence” (2010) 9 *Seattle Journal for Social Justice* 51.

²⁶ Summary of findings of studies at *supra* note 12.

Differential Impact of Access Denied

Socially excluded groups are more vulnerable and this vulnerability compounds the effects of unresolved legal problems. It also makes it more challenging to navigate the justice system.

Dr. Patricia Hughes of the Law Commission of Ontario points out that access to justice may be restricted because of geographic factors, institutional limitations, racial, class and gender biases, cultural differences and economic factors. Not only are people living in disadvantaged conditions or socially excluded groups more vulnerable to experiencing multiple legal problems, they are less likely to take action to resolve these problems, less capable of handling their problems alone and more likely to suffer a variety of adverse consequences that may well further entrench their social exclusion.

Individuals and families living on low incomes often experience additional problems that make finding the time and energy to deal with legal issues even more of a hurdle:

People in poverty who lack services often have legal needs on top of other needs. Even if services could meet the legal needs, the client may not return because their legal needs get subsumed by other needs – accommodation, mental health. Unless other needs are met, legal needs will not be met.²⁷

Specific communities have been identified as facing particular barriers in accessing the legal assistance they require to deal effectively with their civil legal problems. Generally, people living in poverty have lower levels of education and literacy. They disproportionately experience physical and mental health and addiction issues, or have experienced significant trauma in their lives compared to people living at higher income levels. According to British Columbia’s Legal Services Society report, *Making Justice Work*:

Legal aid clients are among the most marginalized citizens. They lack the financial

²⁷ Patricia Hughes, *Inclusivity as a Measure of Access to Justice* (paper prepared for CBA, Envisioning Equal Justice Summit, Vancouver, April 2013).

Arthur's story

A while after their marriage ended, Arthur and his ex-wife stopped adjusting the child support for their three children every year. Arthur knew his ex-wife was remarried to a doctor and was comfortable financially. But, when the first child was ready to go to university, his ex-wife's lawyer served him with papers, demanding money for university expenses and retroactive support increases for the past three years.

Arthur runs his own business in Winnipeg and makes about \$60,000 a year. He had expected his share of university expenses to be about \$10,000 a year per child, and didn't want to pay more for legal fees. A child support variation would not be more complicated than running his own business successfully, he thought.

He figured out which forms to complete, but called the courthouse with one question. The clerk said he could not provide legal advice, but gave Arthur an internet site to research. He finished the defence at 2am the day it was due.

He had neglected his business working on the case, and felt relieved to finally deliver the papers to the courthouse for filing. The clerk passed it back to him, saying he'd "not complied with the rules of court". When Arthur asked what was wrong, the clerk said he could not provide legal advice. As a taxpayer, Arthur was furious that the clerk would not help him. He looked on the website again, but couldn't find the answer. He did find a toll free number, and after 45 minutes on hold, he spoke with the volunteer lawyer. He had failed to attach his tax returns.

Once the documents were filed, Arthur started educating himself on the Child Support Guidelines to see what he should expect to pay. His friends all had conflicting advice, so that wasn't helpful. He read case law he found online but didn't know what he was looking for, exactly. He missed the HST filing deadline for his company.

Arthur arrived at the courthouse, exhausted and nervous. His ex-wife's lawyer arrived and spoke to him before the judge came in. Soon he realized that they were talking about a settlement of the issues. Arthur had no idea whether the deal proposed was good or bad for him but he was overwhelmed. He took the deal.

means to effectively access the justice system when their families, freedom, or security are at risk. Almost 70% have not graduated from high school, and many struggle with basic literacy. Others face linguistic or cultural barriers. Over 25% are Aboriginal; in some communities, this rises to 80%.²⁸

The Legal Australia-Wide Survey (LAW Survey), described as the most comprehensive quantitative assessment of legal needs ever conducted in Australia, found that “65% of legal problems were experienced by just 9% of the respondents, and 85% of problems were experienced by 22% of respondents.”²⁹ Specifically, people with disabilities and single parents were twice as likely as other respondents to experience legal problems. Unemployed people and people in poor housing were also especially impacted. Aboriginal people were more likely to experience compounded problems, involving government, health issues and rights related problems.³⁰

The Ontario Civil Legal Needs Project looked at the unmet legal needs of people earning less than \$20,000 per year, and found a disproportionate number of women (62%) were impacted; most often single, divorced or widowed. They also found disproportionate representation from equality-seeking communities, particularly people with disabilities. The population was more likely to be unemployed, retired or receiving disability benefits – and almost half were receiving income assistance. The conclusion was that “the poorest and most vulnerable Ontarians experience more frequent and more complex and interrelated civil legal problems.”³¹

Private Market Legal Services

The research on civil legal needs demonstrates that many people do not use legal avenues to deal with

justiciable problems and only a small minority turn to lawyers. The reasons are complex, including both the perceived and actual cost of a lawyer’s services and a tendency to view problems as something that ‘just happens’, rather than as legal problems.³² This is an area of active research.

We know little about supply and demand in the legal market for personal legal services. US legal scholar Gillian Hadfield recently noted that the legal marketplace for individuals is poorly documented – meaning it is difficult to understand how well or poorly this marketplace resembles a properly-functioning market.³³ We cannot provide accurate figures for the dollar value of this part of the legal market, the average amounts spent by consumers of legal services, or the amounts earned by lawyers in a comprehensive way.

Surveys on private-market legal services conducted by several Canadian law societies have come to consistent results. The main problem people identify in accessing legal assistance is perceived or actual cost. At the same time, studies show that having legal assistance generally results in better outcomes for the people involved.³⁴

One survey found that one quarter of those who resolved their issue alone felt they would have achieved a better outcome had they used a lawyer. One half of respondents, however, felt it would have made no difference, while 16% thought they would have a worse outcome. The main reasons given for hiring a lawyer were that the legal issues were too complex to handle alone and a lawyer would help to achieve a better result.

While complaints about lawyers’ fees are often heard, the studies show that clients who have actually retained counsel are generally satisfied, both with the service received and the amount they paid.³⁵

²⁸ Legal Services Society, *Making Justice Work* (Vancouver: LSS, 2012) at 8.

²⁹ LAW Survey, *supra* note 23, one page summary: [http://www.lawfoundation.net.au/ljf/site/templates/LAW_AUS/\\$file/LAW_Survey_Summary_FINAL.pdf](http://www.lawfoundation.net.au/ljf/site/templates/LAW_AUS/$file/LAW_Survey_Summary_FINAL.pdf)

³⁰ *Ibid.*

³¹ Ontario Civil Legal Needs Project, *supra* note 13 at 45.

³² Rebecca L Sandefur, “Money isn’t Everything: Understanding Moderate Income Households’ Use of Lawyers’ Services” in Michael Trebilcock, Anthony Duggan and Lorne Sossin, *Middle Income Access to Justice* (Toronto: University of Toronto Press, 2012).

³³ Hadfield, *supra* note 1. See also Sandefur, *ibid.*

³⁴ Engler, *supra* note 25 at 117; Sandefur, *ibid.*

³⁵ *Supra* note 13.

Another important trend is that people want more active involvement in the management, strategy and decision making about their legal matters, and more certainty in terms of cost. People seek legal information to enable them to make more informed choices, but often get advice from friends and family, rather than legal professionals.

There is also a movement away from ‘all or nothing’ lawyering, with clients seeking legal advice and assistance for parts of their legal problems rather than following the traditional full representation model. Lawyers are responding through unbundled legal services, alternative billing arrangements, specialized law firms, and in other ways, but significant gaps in private market services remain and contribute to unequal justice. The two current CBA initiatives (Equal Justice and Legal Futures) are considering these means of providing legal services, along with related concepts like preventative lawyering, use of technology in dispute resolution and non-lawyer providers of legal services, as potential innovations for increasing access to justice.

Public Legal Services

Publicly funded legal services are provided by legal aid plans in each province and territory, but plans cannot meet current demands for legal help. There are huge regional disparities in who can access legal aid based on financial eligibility, the types of legal matters covered, and the amount and type of legal assistance and representation provided. One illustration of these disparities is that the national average annual per capita funding for legal aid (both criminal and civil matters) is \$16.21, but it ranges from only \$10.32 in one province to close to \$30 in another.³⁶

In some jurisdictions, there is no legal aid (beyond information) for many civil legal problems that affect areas of vital interest, such as housing. Some legal aid services such as public legal information are generally available to all, but most assistance and representation is available only on the basis of means testing. Often, an individual or family has to

be receiving social assistance or earning just above this threshold to qualify for legal aid. Currently in Alberta, even recipients of Assured Income for the Severally Handicapped are ineligible for legal aid. People working full time for minimum wage qualify for legal aid only in a few provinces. The Barreau du Québec implemented an advocacy campaign to raise eligibility rates so that those earning minimum wage qualify for services, and Québec has recently announced a significant increase in eligibility levels.³⁷

“[I was ineligible] simply because [I am] a hardworking, frugal and responsible citizen.”

B.C. resident

At the Summit, Nye Thomas, Director General, Policy and Strategic Research at Legal Aid Ontario (LAO) noted that LAO offers a broad range of legal aid programs and covers a range of essential legal issues, but has a lower eligibility threshold than all legal aid standards in Canada and the US. In a recent study, LAO analyzed its financial eligibility guidelines against Statistic Canada’s Low income Measure (LIM) – a common measure of poverty in Canada. They found a wide and growing gap between LAO financial eligibility and LIM in Ontario. Today, a single person earning more than \$208 per week would not qualify for legal aid representation in Ontario. The impact of this gap has been significant. Since 1996, all demographic groups have lost ground relative to LIM. Fewer than 7% of all Ontarians are currently eligible for full representation legal aid, even though more than 16% live below the LIM.³⁸ LAO estimates approximately 1 million fewer Ontarians are financially eligible for a legal aid certificate today than in 1996. This means more hardship, less access to justice, more court delays, more court ordered counsel and more unrepresented litigants. Absent corrective action, things will get worse. Other provinces have more generous eligibility guidelines

³⁶ Statistics Canada, Canadian Centre for Justice Statistics, *Legal Aid in Canada: Resource and Caseload Statistics 2011/2012* (Ottawa: Government of Canada, March 2013).

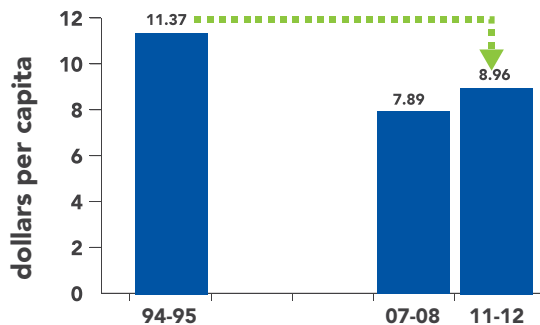
³⁷ See: www.justice.gouv.qc.ca/english/ministere/dossiers/aide/aide-a.htm

³⁸ Nye Thomas, Presentation at CBA Envisioning Equal Justice Summit (Vancouver: April 2013): www.cba.org/CBA/cle/PDF/JUST13_Slides_B1.pdf

but ration legal aid by providing it in a smaller range of legal matters.

The current inadequacy of civil legal aid is largely attributable to underfunding. Although there has been some increased funding for legal aid in the past five years, a longer range perspective shows a 20% overall decrease from the pre-1994 spending on civil legal aid.³⁹ This trend is illustrated in Chart 1: Civil legal aid spending per capita, 1994-2012. In 1994-1995, governments spent \$11.37 on a per capita basis, declining to a low of \$7.89 in 2007-2008 and rebounding slightly in 2011-2012 to \$8.96.

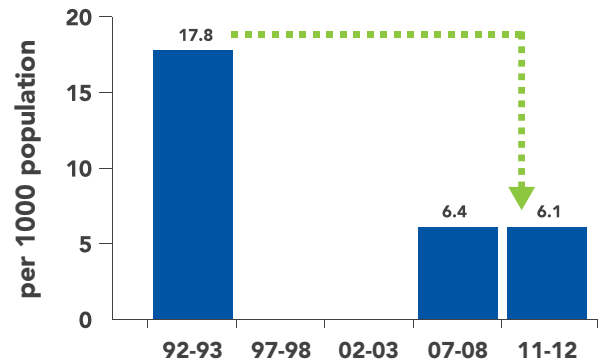
Chart 1: Civil legal aid spending per capita, 1994-2012⁴⁰



The reduction in legal aid funding and its particular impact on non-criminal matters is illustrated in Chart 2: Approved applications for civil legal aid, 1992-2012. Over two decades, the number of approved civil legal aid applications was reduced to a third: in 1992-1993, there were almost 18 approved applications for every 1000 Canadian residents; by 2011-2011 this number hovered just

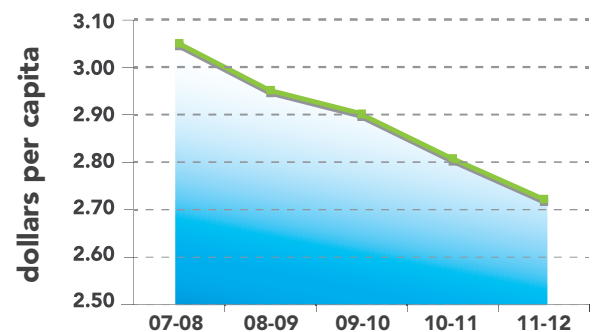
over six for every 1000 people. This represents a 65.7% decline.

Chart 2: Approved applications for civil legal aid, 1992-2012⁴¹



One major change is that the federal government has gradually reduced contributions to criminal legal aid from a high of 50-50 sharing until 1995, to now contributing about 20-30% of the cost. At the same time, the federal government discontinued dedicated funding for civil legal aid in 1995. Direct per capita spending by the federal government on criminal legal aid is illustrated in Chart 3, Federal contributions to legal aid plans.

Chart 3: Federal contribution to legal aid plans (criminal legal aid) (per capita, 2002 constant dollars)⁴²



The next chart illustrates rising provincial and territorial spending on legal aid over the same period, for both criminal and civil matters. Any federal contribution to the provinces for civil legal aid is contained in a global transfer (first called the

³⁹ Ab Currie, "The State of Civil Legal Aid in Canada: By the Numbers in 2011-2012" (Toronto: CFCJ, 2013): www.cfcj-fcj.org/commentary/the-state-of-civil-legal-aid-in-canada-by-the-numbers-in-2011-2012

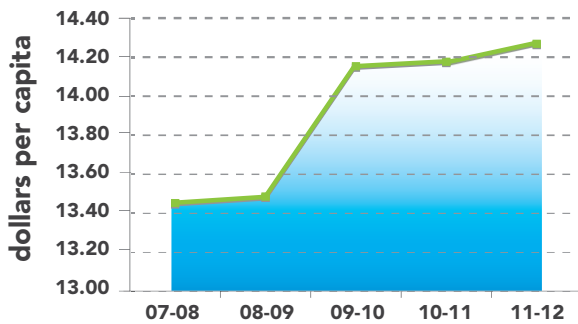
⁴⁰ "Current levels of expenditures and services are considerably lower than the historical high levels in the early to mid 1990's. In 1994-1995 direct service expenditures on civil legal aid were \$329,787,000. This was \$11.37 per capita. In 2007-2008 per capita direct service expenditures had declined to \$7.89 per capita (\$259,946,000). Per capita direct service expenditures on civil legal aid increased to \$8.96 in 2011-2012 (\$309,022,000). This represents a 13.6% increase in per capita direct service expenditures over the recent five-year period. However, it reflects a 21.2% decline from the level of per capita direct service expenditure in 1994-1995." *Ibid.*

⁴¹ *Ibid.*

⁴² Statistics Canada, www.statcan.gc.ca/pub/85f0015x/2012000/t003-eng.htm

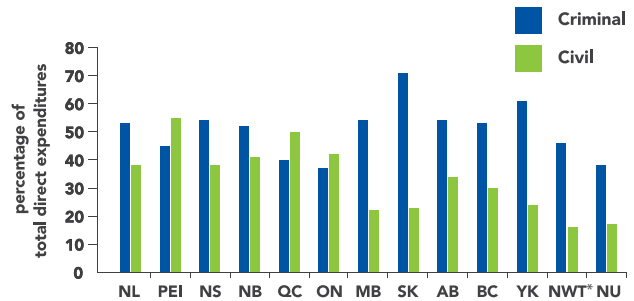
Canada Health and Social Transfer, now the Canada Social Transfer), to allow regions to determine their own priorities. For that reason, it is impossible to say what, if any, federal contribution actually goes to civil legal aid. Provincial and territorial Ministers of Justice have recently challenged the existence of a federal contribution for civil legal aid in the Canada Social Transfer, and called for additional dedicated funding.⁴³

Chart 4: Provincial/territorial contribution to legal aid plans (criminal/civil legal aid) (per capita, 2002 constant dollars)⁴⁴



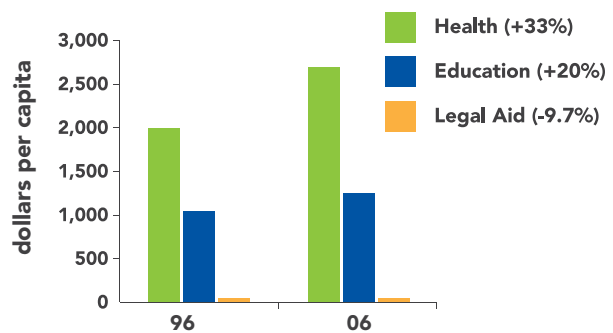
The second important change is that spending on criminal legal aid, some aspects of which have been deemed to be constitutionally required by Canadian courts, accounts for an increasing proportion of overall spending. Of twelve legal aid plans that provided information to StatsCan, nine spent more on criminal matters than on civil matters in 2011/2012. The proportion spent on criminal matters ranged from 52% for New Brunswick to 71% for Saskatchewan.⁴⁵ Of the remaining three jurisdictions, Prince Edward Island and Québec allocated 45 and 40% of direct expenditures to criminal matters, respectively, and Ontario 37%. Chart 5 compares the 2011/12 figures for direct expenditures on criminal legal aid compared to civil legal aid, as a percentage of total plan expenditures.

Chart 5: Regional legal aid spending (criminal/civil)⁴⁶ 2011-2012



Further, spending on legal aid has not kept pace relative to health care and education. In his 2008 study in Ontario, Professor Michael Trebilcock used public accounts data over a decade to demonstrate that while health and education spending had risen 33% and 20% respectively from 1996-2006, legal aid spending over the same period decreased by 9.7%. This trend is illustrated in Chart 6: Ontario Spending on Health, Education and Legal Aid, 1996-2006. There has been some improvement in Ontario's spending on legal aid since 2006, but comparative data is not available for other periods or in other jurisdictions.

Chart 6: Ontario per capita spending on health, education and legal aid 1996-2006⁴⁷



⁴³ See, for example: www.news.gc.ca/web/article-eng.do?mthd=advSrch&nid=182679&ctr.dpt1D=&ctr.tp1D=&ctr.yrndVI=

⁴⁴ Statistics Canada, www.statcan.gc.ca/pub/85f0015x/2011000/t003-eng.htm.

⁴⁵ Statistics Canada, www.statcan.gc.ca/pub/85f0015x/2012000/t006-eng.htm.

⁴⁶ Statistics Canada, www.statcan.gc.ca/pub/85f0015x/2012000/t006-eng.htm. *Note that while these figures are mainly for 2011/12, NWT figures are for 2009/10, the most recent data provided to StatsCan for that region.

⁴⁷ Michael Trebilcock, *Report of the Legal Aid Review, 2008* (report prepared for Ontario Attorney General, Chris Bentley) (Toronto: AG ON, 2008) at 74. www.attorneygeneral.jus.gov.on.ca/english/about/pubs/trebilcock/legal_aid_report_2008_EN.pdf [relying on 1996 and 2006 as ON census years].

The reduction in federal spending overall, increased complexity in the substantive law and growing demands for criminal legal aid have placed pressure on legal aid providers to ration services – in a way often inconsistent with the general purpose and public policy values underlying the program.

Currie notes that the “vitality of the legal aid system is of vital importance.”⁴⁸ Because the legal aid system is not as healthy as it once was, “it probably will not play the important, and perhaps key, role it might in the evolution of access to justice in Canada, without resources to repair the erosion” that has occurred since the early 1990s.⁴⁹

Exponential Growth of Pro Bono

The Committee defines pro bono work as free legal services provided to people or organizations who cannot otherwise afford them and that have a direct connection to filling unmet legal needs. The legal profession has always provided services to people with modest means on a charitable basis and indeed our legal aid system grew out of these pro bono roots.

The numbers of people assisted through pro bono efforts has grown exponentially.

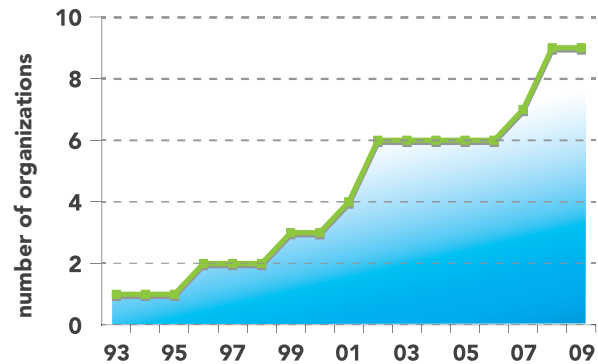
Increasingly institutionalized organizations have developed to act as a broker, taking applications from individuals and small organizations in need of legal assistance and linking them to lawyers willing to volunteer to help.

Pro Bono Students Canada was formed in 1996 and now operates out of 21 law schools across the country. In the last decade, formal pro bono organizations have been established in five provinces, providing an infrastructure and paid staff. (Ontario (Pro Bono Law Ontario); B.C. (Access Pro Bono); Alberta (Pro Bono Law Alberta)); Saskatchewan (Pro Bono Law Saskatchewan) and Québec (Pro Bono Québec)). This growth in pro bono organizations is illustrated in Chart 7.

⁴⁸ Currie, *supra* note 39.

⁴⁹ *Ibid.*

Chart 7: Growth in formal pro bono organizations in Canada 1990-2009

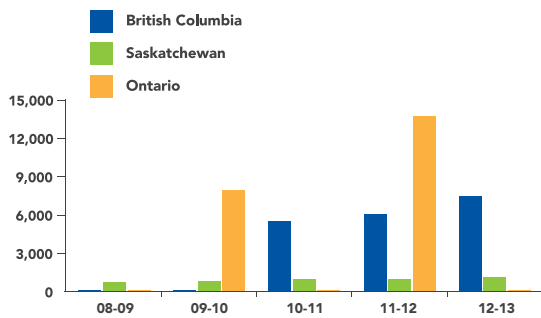


Pro bono organizations play an important role in promoting voluntary services: they develop programs that facilitate lawyer involvement, provide training and match lawyers willing to donate their time to clients with unmet legal needs. Once a client and lawyer are matched, the file might proceed as any other regular paying client file would, or the lawyer or organization might offer assistance with only certain aspects of the file or provide referrals, legal information or self-help materials.

Many pro bono organizations can be more flexible as to who qualifies for help than legal aid programs. The organizations supply administrative support, an intake and screening process to ensure clients meet established financial criteria and need the type of assistance offered by the organization, and a roster of volunteer lawyers to call on as needed, or who regularly attend at a designated location.

As with so many aspects of the access to justice landscape in Canada, there are few firm statistics on the number of lawyers who provide pro bono services, people helped or the value of this contribution. Several law societies collect statistics on pro bono contributions from their members, but reporting that information is optional for lawyers. Anecdotally, most pro bono organizations report that they cannot keep pace with growing demand. Many pro bono organizers describe how quickly their services become oversubscribed, finding it impossible to keep up. The exponential growth in the number of people and matters aided by pro bono lawyers is illustrated in Chart 8, based on information provided by the organizations that have begun to collect comparable data.

Chart 8: Pro Bono – cases accepted 2008-2013⁵⁰



There is a growing schism in the profession about pro bono work, between those who believe that lawyers should have a mandatory obligation to donate legal services and those who oppose this trend. Adam Dodek of the University of Ottawa (and member of the CBA Legal Futures Initiative’s Ethics and Regulatory Issues Team) recently wrote:⁵¹

Unfortunately, no Canadian law societies or bar associations have any rules imposing an ethical let alone a regulatory obligation on Canadian lawyers to provide legal services to those who cannot afford them. The CBA’s Code of Professional Conduct rather meekly states that

Lawyers should make legal services available to the public in an efficient and convenient manner that will command respect and confidence, and by means that are compatible with the integrity, independence and effectiveness of the profession.

(This is in chapter 14 on “Advertising, Solicitation and Making Legal Services Available”).

The Federation of Law Societies of Canada does no better. Its now-completed Model Code of Conduct states at Rule 3.01(1) that “A lawyer must make legal services available to the public efficiently and conveniently and, subject to rule 3.01(2), may offer legal services to a prospective

⁵⁰ In the spring of 2013, CBA contacted the five major pro bono organizations for any data they could share in regard to cases accepted annually. The chart reflects data received that could readily be compared.

⁵¹ Adam Dodek, “Mandated or Mandatory Pro Bono”, May 3 2012, SLAW: www.slw.ca/2012/05/03/mandated-or-mandatory-pro-bono/

client by any means.” The commentary states:

As a matter of access to justice, it is in keeping with the best traditions of the legal profession to provide services pro bono and to reduce or waive a fee when there is hardship or poverty or the client or prospective client would otherwise be deprived of adequate legal advice or representation. The Law Society encourages lawyers to provide public interest legal services and to support organizations that provide services to persons of limited means.

However, unmet legal need and the demand for legal services in Canada far exceeds availability and what can reasonably be provided on a charitable basis. Some question the sustainability of increased dependence on volunteerism by the profession. More fundamentally, the increased emphasis on pro bono services as a solution to the access to justice crisis is seen by some to discourage facing the fundamental inadequacies of our justice system. From this end of the spectrum of views regarding pro bono, the profession’s work in the public good “does nothing to ensure that there is a healthy *public* commitment” to access to justice, particularly to the disadvantaged, and in fact it can be seen as letting “the government off the hook too easily.”⁵²

A distinguished Ontario practitioner, well known for his contributions of low-rate or pro bono services, likened pro bono work to a sort of legal food bank: pro bono services alleviate hunger for some on a daily or monthly basis, but it absorbs the energy of those who provide these so that they have little energy left for changing the underlying conditions that create the hunger.

Mary Eberts reference to Andrew Orkin in “Lawyers Feed the Hungry”, note 52.

⁵² Mary Eberts, “‘Lawyers Feed the Hungry’: Access to Justice, the Rule of Law, and the Private Practice of Law” (2013) 76:1 Saskatchewan Law Review 91.

There are many unresolved questions about the extent to which unmet legal needs can reasonably be addressed by pro bono efforts, and the extent to which those efforts are the profession's responsibility.⁵³

Unrepresented Litigants

Perhaps the most obvious consequence of the gap between the prevalence of legal problems and inadequacies in the availability of public and private legal services is the exponential growth in recent years of unrepresented and under-represented⁵⁴ litigants in the courts. Unrepresented people are now so common place that we tend to quickly refer to them as 'SRLs' (self-represented litigants), despite the fact that the vast majority state that they would prefer to have access to counsel to assist them with their legal matter.

Historically, we did not keep track of unrepresented litigants and courts do so only inconsistently today. As a result, data on this phenomenon is still limited. Twenty years ago, best estimates are that less than 5% of litigants were not represented by counsel. Today anywhere from 10-80% of litigants are unrepresented, depending on the nature of the claim and the level of court. While provincial court family matters and small claims courts have the highest levels of unrepresented litigants, even the Supreme Court of Canada is experiencing this trend. One recent study estimates that 50% of family law litigants across Canada are unrepresented.⁵⁵ Of the few longitudinal studies of unrepresented litigants, one from California's Family Courts shows that in just over 30 years the percentage of unrepresented litigants went from 1% or less to 80% (see Chart 9). At least one international study has demonstrated a link between cuts to legal aid and the growth of unrepresented litigants.⁵⁶

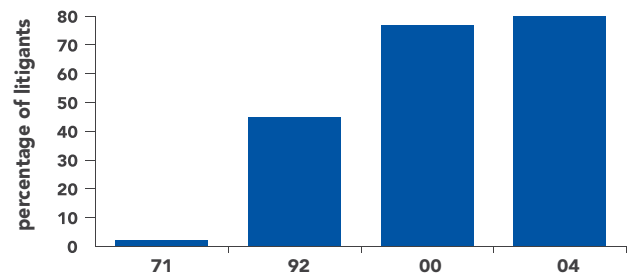
⁵³ These questions are explored further in CBA Access to Justice Committee discussion paper, *"Tension at the Border": Pro Bono and Legal Aid* (Ottawa: CBA, 2012) www.cba.org/CBA/groups/PDF/ProBonoPaper_Eng.pdf.

⁵⁴ By "under-represented" we mean litigants who may have received some legal help short of full representation but require full representation for their matter.

⁵⁵ Birnbaum study, *supra* note 6.

⁵⁶ See, Dewar, cited in Birnbaum study, *ibid* at footnote 13.

Chart 9: Percentage of unrepresented litigants: California family courts 1971-2004⁵⁷



A recent Canadian study⁵⁸ examines how lawyers and judges perceive changes in the numbers of unrepresented litigants in recent years, and documents their strong perception that numbers have grown significantly. The majority of litigants in this study reported earning under \$30,000 per year although significant numbers reported earning up to \$60,000.

They conclude that the reasons for not having counsel are complex. The main reason is financial, including ineligibility for legal aid. Among middle income earners were those able to afford legal fees, but who chose not to because they did not believe they would receive good value relative to other financial priorities. Other reasons for not retaining counsel include that litigants believe they have sufficient knowledge about family law to represent themselves, that lawyers increase the adversarial nature of the proceedings and that lawyers increase the time and cost involved.

While the study identified these various reasons for not retaining counsel, it also found that litigants who had lawyers were almost all satisfied with their decision to have representation. A significant number of lawyers and judges noted gender differences for being unrepresented. The common perception is that women are more likely to be unrepresented because they cannot afford a lawyer, while men are more likely to want to deal directly with their former partner or are confident of their ability to represent themselves. Some comments include:

⁵⁷ Macfarlane study, *supra* note 6 at 34.

⁵⁸ Birnbaum study, *supra* note 6.

“For women, it is finances; men think they do as well as a lawyer but without the expense.” *[lawyer]*

“Sometimes abusive men want to be able to have direct contact with their partner.” *[lawyer]*

“Men more often believe they don’t need a lawyer. Women do not have the money.” *[judge]*⁵⁹

Again, there is little hard data on the impact of unrepresented persons on court services. There is a strong perception – supported by the quantitative findings in the study by Macfarlane – that unrepresented persons, through no fault of their own, take up more court time and court services. Court registry staff walk the fine line between legal information (which they are authorized to offer) and legal advice (which they must not provide). They are often placed in difficult positions because of requests for information and assistance they are unable to meet. There is a strong perception among judges and lawyers that unrepresented parties are less likely to settle (partially due to unrealistically high expectations about outcomes), proceedings take longer and represented parties bear higher costs when the opposing party is unrepresented because proceedings are less efficient. Judges say they find it challenging to meet the needs of unrepresented litigants while maintaining their neutrality and independence.⁶⁰

These results indicate that professionals clearly believe that lack of representation makes settlement less likely, takes longer, and therefore implicitly increases the costs to the represented party as well as to the publicly funded justice system.

Birnbaum study (note 6).

⁵⁹ *Ibid* at 79.

⁶⁰ Macfarlane study, *supra* note 6.

Concerns have been raised about a two-tier justice system – with unrepresented litigants getting less than their fair share. One unrepresented litigant put it this way:

Either lawyers should charge less, or there should be more legal aid. Something’s gotta give or they can’t say it’s really justice, right?

Unrepresented litigant from Macfarlane study (note 6)

Similarly, in large scale civil legal needs surveys, Currie found that although many respondents were able to resolve problems on their own and get on with their lives, “[m]any of the self-helpers achieve outcomes that they consider to be unfair and, among those, some feel, in retrospect, that some help would have produced a better outcome. Many people who do not resolve their problems feel that the situation is becoming worse.”⁶¹

Unrepresented litigants’ perception that they do not receive fair outcomes is validated by empirical research. More than 200 US studies in a wide range of legal proceedings and matters have demonstrated that unrepresented parties lose significantly more often – and in a bigger way – than represented ones. Several studies of this question are now underway using the more rigorous methodology of randomized testing, and early results appear to substantiate the earlier research. Further, recent US studies show that unbundled legal services, where an unrepresented litigant has some assistance from a lawyer (for example the lawyer drafts the court documents but the litigant appears in court on his or her own), make little difference to outcome, although these limited services do contribute to procedural fairness.⁶²

⁶¹ Currie (2009), *supra* note 12 at 89.

⁶² Jessica Steinberg, “In Pursuit of Justice? Case Outcomes and the Delivery of Unbundled Legal Services” (2011) 18 *Geo. J. Poverty Law & Pol’y* 453 at 455; D. James Greiner, Cassandra Wolos Pattanayak and Jonathan Hennessy, “The Limits of Unbundled Legal Assistance: a Randomized Study in a Massachusetts District Court and Prospects for the Future” (draft March 2012). For a more detailed discussion, see CBA Access to Justice Committee, *Toward National Standards for Publicly Funded Legal Services* (Ottawa: CBA, 2013) at 20-22.

As noted above, Macfarlane found serious implications of the SRL experience, including health issues, financial consequences, social isolation and declining faith in the justice system generally.⁶³ Lack of representation or under-representation has a disproportionately negative effect on individuals living in marginalized conditions. Many reports and studies have shown the increasingly prevalent ‘self-help services’ are most effective for people with higher levels of literacy and comprehension, while people who face other barriers are less able to effectively use those tools to navigate the legal system.⁶⁴

Courts and the Civil Justice System

Access to legal services is one piece of the access to justice puzzle. Others include court structures, rules and procedures, administrative tribunals, alternatives to adjudication, and substantive law. Courts and tribunals across Canada face a range of challenges in providing equal access to justice, challenges too complex to sum up here. A scan of recent annual reports shows an ongoing concern in many courts and tribunals with delays and the growing length of proceedings,⁶⁵ despite

⁶³ *Supra* note 6 at 108-110.

⁶⁴ See for example, Carol McEown, *Civil Legal Needs Research Report* (Vancouver: Law Foundation of BC, 2nd Edition, March 2009) at 30; Community Legal Education Ontario, *Tapping the Community Voice: Looking at Family law Self-Help through an Access to Justice Lens – Themes and Recommended next Steps* (Toronto: CLEO, September 2009) at 3.

⁶⁵ See, for example, the following annual reports:

Supreme Court of BC 2012 *Annual Report* at 24:
www.courts.gov.bc.ca/supreme_court/about_the_supreme_court/annual_reports/2012%20Annual%20Report.pdf

Alberta Court of Queen’s Bench *Annual Report* at 41:
www.albertacourts.ab.ca/LinkClick.aspx?fileticket=q1Bq8QoSalk%3D&tabid=92&mid=704

The Provincial Court of Manitoba 2010 *Annual Report* at 10, 17, 18:
www.manitobacourts.mb.ca/pdf/annual_report_2010-2011.pdf

Ontario Superior Court of Justice *Annual Report* at 25:
www.ontariocourts.ca/scj/en/reports/annualreport/10-12.pdf

Ontario Court of Justice Biennial Report 2008-2009:
www.ontariocourts.ca/ocj/ocj/publications/biennial-report-2008-2009

Learn More: about Reforming Legal Services to Meet Legal Needs

Anne-Marie Langan, “Threatening the Balance of the Scales of Justice: Unrepresented Litigants in the Family Courts of Ontario” (2005) 30:2 *Queen’s Law Journal* 825.

Gayla Reid Donna Senniwi and John Malcolmson, “*Developing Models for Coordinated Services for Self-Representing Litigants: Mapping Services, Gaps, Issues and Needs.*” (Vancouver: Justice Education, 2004):
http://www.justiceeducation.ca/themes/framework/documents/srl_mapping_repo.pdf

CBA Access to Justice Committee, *Toward National Standards for Publicly Funded Legal Services* (Ottawa: CBA, 2013):
<http://www.cba.org/cba/equaljustice/PDF/TowardNationalStandards.pdf>

Community Legal Education Ontario, *Tapping the Community Voice: Looking at Family law Self-Help through an Access to Justice Lens – Themes and Recommended next Steps* (Toronto: CLEO, September 2009).

Kathryn Alfisi, “Access to Justice: Helping Litigants Help Themselves” (January 2010) *Washington Lawyer*:
www.dcb.org/for_lawyers/resources/publications/washington_lawyer/january_2010/access_justice.cfm

Benjamin H. Barton, “Against Civil Gideon (and for Pro Se Court Reform)” (2010) 62:5 *Florida Law Review* 1227.

John M. Greacen, “Self-Represented Litigants: Learning From Ten Years of Experience in Family Courts” (2005) 44:1 *The Judges’ Journal* 24.

Richard Moorhead, “Litigants in Person: What the Research Actually Says” (posted 16 December 2010) *Lawyer Watch*:
<http://lawyerwatch.wordpress.com/2010/12/16/litigants-in-person-what-the-research-actually-says/>

concerted efforts toward reform over more than two decades.⁶⁶

Few justiciable problems are actually resolved through the formal justice system. More informal assisted dispute resolution processes, including mediation in, connected to and separate from court and tribunal processes, are available. While only a small fraction of civil matters are ultimately resolved by a court or tribunal, these institutions have a central and irreplaceable role in maintaining a legal framework for resolving disputes. Reaching equal justice requires the formal and informal aspects of the justice system – courts, tribunals and the broader civil justice system – to work together effectively.

Recent studies emphasize the importance of timely intervention and assistance as key to enhancing access, avoiding problems, achieving positive outcomes and saving money. Public legal education and information providers are leading the way, often relying on online resources as a gateway. This significant trend to provide more online information and tools is important and welcome, as it can reach many people regardless of income. However, it is less helpful to the almost 48% of Canadians⁶⁷ who lack the literacy skills to make use of this type of information. As well, many people, especially those already living in situations of disadvantage, need ‘human help’ in tailoring information and tools to their own problems and to answer their questions.

Currently, courts and tribunals are engaged in

⁶⁶ For example, see the Canadian Bar Association Task Force on Court Reform, *Court Reform in Canada* (Ottawa: CBA, 1991); Canadian Bar Association Committee on Court Cost and Delay, *Court Cost and Delay in Canada* (Ottawa: CBA, 1989); Ontario Law Reform Commission, *Report on Administration of Ontario Courts* (Toronto: OLRC, 1973); Ontario Government, *White Paper on Court Reform* (Toronto: Queen’s Park, 1976); Thomas Zuber, *Report of the Ontario Courts Inquiry* (Toronto: ON AG, 1987) [Zuber Report]; Deschenes Report, *Masters in Their Own House* (1981); Perry S. Millar and Carl Baar, *Judicial Administration in Canada* (Toronto: Institute of Public Administration in Canada, 1981), Huguette St-Louis, “Reform of Trial Courts in Québec” in Peter H. Russell, ed, *Canada’s Trial Courts: Two Tiers or One?* (Toronto: University of Toronto Press, 2007) at 123; British Columbia Minister of Justice and Attorney General, *White Paper on Justice Reform System* (Victoria: British Columbia Attorney General, 2012); Geoffrey Cowper, QC (Chair), *BC Justice Reform Initiative: A Criminal Justice System for the 21st Century* (Victoria: British Columbia Attorney General, 2012).

⁶⁷ National Literacy Survey, see: www4.hrsdc.gc.ca/.3ndic.1t.4r@.eng.jsp?iid=31

an ongoing process of modernization to make their processes efficient and effective. In addition to expanding the range of dispute resolution processes, many courts are streamlining their work, in particular by integrating the principle of proportionality to civil procedures and using other mechanisms to simplify court processes. The National Action Committee Court Simplification Working Group report provides an overview of the current status of these reforms.⁶⁸

Overall, the justice system has not been subject to the same technological transformation as other institutions or sectors. A recent newspaper article highlighted the fact that technological transformation was actually “bypassing the justice system”.⁶⁹ As one example, there is still a lack of widespread capacity for scheduling of court dates (motions and trials) online. Administrative tribunals have been more nimble than courts in using technology to become more accessible. While technology offers courts “mind-boggling” opportunities to address shortcomings and efficiency gaps, courts have been cautious in embracing this potential.⁷⁰ This caution is at least in part for good reason. Technology is never neutral.⁷¹ Reforms must be measured for whether they actually advance meaningful access to justice and questions need to be answered. For example, a report on remote court appearances by phone or video prepared for the Association of Canadian Court Administrators/Canadian Center for Court Technology noted:

Such questions concern the availability and reliability of the technologies, how they are best used, whether justice would be compromised,

⁶⁸ Action Committee on Access to Justice in Civil and Family Matters, Report of the Court Processes Simplification Working Group (May 2012): www.cfcj-fcjc.org/sites/default/files/docs/2012/Report%20of%20the%20Court%20Processes%20Simplification%20Working%20Group.pdf

⁶⁹ Kirk Makin, “Technology seen as Key to solving Justice System Problems”, April 24 2013, *Globe and Mail*: www.theglobeandmail.com/news/national/technology-seen-as-key-to-solving-justice-system-problems/article11539656/

⁷⁰ Dr. Erich P. Schellhammer, *A Technology Opportunity for Court Modernization: Remote Appearances* (January 2013) at 2 [A white paper prepared for Association of Canadian Court Administrators and Canadian Centre for Court Technology].

⁷¹ Landgon Winner, *The Whale and the Reactor: A Search for Limits in an Age of High Technology* (Chicago: The University of Chicago Press, 1986), cited in Schellhammer, *ibid* at 2.

whether the common law principle of confrontation can be upheld, how demeanour can be assessed, how the remote location is set up to be suitable for a court proceeding, whether the solemnity of the court can be preserved, and what costs are involved.⁷²

In the same vein, innovation has largely bypassed the justice system. Many factors contribute to this deficit, but one looms above all others: the civil justice system is an incoherent system likened by American scholar Rebecca Sandefur to a “body without a brain”. Less colorfully, it has been said that the justice system lacks a CEO. The justice system is a system of systems, each with its own diffuse leadership (levels of court, levels of government, professional bodies, service providers) and underdeveloped mechanisms for communication, cooperation and collaboration.

Our lack of capacity for innovation is illustrated in an approach to reform dominated by pilot projects, often with insufficient commitment to follow through even on those that prove successful, let alone integrating learning from less successful ones into the process of trial and error needed for innovation. Pilot projects have become synonymous with disappointed expectations and “nothing reduces trust in a system more than disappointed expectation.”⁷³ Reports have also emphasized how the existing judicial and legal culture itself can serve as a barrier to innovation in courts and the civil justice system.⁷⁴

⁷² Schellhammer, *ibid.*

⁷³ Geoff Mulherin comment, during Plenary 3: Building Capacity and Creating an Environment for Innovation, at CBA Summit, *supra* note 2.

⁷⁴ Report of the Civil Justice Reform Working Group to the Justice Review Task Force, *Effective and Affordable Justice* (Vancouver: British Columbia Justice Review Task Force, 2006), and studies cited at footnote 78 and 79, which says: “For a more detailed analysis of legal culture, see Rodney Macdonald, “Legal Culture” (discussion paper prepared for the British Columbia Justice Review Task Force, February 2005): www.bcjusticereview.org/working_groups/civil_justice/civil_justice.asp, and Barbara Young, Q.C., “Change in Legal Culture: Barriers and New Opportunities” (discussion paper prepared for the BC Justice Review Task Force, February 2006): www.bcjusticereview.org/working_groups/civil_justice/civil_justice.asp Also cited, Steven J. Kelman, “Changing Big Government Organizations: Easier than Meets the Eye?” (paper prepared for the Ash Institute for Democratic Governance and Innovation, John F. Kennedy School of Government, Harvard University, 2004):

Internationally – How are we Doing?

The Chief Justice of Canada has galvanized the national agenda for access to justice, in part by highlighting Canada’s poor rating on international access to justice indicators. She has noted with dismay that the World Justice Project found that on civil justice, Canada ranked ninth out of 16 North American and Western European nations and 13th among the world’s high-income countries, just ahead of Estonia.⁷⁵

Two particular sub-factors contribute to Canada’s low ranking – delays in the resolution of civil matters and inadequate access to legal counsel

How Canada Ranks in the World on Access to Justice

9/12 in North America and Western Europe in 2011

13/29 of high income countries in 2012

54/66 in access to legal counsel (legal aid)

According to the 2011 World Justice Project report, one of Canada’s greatest weaknesses is in access to civil legal aid, especially for marginalized segments of the population. Here Canada ranks a shocking 54th in the world, well behind many countries with lower Gross Domestic Product (GDP). Somewhat surprisingly given the greater volubility of Canada’s public commitment to a social safety net, Canada even ranks behind the US, ranked at 50th in the world on this indicator.

www.ssrn.com/abstract=563163. See also, National Action Committee Family Justice Working Group report (Toronto: CFCJ, 2013): www.cfcj-fcjc.org/sites/default/files/docs/2013/Report/%20or%20the%20Family%20Law%20WG%20.

⁷⁵ The World Justice Project (2012): <http://worldjusticeproject.org/country/canada>

Complexity in Law and Legal Process

The growing complexity of law and legal process, including vocabulary, protocols, procedures and institutions, contributes to an inaccessible justice system. This is perhaps the most evident contributor to barriers to equal justice. This complexity can be traced to various sources, including “the current state of rules of procedure, a multiplicity of practice directions, and the substantive law, which is often obscure and uncertain.”⁷⁶ The volume of legal materials continues to expand at an exponential rate. Court decisions are longer, legislation runs to hundreds of pages and regulations can be even thousands of pages long. This growing complexity is in large measure a reflection of modern society.

Gone are the days of basic domestic contracts, which are now the stuff of massive disclosure and debate. Gone are the days of the short, quick interlocutory motion for interim parenting and support, which are now the stuff of lengthy, and often repeated examinations, leading to the requirements for legal briefs preliminary to special chambers motions, such that while a lawyer’s billing rate may have increased 100% in a decade or two, the time required to address a matter may have also increased by perhaps even two or three times what would have been contemplated 20 years ago.

Comment received from Alberta lawyer during consultations

Law reform initiatives can help to increase accessibility. For example, the federal child support guidelines are credited with clarifying and simplifying the law. But, when we look back we can see that many other attempts to simplify legal process to save cost and time have had perverse

⁷⁶ CBA Systems of Civil Justice Task Force, The Right Hon. Brian Dickson, Hon. Chair, *Systems of Civil Justice Task Force Report* (Ottawa: CBA, 1996) at 16.

results. While there have been some positive gains from certain reforms, generally procedures are as elaborate as ever and the cost of litigation continues to rise. One example given in our consultations is that recent changes in Alberta court rules for entry of orders actually make it more difficult, time consuming and expensive to resolve orders in dispute because of added demands on court staff (from judges or administration), resulting in greater delays and expense.

Proactive legal regimes such as consumer protection measures and regulatory oversight can contribute to equal justice by shifting the burden of enforcing legal rights and responsibilities and ensuring compliance to the regulator, rather than individual legal claims. In Canada, however, we have witnessed an opposite trend where administrative agencies, such as human rights and employment standards commissions originally intended to protect individuals through systemic enforcement and reliance, now rely almost exclusively on individuals to launch complaints.⁷⁷ This move away from state enforcement of standards has led to rising demand for related legal assistance, undermining the original objective of preventing disputes and improving public protection.

The Australian strategic framework for access to justice recognizes this dimension of the access to justice issue, noting that “clearer laws” are critical. It sets out the following principle to guide reform:

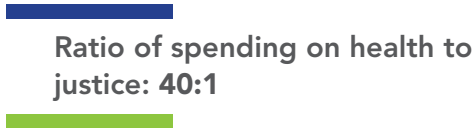
Justice initiatives should reduce the net complexity of the justice system. For example, initiatives that create or alter rights, or give rise to decisions affecting rights, should include mechanisms to allow people to understand and exercise their rights.⁷⁸

⁷⁷ See for example, Report of the Canadian Human Rights Act Review Panel, *Promoting Equality: A New Vision* (Ottawa: CHRA Review Panel, 2000) at 6; Anthony Duggan and Iain Ramsay, “Front-End Strategies for Improving Consumer Access to Justice” in *Middle Income Access to Justice*, *supra* note 32 at 95.

⁷⁸ Attorney General’s Department Access to Justice Taskforce, *A Strategic Framework for Access to Justice in the Federal Civil Justice System* (Canberra: Australia Attorney General’s Office, 2009) at 62.

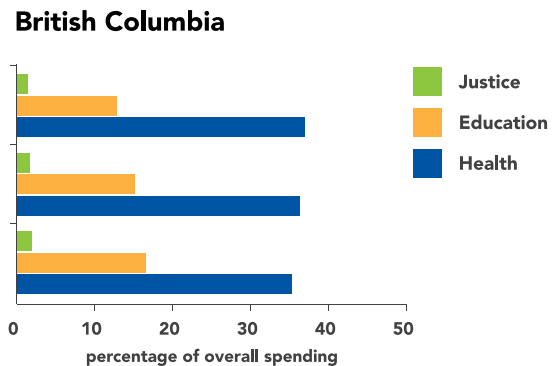
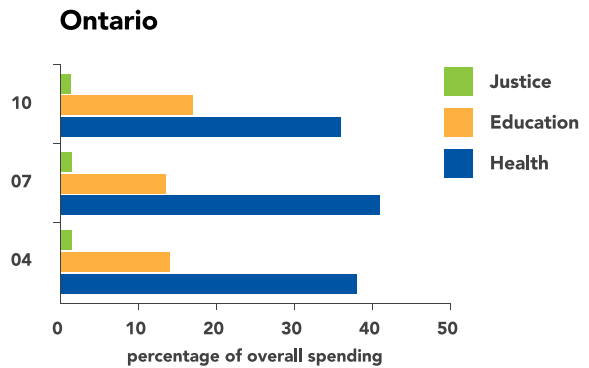
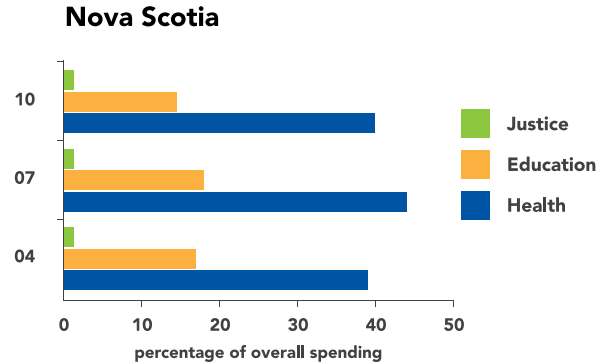
Low Relative Spending on the Justice System

Spending on the justice system (excluding policing and corrections but including prosecutions, courts, victim and other justice services, and legal aid) is roughly 1% of government budgets. This 1% includes prosecution, court services and justice services such as legal aid and law reform.



Government spending on justice compared to overall government spending shows a trend: health and education funding is generally stable or gradually increases, while spending on justice is flat or declines from year to year.⁷⁹ This is illustrated in the following charts, showing numbers from three sample provincial budgets (Nova Scotia, Ontario and British Columbia) for justice, education and health over the same period.

Chart 10: Comparative government spending in 3 sample regions 2004-2010



⁷⁹ Data taken from the *Annual Budget Estimates* from those sample provinces over the past decade.

Nova Scotia

www.novascotia.ca/finance/site-finance/media/finance/budget2010/EstimatesAndSupDetail2010-11.pdf

www.novascotia.ca/finance/site-finance/media/finance/2007_estimates.pdf

www.novascotia.ca/finance/site-finance/media/finance/2004-2005_Estimates_Book.pdf

Ontario

www.fin.gov.on.ca/en/budget/estimates/2010-11/volume1/

www.fin.gov.on.ca/en/budget/estimates/2007%2D08/volume1/

www.fin.gov.on.ca/en/budget/estimates/2004-05/volume1/index.html

British Columbia

www.bcbudget.gov.bc.ca/2010/estimates/2010_Estimates.pdf

www.bcbudget.gov.bc.ca/2007/pdf/2007_Estimates.pdf

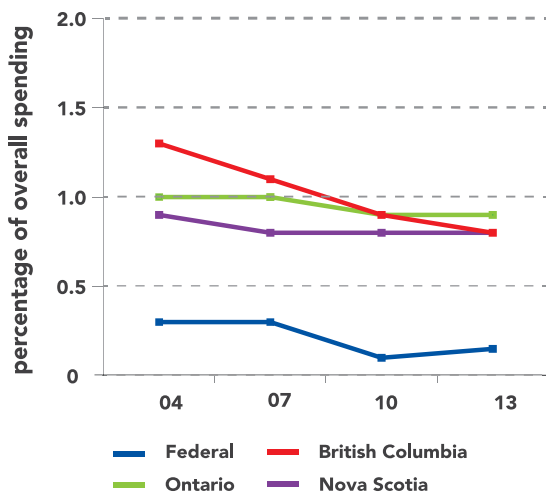
www.bcbudget.gov.bc.ca/2004/est/pdf/default.htm

At about the same time, federal government spending on prisons and policing has increased significantly, while Canada's crime rate continued to decline. At the federal level, police services use more than half the justice budget (57.2%), followed by corrections (32.2%), courts (4.5%), prosecutions (3.5%) and legal aid (2.5%).⁸⁰ The next chart sets out the percentage of public spending on justice in the same provinces (Nova Scotia, Ontario, British

⁸⁰ Ting Zhang, *Costs of Crime in Canada, 2008* (Ottawa: Justice Canada, 2008) at 5.

Columbia) as well as the federal government. Again, keep in mind that for every dollar spent on the justice system, our governments spend about \$40 on health.

Chart 11: Justice spending in Canada⁸¹



So Much to Learn

This brief overview of what we know and don't know about access to justice shows there are still many gaps in our knowledge and these gaps impact our capacity for reform.

Over the past two decades the justice system has become more adept at collecting baseline data, but the empirical basis for decision making is still extremely limited compared to what is known about health and education. The justice system has a long way to go in terms of what information is collected, how it is collected and how open it is. Overall we have become better at counting inputs and outputs, although not all of this data is open or transparent and there is no coordination across agencies to collect information in a manner that permits comparison. The Canadian Association of Provincial Court Judges and the Association of Legal Aid Plans are both in the early stages of developing a protocol for standardized data collection. These commitments mark a welcome step in the right direction.

In 1996, the CBA identified the lack of court management information data as an obstacle. This information is essential for planning and evaluating

⁸¹ *Ibid.*

access to justice initiatives and understanding the role of legal and justice services vis-à-vis other support services.⁸² But that is just the tip of the iceberg. We know little about the relative effectiveness and efficiency of various service delivery models, legal information, assistance and representation, or dispute resolution mechanisms across different types of legal matters, and how to match processes and legal services to the nature and intensity of the legal dispute.⁸³ At this time, we do know that we fall far behind the health and education systems in our commitment to and capacity for evidence-based decision making. It contributes to our justice innovation deficit.

This lack of knowledge cannot be an excuse for inaction. Nor can we focus only on what is currently measured or easy to measure and ignore what cannot be measured or what we have chosen not to measure. It is detrimental and wrong-headed to suggest a lack of evidence justifies inaction, where it is obvious that action should be taken. Action is needed on many fronts, including developing and maintaining a stronger knowledge base.

The Case for Fundamental Change

What has gone wrong? The simple answer is that justice has been devalued. We see justice as a luxury that we can no longer afford, not as an integral part of our democracy charged with realizing opportunity and ensuring rights. The justice system has been starved of resources and all but paralyzed by lack of coordinated leadership and a tendency to focus on how justice institutions other than our own are contributing to the problem. As one person put it: "access to justice is even more undervalued in an already undervalued area." Meaningful access to justice is a scarce resource and the mechanisms used to ration this scarce resource are largely hidden. The implications of this rationing are often also invisible.

In this section, the Committee considers arguments in support of a fundamental reexamination of the value we put on our justice system, and ways

⁸² CBA Systems of Civil Justice Task Force, *supra* note 76.

⁸³ The CBA Legal Futures Initiative is canvassing the legal profession, the public, and other stakeholders for their opinions about these concepts.

to create conditions that promote justice system change.

JUSTICE = GROWTH.
JUSTICE IS A VALUE IN ITSELF.
IT IS A VERY GOOD INVESTMENT.

Hague Institute for the Internationalisation of Law (HiIL), Innovating Justice (2013)

Everyone Experiences Legal Problems

We live in a society regulated by law. Everyone's lives are shaped by the law and everyone is likely to experience a legal problem at some point. This is not to say that everyone will engage with the formal justice system: many problems can and should be resolved in more informal ways. Still, we should know for certain that we – and those we care about – will have meaningful access to justice if and when we need it. **Everyone is entitled to justice. This point needs to be a common thread of public discourse and individual understanding.** Needing recourse to the justice system does not suggest a personal failure, any more than a health problem requiring access to the medical system does. It is a simple fact of 21st century life in a developed political economy: law “knits together the fabric of our society”.⁸⁴

Direct Relationship between the Courts and Democracy

The courts are one branch of government (in addition to the executive and the legislature) and an essential component of Canadian democracy. Courts are essential to a society committed to the rule of law, ensuring the peaceful resolution of disputes in a system where no individual or institution is above the law. The rule of law is two-dimensional: it shapes and protects the relationship between the individual and the court and between courts and other branches of government. In this way, access to justice is a democratic imperative. Basing arguments for justice innovation on democratic principles and the rule of law may seem abstract, as the straight line between those

⁸⁴ Eberts, *supra* note 52.

concepts to the services that may help an individual to resolve a legal problem is not immediately obvious. Yet this line is very real.

Can therefore a country be said to be governed by the rule of law if some of its populace is excluded from accessing the law or is faced with significant challenges in doing so, cannot benefit from using the legal process or is disadvantaged in proceedings brought against them by the state?

Dr. Patricia Hughes

Growth in Poverty and Social Exclusion

The reality today is that not everyone has meaningful access to justice regardless of income. When social exclusion becomes more entrenched because a person cannot get the legal help needed to redress a wrong or enforce a right, the justice system aggregates, rather than mitigates, inequality. We know that poverty is deepening across Canada and it is changing the structure of society.⁸⁵

The growth in income disparity and social exclusion is a leading public policy concern and has specific ramifications for justice policy. In a section discussing the lack of access to legal services in Canada, the World Justice Project report notes that these issues “require attention from both policy makers and civil society to ensure that all people are able to benefit from the civil justice system.” A recent US study by the RAND Institute of Civil Justice similarly concluded, “[t]he policy ramifications of diminished legal aid, in terms of what the civil justice system actually accomplishes and whom it serves, present a troubling set of questions for society”.⁸⁶

Providing suitable legal advice and assistance can play a crucial role in helping people move out of some of the worst experiences of social exclusion.

⁸⁵ See: www.cwp-csp.ca/poverty/just-the-facts/.

⁸⁶ Michael Greenberg, Geoffrey McGovern, *An Early Assessment of the Civil Justice System after the Financial Crisis* (Santa Monica, CA: Rand Institute, 2012) at 62.

I just wanted to say when I first started working in community people were poor. We were just poor. Today there are different types of poverty, not just that people are poor. I have young people that I work with. Young couples with children, where 20 years ago they would have been working middle class, and they're not anymore. They're homeless. They make enough money between the two of them to keep their kids fed and to be able to buy clothing for them and send them to school. But they don't have money to pay rent. There's no way that they can pull that kind of money. One of them gets minimum wage and the other one is making a bit more but there's still not enough to cover. So there's a whole new kind of poverty that's becoming even more prevalent in the community.

*Maria Campbell,
Metis Elder, Envisioning Equal
Justice Summit,
April 2013*

Timely intervention in a life crisis triggered by a problem with a legal component, like debt or homelessness, can make all the difference, preventing the situation from becoming more extreme. For these reasons, the UK National Action Plan on Social Inclusion (2003) gave access to justice similar priority to health-care and education, recognizing access to justice as a basic right and a vital element in policies that address social exclusion. Currie's Canadian research highlights the relationship between legal problems and health problems, demonstrating a strong policy rationale for connecting access to justice policy with other public policy concerns. His findings also illustrate the ways that lack of access to justice reinforces social exclusion faced by certain groups in Canada, particularly people with disabilities.

Canadians have a strong commitment to equality, exemplified in domestic and international human rights commitments, and Canadian governments have an important role in offsetting income

inequality. For example, the Canadian Institute for Health Information recently found that public health care alone reduces the income gap by 16%, as wealthier Canadians pay more in taxes than they reap in benefits. As stated by Hughes: "While responding to the needs of members of less advantaged communities matters if there is to be equal access to justice, a failure to achieve 'equal justice' also has implications for other aspects of people's lives and inevitably therefore for society at large."⁸⁷

Poor Public Policy

There are strong practical reasons for ensuring meaningful access to justice. Adequate representation leads to a smoother and more effective functioning of the system. When people receive appropriate assistance in reading and preparing documents and making arguments, it saves public money in the long run and results in better outcomes.

Justice degrades with delay: while the outcome may look the same when a resolution is finally reached or a decision rendered, the justice the person receives is not the same. The parties' position or personal safety may be compromised and the damage may be irreparable. People whose legal issues are not resolved face ongoing difficulties. Problems spread to other areas of their lives, at significant individual and social cost. For example, a mother and children unable to get timely, effective assistance or an expedited court hearing to determine their right to support may eventually get the requested order and judgment, but that won't cure the deprivations or repercussions suffered in the meantime. Further, since we know that people whose legal issues are unresolved face ongoing and escalating problems in different areas of their lives, at significant individual and social cost, society as a whole benefits from providing timely access to justice.

Empirical research shows a false dichotomy between focusing on "efficiency and effectiveness rather than equality and ideals." Equal justice

⁸⁷ Hughes, *supra* note 27 at 5.

makes sense for both “the wallet and the heart.”⁸⁸

Costs of Inaccessible Justice

Studies are now demonstrating how unresolved legal problems and inadequate access to justice can be costly for both the individual and to society at large. For example, Macfarlane’s national SRL study notes some costs of inaccessibility in terms of stress and health effects, loss of income and loss of employment. Children can be secondarily affected if parents are not afforded the fair outcomes that they need. This may be obvious in child support or parenting cases, but is equally true when families with dependent children are at risk because of other unmet legal needs, such as those impacting housing or income issues. The costs and benefits of equal justice are also documented in reports prepared by the Canadian Forum on Civil Justice⁸⁹ and others.⁹⁰ However, we have as yet been unable to quantify the impact of these costs in Canada.

Other jurisdictions are further ahead. For example, one British study calculated that each legal problem reported to cause physical illness ultimately costs Britain’s National Health Service between £113-£528, depending on which service provider was used, or more if multiple providers were involved. Stress-related effects cost between £195-£2224 per patient, again depending of which service provider was used.⁹¹ Similarly, an Australian study found that providing legal aid at the committal stage of a criminal procedure would save the equivalent of three or four district court judges per year.⁹²

The Canadian Forum on Civil Justice is collaborating with a range of individuals and

institutions on a five-year study to define the economic and social costs of justice. The study will develop methods to measure what our civil justice system costs, who it serves, whether it is meeting the needs of its users and the price of failing to do so. The project has two prongs: the costs of providing an accessible system and the costs of not providing an accessible system. The costs of justice system inaccessibility will be measured at four levels:

- individual (health, well-being, power, security, economics, education)
- private sector (business, lawyers, paralegals)
- government (justice system, health care system, other social services (housing, social welfare, policing, for example)), and
- civil society (rule of law, democracy, sustainability).

The results of these research projects are eagerly awaited. They will offer an in-depth understanding of the value of an accessible justice system and a convincing case for institutions and citizens to invest in access to justice.

⁸⁸ Pascoe Pleasence and Richard Moorhead, *Access to Justice after Universalism* (2003) 30:1 *Journal of Law and Society* at 1.

⁸⁹ Mary Stratton and Travis Anderson, *Social, Economic and Health Problems Associated with a Lack of Access to the Courts* (Toronto: CFCJ, 2008).

⁹⁰ Pascoe Pleasence, Nigel J. Balmer, Alexy Buck, Marisol Smith, Ash Patal, “Mounting Problems: Further Evidence of the Social, Economic and Health Consequences of Civil Justice Problems” in Pascoe Pleasence, Alexy Buck, Nigel J. Balmer, eds, *Transforming Lives: Law and Social Process*, (Belfast: 2006) at 61-63 [Papers from the Legal Services Research Centre’s International Research Conference, *Transforming Lives*].

⁹¹ *Ibid* at 83-84.

⁹² Mulherin, *supra* note 73.

Learn More: about the landscape of civil justice problems experienced by Canadians

Ab Currie, *The Legal Problems of Everyday Life: The Nature, Extent and Consequences of Justiciable Problems Experienced by Canadians* (Ottawa: Department of Justice Canada, 2007): www.justice.gc.ca/eng/rp-pr/csj-sjc/jsp-sjp/rr07_la1-rr07_aj1/rr07_la1.pdf

Access to justice and social exclusion:

Pascoe Pleasence, Alexy Buck and Nigel J. Balmer (eds.), *Transforming Lives: Law and Social Process*, note 90.

A. O'Grady, Pascoe Pleasence, Nigel J. Balmer, Alexy Buck and Hazel Genn, "Disability, Social Exclusion and the Consequential Experience of Justiciable Problems" (2004) 19:3 *Disability & Society* 259.

Patricia Hughes, *Inclusivity as a Measure of Access to Justice*, note 27.

Costs of Inaccessible Justice:

Pascoe Pleasence and Richard Moorhead, *Access to Justice after Universalism*, note 88.

Final Report of the Justice Sector Constellation of the Calgary Poverty Reduction Initiative, "Intervening at the Intersection of Poverty and the Justice System" (March 2013): www.enoughforall.ca/wp-content/uploads/2013/03/Justice-Sector-Constellation-Final-Report.pdf

Return on Investment for Legal Aid Spending

In recent years, we have repeatedly heard that legal aid is not sustainable. But legal aid is our most important access to justice program. In addition to being a significant down payment on the promise of equal justice, funding for civil legal aid represents a good social and economic investment.

Synthesizing several studies on the economic benefits of civil legal aid, Dr. Laura Abel notes

that it can actually save public money by reducing domestic violence, helping children leave foster care more quickly, reducing evictions and alleviating homelessness, protecting patient health and helping low-income people participate in federal safety-net programs.⁹³

A growing number of studies are contributing to a business case for adequately funding legal aid by actually quantifying the return on investment for legal aid dollars spent:

- A 2012 Australian study, *Cost Benefit Analysis of Community Legal Centres (CLCs)*, finds that, on average, CLCs have a cost benefit ratio of 1:18. For every dollar spent by government they return a benefit to society that is 18 times the cost. To express this in dollar terms, if the average held constant for CLCs in Australia, the \$47 million spent on the program nationally in 2009/10 would yield around \$846 million of benefit to Australia.⁹⁴
- A PricewaterhouseCoopers study, also in Australia, found that every dollar spent on family law legal aid provided a \$1.60 to \$2.25 benefit to the overall justice system. "Legal aid demonstrably benefits those receiving legal aid support, those people and businesses they have contact with, the community more broadly and the efficiency of the legal system as a whole. Therefore there is a strong economic case for appropriately and adequately funded legal aid services, based on the magnitude of the quantitative and qualitative benefits that this funding can return to individuals, society and the government."⁹⁵
- A 2009 Texas study found that "investment in legal aid services led to economic growth in the community by increasing jobs, reducing work

⁹³ Laura K Abel, *Economic Benefits of Civil Legal Aid* (National Centre for Access to Justice, Cardoza Law School, 4 September 2012) <http://ncforaj.files.wordpress.com/2012/09/final-economic-benefits-of-legal-aid-9-5-2012.pdf>.

⁹⁴ Judith Stubb and Associates, *Economic Cost Benefit Analysis of Community Legal Centres* (Sydney: National Association of Community Legal Centres, 2012) http://www.communitylawaustralia.org.au/wp-content/uploads/2012/08/Cost_Benefit_Analysis_Report.pdf.

⁹⁵ PricewaterhouseCoopers, *Economic Value of Legal Aid: Analysis in relation to Commonwealth Funded Matters with a Focus on Family Law* (National Legal Aid, 2009) at ix-x www.legallaidact.org.au/pdf/economic_value_of_legalaid.pdf

days missed due to legal problems, creating more stable housing, resolving debt issues and stimulating business activity.” In fact, “for every direct dollar expended in the state for indigent civil legal aid services, the overall annual gains to the economy are found to be \$7.42 in total spending, \$3.52 in output (gross product), and \$2.20 in personal income.⁹⁶ Reductions in legal aid spending, therefore, have a negative impact on spending and create an economic burden on the community.”

- A 2011 UK Citizens’ Advice Bureau Report, *Towards a business case for Legal Aid*, found that for every pound of legal aid expenditures on housing advice, debt advice, employment benefits and income benefits advice, the state potentially saves between €2.34 and €8.80.⁹⁷

One British study approached this issue from the opposite perspective: how cuts to legal aid increase costs in other areas of public spending. In a 2011 report for the Law Society of England and Wales, Dr. Graham Cookson of the School of Social Science and Public Policy of King’s College London was asked to consider any “knock on” costs (unintended costs) because of significant cuts to legal aid, and the overall impact of those cuts on government budgets. His advice was that the cuts would involve such significant “knock on” costs that the promise of any cost savings should be reevaluated. He also noted significant areas where additional longer-term costs were likely, but were difficult to precisely evaluate.

Similarly, a British study on the effectiveness of legal aid in the asylum (refugee) context found that restrictions on the quality of legal aid as a cost savings measure resulted in higher costs overall: “poor quality work costs much more in the longer term to the public purse and in human terms to individual asylum seeker applicants.”

These studies from Australia, the UK and the US conclude that the average demonstrated social return on investment is that for every \$1 of legal

⁹⁶ The Perryman Group, *The Impact of Legal Aid Services on Economic Activity in Texas: An Analysis of Current Efforts and Expansion Potential* (Waco: Perryman Group, February 2009) at 3.

⁹⁷ Citizens Advice Bureau, *Towards a Business Case for Legal Aid* (London: International Research Conference, July 2010).

aid spending about \$6 of public funds are saved elsewhere (a range from 1:2 to 1:18.)

**Average Social Return on Investment
from Legal Aid Spending
\$1 = \$6**

US civil legal aid providers increasingly report the economic impact of their programs in concrete terms. Program impacts are quantified in millions of dollars, on an annual basis. The impacts measured include: income benefits and cost savings received by low income families, cost savings to tax payers, economic impact of federal dollars flowing into local economies as an outcome of legal aid cases, increased tax revenue, and systemic changes resulting in savings for state residents. These reports also note additional economic impacts that while difficult to quantify are no less real, including for health care providers, court efficiencies, and for costs and losses to the state from homelessness and domestic violence.⁹⁸

Unfortunately no Canadian studies to date have quantified the economic impact of legal aid in this way. Several legal aid plans have reported in general terms the ways legal aid can save public funds.⁹⁹ In 2012, the Law Foundation of British Columbia commissioned Yvon Dandurand and Michael Maschek to conduct a feasibility study on the economic impact of legal aid. They identified a number of promising areas for future research, proposing four studies on the impact of legal aid.¹⁰⁰

⁹⁸ See sources in “Learn More”, *infra* at 55.

⁹⁹ For example, see Legal Aid Ontario, Business Plan, 2006-07: www.legalaid.on.ca/en/publications/PDF/Public_Business_Plan_April_2006.pdf; for other Canadian discussions of the cost benefit of funding legal aid, see Doust, *supra* note 11; Sharon Matthews, *Making the Case for the Economic Value of Legal Aid* (Vancouver: CBA-BC, 2012); Kamloops Chamber of Commerce: www.kamloopschamber.ca/files/documents/Go%20Long%20on%20Legal%20Aid%20Funding%20FINAL.pdf; Alberta Government, *New Ways for Families: Social Return on Investment Case study: Medicine Hat Family Services* www.newways4families.com/images/pdfs/Medicine%20Hat%20Family%20Services_Executive%20Summary.pdf

¹⁰⁰ Yvon Dandurand and Michael Maschek, *Assessing the Economic Impact of Legal Aid - Promising Areas for Future Research* (Vancouver: Law Foundation of British Columbia, 2012).

Learn More: about Bang for the Legal Aid Buck! [#1]

PricewaterhouseCoopers for National Legal Aid (Australia), "Economic Value of Legal Aid" (Sydney: PricewaterhouseCoopers, 2009): www.legalaidact.org.au/pdf/economic_value_of_legalaid.pdf

The Perryman Group, "The Impact of Legal Aid Services on Economic Activity in Texas: An Analysis of Current Efforts and Expansion Potential" (2009): www.nlada.org/DMS/Documents/1236008203.14/FINAL%20Econ%20Impact%20Study%2002-12-09.pdf

Citizens Advice Bureau, "Towards a Business Case for Legal Aid" (London: CAB, July 2010): www.google.ca/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&ved=0CDUQFjAA&url=http%3A%2F%2Fwww.citizensadvice.org.uk%2Ftowards_a_business_case_for_legal_aid.pdf&ei=ADJpUsubHMufkQeYk4GIAg&usq=AFQjCNF3BPvWbn7ktg10pDD2mTutlBCn2A&bvm=bv.55123115,d.eW0

Kenneth A. Smith et. al., "Economic Impacts of Civil Legal Aid Organizations in Virginia: Civil Justice for Low-Income People Produces Ripple Effects That Benefit Every Segment of the Community" (Legal Services Corporation of Virginia, 2011): www.vplc.org/wp-content/uploads/2012/10/VA-Report-on-Economic-Impacts.pdf

Access to Justice Commission, "Economic Impact of Civil Legal Aid Services in Maryland" (Access to Justice Commission, 2013): www.mdcourts.gov/mdatjc/pdfs/conomicimpactofcivillegalservicesinmd201301.pdf

Learn More: about Bang for the Legal Aid Buck! [#2]

Laura K. Abel and Susan Vignola, "Economic and Other Benefits Associated with the Provision of Civil Legal Aid" (2011) 9 Seattle J. for Soc. Justice 139: www.law.seattleu.edu/Documents/sjsj/2010fall/Abel.pdf

Laura K. Abel, Economic Benefits of Civil Legal Aid, National Centre for Access to Justice at Cardoza Law School (2012): www.ncforaj.files.wordpress.com/2012/09/final-economic-benefits-of-legal-aid-9-5-2012.pdf

The National Legal Aid Defenders Association, *Economic Benefit of Meeting Civil Legal Needs*: www.nlada.org/DMS/Index/000000/000050/document_browse#topics

James A. Richardson, *Legal Services Programs in Louisiana: Their Economic Impact on the State of Louisiana* (2011): www.lsba.org/2007Documents/NewsDocuments/NewsDocument-647.pdf at page 5.

Rod Feelhaver and Jerome A. Deichert, *The Economic Impact of Legal Aid in Nebraska: National Legal Aid & Defender Association*, (2008): www.nlada.org/DMS/Documents/1236007550.3/NE_impact_2007.doc

Florida Tax Watch, *The Economic Impact of Legal Aid Services in the State of Florida* (2010): www.nlada.org/DMS/Documents/1309704171.89/florida%20legal%20aid%20economic%20impact%20study%202010.pdf

Task Force to Expand Access to Civil Legal Services in New York, *Report To The Chief Judge Of The State Of New York* (2010): www.nycourts.gov/ip/access-civil-legal-services/PDF/CLS-TaskForceREPORT.pdf

Why Tinkering is Insufficient

The civil justice system is too badly broken for a quick fix. People fall between the cracks at an unacceptable cost. Injustice is too deeply woven into the system's very structure for piecemeal reforms to make much of a dent. It is unclear whether the myriad of ad hoc access to justice interventions currently proliferating outside an overarching strategic framework are actually helping. Individual interventions may work at cross-purposes and risk hindering progress by fostering complacency and diminishing support for more substantive reform. An excess willingness to compromise makes achieving the equal justice vision impossible.

Believing that we are doing something effective can reduce our perceptions of injustice, whether or not our beliefs are factually justified.

Gary Blasi, How Much Access? How Much Justice? (2004)

We need to abandon a "culture of martyrdom"; we need to stop trying to simply make do. It is time to reach for equal justice, not some limited vision based on a short term view of current constraints. The enormity of the challenge may seem paralyzing, but access to justice problems are not intractable, and committing to achievable reforms can be empowering. Change will not happen quickly, but every step along the right path, with a common vision and commitment to measure how effective each innovation has been in achieving that vision, can help. Missteps can be corrected when evidence shows a better way, but we should not waiver about the need to start walking, or the ultimate destination.



PART II

equal justice strategies

Equal justice strategies

Envisioning Equal Justice Finding the ‘Soul’ of Reform

At the Summit, Sam Muller of the Hague Institute for the Internationalisation of Law (HiilL) urged participants to consider the ‘soul’ of reform, that is to work toward a consensus on the animating purpose of our access to justice efforts. Agreeing on the ‘soul’ of reform would give us a shared focus and a measuring stick for progress, while allowing flexibility on how the animating principles are actually achieved in particular circumstances. It would also recognize that diverse approaches are needed and should be encouraged.

Improving access to justice is an ongoing project, and contemporary efforts date back to the 1960s. The focus of these efforts has changed over time, with succeeding waves of the access to justice movement. Early on, access to justice was seen as one prong of an agenda to build a more equitable society, joined with a focus on human rights and increased accountability of government institutions. This gave rise to the spectacular growth of administrative tribunals and legal aid, including community-based clinics. In the 1980s, the focus shifted away from institutional change to processes and procedures, with a renewed interest in alternative dispute resolution in both court and community settings. In the 1990s, the focus was more on court reform, with an emphasis on reducing costs, delays and complexity. And, the new millennium has ushered in an emphasis on cost efficiency and meeting budgetary targets, seemingly based on the general belief that as a society, we can no longer afford justice.

The emphasis on rationing civil justice has been linked to the steady rise in the cost of legal aid and the dramatic increase in spending on criminal justice. Some reforms of the 21st century have been more about eradicating barriers to the courts¹⁰¹, though couched in the overall language of rationing access to justice. More recently, empirical research into unmet legal needs and their impact on people’s lives and society as a whole has begun to shift the discourse back to a focus on client needs, but the trend now is more towards problem-solving than based on the idea of a right to equal justice.

The earlier generations’ access to justice agendas were never finished, and they continue to motivate individual and institutional positions and reform priorities. This gives rise to distinct and sometimes conflicting goals for reform. The lack of clarity and agreement about the purpose (or ‘soul’) of reform is a key barrier to change and impedes progress. It also adds a layer of unintended, negative consequences to the process of reform.

Reaching agreement on the ‘soul’ of reform involves delineating the goal: a vision that is ambitious but possible. The Committee proposes a tangible vision of equal justice to guide reform:

An inclusive justice system requires that it be equally accessible to all, regardless of means, capacity or social situation. It requires six concrete commitments:

1. *People – The system focuses on people’s needs, not those of justice system professionals and institutions.*
2. *Participation – The system empowers people. It builds people’s capacity to participate, by managing their own matters and having a voice*

¹⁰¹ When the Committee refers to “courts” in the general or conceptual sense in this Part, it views this term as potentially encompassing court-like tribunals that adjudicate disputes for individuals.

TIMELINE of Unfinished Access to Justice Agendas



in the system as a whole.

3. *Prevention – The system focuses attention and resources on preventing legal problems, not just on resolving them after they arise.*
4. *Paths to justice – A coherent system involves several options and a continuum of services to arrive at a just result. People get the help they need at the earliest opportunity, and find the most direct route to justice.*
5. *Personalized – Access to justice is tailored to the individual and the situation, responding holistically to both legal and related non-legal dimensions, so that access is meaningful and effective.*
6. *Practices are evidence-based – The system encourages equal justice by ensuring justice institutions are ‘learning organizations’, committed to evidence-based best practices and ongoing innovation.*

Equal and Inclusive Justice

It is hard to object to the goal of building a Canadian justice system that is equally accessible to all regardless of means, capacity or social situation. Equality, after all, is what the rule of law is all about. Despite this, there is a long way to go to ensure equality and inclusivity in practice.

At the Summit, Hughes reminded us that acknowledging diversity is not about including the ‘other’ but rather it is about all of us. The challenge is to approach the task of building an inclusive

You’re lawyers, you know that words have power. Words like marginalization, all of these things; we separate ourselves from people, from each other when we use that kind of language. It’s like establishing boundaries if I’m coming to you for help and I’m seeing that kind of language on brochures or I’m hearing that kind of language used then that barrier is there between us before I even get started. Which would make me powerless even more.

*Maria Campbell, Metis Elder,
Envisioning Equal Justice Summit,
April 2013*

justice system not from a list of categories, like gender or Aboriginality, but based on people’s relationship to the justice system and their need for assistance in different situations. Maria Campbell also spoke about the importance of working across differences in a manner that builds trust and empowers, rather than erects or reinforces boundaries.

What’s the fix? Focus on users’ needs and how they need it. No one-size-fits-all solution for poor, middle class and distinct communities.

In this report, we highlight differences between the needs of the middle class and the needs of lower-income, poor and people living in marginalized conditions, as they are often not the same. While this approach oversimplifies the realities, it is a shorthand way of reminding us that individuals are socially-situated and that social situation relates to both the characteristics of the individuals and the complexity and extent of their legal needs. As such, many of the solutions to the crisis in access to justice for the middle class and the poor are distinct.

We need to continually question: who needs what kind of help in accessing justice? And what can be done to ensure that they can find it regardless of their particular characteristics and situation?

Dr. Ab Currie, the leading Canadian legal needs researcher, has shown that experiencing more than one form of disadvantage, say disability and remoteness, has an “additive effect”. Multiple disadvantage results in multiple problems in different areas of life, like health and employment, and legal issues themselves compound at an ever-increasing rate. These realities result in further entrenching social exclusion.

At the Summit, Geoff Mulherin, Executive Director of the Law and Justice Foundation of New South Wales, provided a practical example of how paying attention to inclusivity will affect reform initiatives. He warned us to be careful about focusing too much on ‘early intervention’ – a current trend in Australia and Canada. The

research by his foundation demonstrates that “many disadvantaged people will turn up late in the process, not early.” Focusing on early intervention is a positive direction for reform, but not when it has the perverse result of reinforcing barriers for people who need assistance the most. ‘Timely intervention’ is a more inclusive, more effective policy.

The Committee employs broad categories to distinguish between the legal needs of different segments within Canadian society, recognizing that these categories are imperfect and there are no hard and fast rules that separate the legal needs of various groups of people. They do however reflect differing means, capacities and social situations in a general way, and assist us to keep in mind significant differences in legal needs, the impact of unresolved legal problems, and problem-solving and dispute resolution behavior, so we can assess who is most likely to benefit from proposed innovations.

While “100% access is the only defensible ultimate goal”,¹⁰² the Committee recognizes that this will be challenging. To the extent that rationing justice must be done, and undoubtedly is done on a daily basis, how can it be done to mitigate rather than reinforce patterns of inequality? Getting to equal justice demands that we first focus on the people who are most disadvantaged by their social and economic situation.

Designing a People-Centered Justice System

Over time, our justice system has developed to reflect the needs, approaches and imperatives of courts, court administration, tribunals and the legal profession. Justice institutions are not alone in this tendency. It is common to the way many organizations and professions work, and is difficult to overcome. But the civil legal needs research has demonstrated how far removed this approach is from what people actually want, need and expect from their courts and justice system. The way legal services are delivered by the legal profession, the

nature of court and tribunal proceedings, including procedural requirements and the language used, the complexities and the costs, all act as barriers limiting people’s opportunity to obtain justice.

A people-centred justice system will be easier to use, transparent and fair. It will ensure just outcomes so that people can go on with their lives and have confidence in the justice system. It will operate on the basis of reciprocity, actively transcending the standard ‘us-them’ divide between service provider and the user of services.

Participants in the Committee’s community consultations were clear that justice and equality are primary goals underpinning the law. When asked what they meant by ‘justice’, comments included:

“Fairness, equality and being held accountable.” **Person with Disability, Toronto**

“Due consideration of all the facts and circumstances.” **Man with mental disability, Toronto**

“Being heard. Being taken seriously.” **Single mother, Kentville**

“It makes it possible to fix the damage.” **Youth, Montréal**

The Committee summarizes the broad vision of the justice system gained from the consultations it held with people living in marginalized conditions this way:

Justice is inviolable. It ensures fairness and equality for all, and respect for all who come before it. Being accorded respect from a justice system means being heard and provided with an effective, meaningful outcome.

A justice system designed for the people using it will have strong linkages to other services. Legal issues are often experienced as part of a constellation of issues or problems, many that are not legal in nature.

¹⁰² Richard Zorza, “The Access to Justice “Sorting Hat”: Towards a System of Triage and Intake that Maximizes Access and Outcomes” (2012) 89:4 Denver University Law Review 859 at 861 <http://www.zorza.net/Sorting-Hat.pdf>.

“People don’t have federal problems or state problems. They have problems. They’re multiple, complex, legal and non-legal. We have this real problem in Australia where things are driven by stovepipes [silos], by area of law, by is it a commonwealth matter, is it a state matter.

People don’t have problems that way as you all know. So we need to break down the stovepipes.”

**Geoff Mulherin, Executive Director,
Law and Justice Foundation of New South
Wales**

When lawyers and judges talk about access to justice, we usually talk about law, justice systems and sometimes about how legal services and information are provided. Our vision is often limited by our own frame of reference. One of the most palpable and crucial findings of the Committee’s consultations, consistent with other broad based surveys, is that the public has a more holistic view of justice.

The community consultations made it clear that people’s legal issues are intimately interwoven with other social and personal issues in their lives. This can flow in two directions. In one sense, what is happening in the justice system has a ripple effect on their lives, like the single mother experiencing excessive delay in family court who fears she may lose her home as a result. In another sense, what is happening in people’s lives and households can create legal problems and promote involvement in the legal system, for example, when a youth flees a troubled home life to become easy prey for gangs on the street. These realities illustrate the link between prevention and integration.

A Participatory Justice System

The only way to ensure a people-centred justice system is to ensure that members of the public are engaged in its oversight. Many also want to be active participants in preventing and resolving legal problems. The goal is to move away from traditional approaches that set lawyers and courts apart, denigrating any non-professional knowledge.

Enhanced public accountability and participation depends upon informed and capable citizens and disputants or litigants. Strong commitments and resources must be devoted to building people’s individual legal capabilities.

A Standard for Meaningful Access to Justice

A meaningful access to justice standard should guide our reform agenda, in particular, our evaluation of services designed to increase and ensure access. **Assessing whether the system, process, service or resource provides meaningful access to justice depends on the nature of the right, interest or legal problem at issue, the capacity of the individual, the complexity of the legal process or proceeding, and the seriousness and impact of potential outcomes.** These factors are supported by a growing body of jurisprudence¹⁰³ and empirical research.¹⁰⁴

Developing a meaningful access to justice standard will involve a commitment to transcending the SRL phenomenon. SRLs appear to be an increasingly accepted fixture of our justice system, yet the current situation is unacceptable.¹⁰⁵ A tripartite approach to reform is required, including:

¹⁰³ See, *G (J) v New Brunswick*, [1999] 3 SCC 46 and *British Columbia (Attorney General) v Christie*, [2007] 1 SCC 873. In the criminal law context, some examples include *R v Sechon* (1995), 104 CCC (3d) 554 at 560 (Que CA); *Deutsch v Law Society of Upper Canada Legal Aid Fund* (1985), 48 CR (3d) 166 (Ont Div Ct); *R v Cormier* (1988), 90 NBR (2d) 265 (QB); *R v McKibbin* (1988), 45 CCC (3d) 334 (Ont CA); *R v James* (1990), 107 AR 241 (QB); *Spellacy v Newfoundland* (1991), 91 Nfld & PEIR 74 (Nfld SC); *Mireau v Canada (Attorney General)* (1991), 96 Sask R 197 (Q.B.); *R v Rothbotham*, 1988 CanLII 147 (ON CA); *R v Fisher*, [1997] S.J. No. 530. (QB); *R v Brydges*, [1990] 1 SCC 190; *R v Bartle*, [1994] 3 SCC 173; *R v Prosper*, [1994] 3 SCC 236; *R v Matheson*, [1994] 3 SCC 328. See also, *Universal Declaration of Human Rights*, GA Res 217 A (III), UN Doc. A/810 (1948), cited by the New Brunswick Court of Appeal in *G(J)* above.

¹⁰⁴ For example, see the work of Russell Engler, including “Towards a Context-Based Civil Gideon Through Access to Justice Initiatives” (2006) Clearinghouse Review 196; “Shaping a Context-Based Civil Gideon from the Dynamics of Social Change” (2006) Temple Political & Civil Rights Law Review; “Reflections on a Civil Right to Counsel and Drawing Lines: When Does Access to Justice Mean Full Representation by Counsel, and When Might Less Assistance Suffice?” (2010) 9:1 Seattle Journal for Social Justice 97; “Connecting Self-Representation to Civil Gideon: What Existing Data Reveal About When Counsel is Most Needed” (2010) 37:37 Fordham Urban LJ.

¹⁰⁵ See comments from SRLs and findings from Macfarlane and Birnbaum studies, *supra* note 6.

- reducing the need for representation through enhanced legal information and assistance services;
- where feasible, developing paths to justice (including forms of adjudication) that do not require representation; and
- re-engineering the delivery of private and public legal services to make representation available in a greater range of situations.¹⁰⁶

Full legal representation is not required in every case: meaningful access can be assured through a range of legal services and forms of assistance, depending on the circumstances. A growing body of research can assist in translating this general standard into best practices to guide the delivery of legal services and decision making processes (both court and non-court-based). The key is to offer a seamless continuum of legal and non-legal services, and ensure that representation is available when needed to have meaningful access to justice. While a lawyer is not required in every case, people must have access to a lawyer when their situation requires it, regardless of their financial capacity.

A Dual Focus on Prevention and Resolution

Our long range goal is to shift justice system resources away from finding effective ways to deal with legal problems, conflicts and disputes, toward preventing them in the first place. At the Summit, many discussions circled back to the need to invest in building the fence at the top of the cliff,¹⁰⁷ rather than spending all of our resources for the ambulance at the bottom. This does not mean abandoning those who require the ambulance, but it does mean finding ways to reduce the need for responsive interventions by increasing capacity for prevention and resilience. To use another analogy, we need to find ways to provide legal help “further upstream”. This analogy is used frequently in health prevention literature and derives from the parable of the fisher, tired of continually saving people being swept downstream, who decided to

¹⁰⁶ Engler, *supra* note 25.

¹⁰⁷ See, Richard Susskind, *The End of Lawyers?* (Oxford: Oxford University Press, 2008). Susskind also acts as a Special Advisor to the CBA’s Legal Futures Initiative.

go upstream to find out why so many people were ending up in the water.

It is useful to think of this as a dual-track approach that provides a better balance of justice system services aimed at both preventing and resolving legal problems. A proposed statement of civil justice system objectives developed by the Australian Attorney-General’s Department distinguishes between a system in which “people can solve their problems before they become disputes” and “people can resolve disputes expeditiously and at the earliest opportunity.” Importantly, it recognizes the need for both approaches.

Reform must not be approached in a monolithic fashion or based on an idealized view of how people should approach their legal problems. Relying on concepts of “ideal” citizens, those sensible people who know their rights and responsibilities, resolve their disputes by discussion, act quickly and are always prepared, and know how to navigate the system, is not useful. While we shift the emphasis towards prevention, we must also keep in mind that there is no way to prevent all problems and disputes.

One System, Many Paths

Another central component of this proposed vision is building a more coherent civil justice system. There is rarely only one solution or resolution to a legal problem. There are many paths to justice, some leading toward and others away from formal court and tribunal processes. Those paths must be integrated to a much greater degree than at present and we need additional paths to meet everyone’s needs. The keys to greater coherence are effective navigation assistance and enhanced collaboration amongst stakeholders and participants.

Access to justice means more than simply access to the courts, but there are diverging views on what this insight means for the courts. For some, recognizing multiple paths to justice results in a ‘de-centering’ of courts, setting up an alternate system that is opposed to formal justice. However, in the Committee’s vision, access to the courts remains a central component within a broader access to justice system. It is the threat of coercion

from the formal justice system that brings many defendants to the negotiating table, and the courts that ultimately decide what is just under the law. The Committee, like Hazel Genn, does not want to abandon “the language of justice”.¹⁰⁸ It is not a question of de-centring courts, but re-centring them in an integrated, well-ordered justice system. Re-centred courts are required to ensure that the resolution of disputes is consistent with legal norms. Re-centred courts will also keep our laws and legal system alive through ongoing judicial interpretation.

off initiatives. Equal, inclusive justice is a shared aspiration, one that can only be achieved through an ongoing commitment to learning, continuously developing evidence-based best practices and supporting innovation. Learning is required at many levels, ranging from adapting procedures based on public feedback and evaluation, to testing and refining mechanisms for the improved delivery of legal services to better meet the public’s needs, to integrating knowledge about common legal problems into systemic solutions.

Learning Institutions, Organizations and Systems

If we have learned anything from decades of access to justice reform, it is that these issues are complex and cannot be addressed through one-

¹⁰⁸ Hazel Genn, “What is Civil Justice For? Reform, ADR, and Access to Justice” (2012) 24:1 Yale Journal of Law and the Humanities” 415.

Building a Bridge to Equal Justice

Reaching equal justice requires us to bridge the distance from the current state of inequality to the vision articulated above. The Committee imagines this ‘bridge’ as having three lanes, each representing different strategies for moving to equal justice. One lane is facilitating everyday justice, the second is transforming formal justice



and the third is reinventing the delivery of legal services. Those three lanes are the topic of this part of the report.

The conceptual bridge rests on three structural supports: increased public participation and engagement; improved collaboration and effective leadership; and enhanced capacity for justice innovation. Those structural supports will be discussed in part III.

The Committee has proposed targets, milestones and actions for each lane and structural support. The targets are framed as measurable, concrete goals to be achieved at the latest by 2030. While different organizations and individuals may debate the specifics, the targets are designed to reflect a consensus of what is required. Achieving these targets will require individual, coordinated and collaborative efforts – none is in the purview of a sole justice system player.

Examples of immediate and interim actions and strategies are offered to illustrate the way forward, recognizing that much more detail is required and can be developed over time. Wherever possible, examples of emerging good practices and insights from research and evaluations, as well as links to further information are included in the discussion. The goal is to enlarge and change the conversation about access to justice in a manner that invites participation and inspires action. The Committee solicits feedback to these proposals and looks forward to an active and engaged dialogue.

Facilitating Everyday Justice

A new paradigm for access to justice is gradually evolving out of civil legal needs research that has taken place over the past several years. Currie has been a strong proponent of this shift, centred on the concept of “everyday justice”. The idea of everyday justice is that few problems, in reality, are dealt with in the formal justice system. Knowing this, we need to take a much broader view of access to justice. Facilitating everyday justice requires three main changes. We need to:

- Recognize that there are many paths to justice.
- Find ways to deal with a larger number of legal problems through a larger range of mechanisms.

- Shift our attention “far upstream from the courts” by investing in timely intervention and preventative services.

Facilitating everyday justice means improving legal capability, taking legal health seriously, enhancing triage and referral systems to navigate paths to justice and taking active steps to ensure that technology is well used to facilitate equal, inclusive justice.

Law as a Life Skill

Law should be seen as a life skill, with opportunities for all to develop and improve legal capabilities at various stages in their lives, ideally well before a legal problem arises. Law is a fact of life in the 21st century. Almost everyone will experience a legal problem at some point in their lives, but until that happens, most people don’t know what to expect from the justice system, the benefits of different paths and legal services and so on. Those involved in the justice system and in legal service delivery have a shared responsibility to increase the legal capabilities of everyone in Canada.

Building legal capability involves knowledge, skills and attitudes. Teaching law as a life skill also helps to cultivate trust and confidence in the justice system. All justice system participants can find ways to help build capability in their daily contact with members of the public.

Poor people and potential

“All people, including the poor, have enormous capacity to help themselves. Despite appearances, deep inside of every human being lies a precious treasure of initiative and creativity waiting to be discovered, to be unleashed, to change life for the better.”

*Muhammad Yunus, Founder Grameen Bank,
Lawyers Can Help Us to Win the War Against
Poverty (2013)*

Legal capability training is a new approach that builds on a rich foundation of public legal education and information (PLEI) resources and curriculum.

PLEI is key for people to develop their capacity to understand the law. Information is a basic element of access to justice. The focus of this section is on PLEI approaches to building law as a life skill, but PLEI is also an important aspect of the continuum of legal services, discussed later in the report, assisting people when they confront a specific legal problem or problems.

At present, most people seek out legal information when they are in a legal bind, during a time of crisis. The goal is to change this so that everyone develops basic legal capabilities as part of public education curriculum and has a continuing opportunity to build on this base of knowledge and understanding throughout their lives.

As Sarah McCoubrey, Executive Director of the Ontario Justice Education Network, explained in her Summit presentation, building legal capability involves three components: knowledge; skills and attitudes. Teaching law as a life skill helps to cultivate trust and confidence in the justice system.

Seeing law as a life skill is also consistent with what the Committee learned in the community consultations. Many individuals said they experience the justice system as withholding critical information. In their view, information about law and its processes *empowers*; it enables community members to know their rights and how to enforce them. Being informed helps to ensure equal participation in the justice system.

McCoubrey offered her framework for the elements of legal capabilities and highlighted the value of legal professionals sharing our advocacy skills.

Framework for Building Legal Capabilities

Knowledge

- Know where to find out more
- Understand the issues
- Know the routes to a solution (or processes)
- Know where to get help.

Skills of Legal Capability

- Listening
- Communication
 - Distinguishing between interests
- Imagining alternative solutions
- Ability to collect and record details
- Identifying between facts and emotions
- Empathizing with others in a dispute
- Identifying bias or self-interest

Attitudes of Legal Capability

- Trusting the professionals working in the system
- Believing that the system is impartial
- Believing that one deserves a fair resolution
- Having confidence that decision makers are unbiased (bribes, connections etc.)
- Believing that system evolves or can change
- Seeing that the system responds to injustices

Sharing our Advocacy Skills

- Consider All Perspectives
- Listen
- Find Evidence
- Talk to Experts
- Look for Bias
- Evaluate Sources
- Empathize with Others
- Be Curious
- Take Responsibility
- Give Reasons

The Summit workshop on PLEI centred on new challenges, emphasizing the need to empower the public and engage the legal profession to a greater extent. Legal practitioners need to do better at integrating public legal education and information resources into their delivery of legal services. Providing reliable legal information can help to

build trust between a lawyer and client. Lawyers can also assist in developing PLEI materials, using plain language and providing specialized legal content to technology specialists, while also making their clients aware of and promoting easy access to those materials.

Learn more: about Emerging practices – some examples:

Use of Wiki books, wiki resources, and crowdsourcing:

[Clicklaw Wikibooks](#) (eg. See, JP Boyd on family law)
www.wiki.clicklaw.bc.ca/index.php/JP_Boyd_on_Family_Law

Partnering with public libraries and others to increase access Legal aid at the library:
www.lasclev.org/legal-aid-at-the-library/

Public libraries - Access to Justice project:
www.lawhelpmn.org/resource/public-libraries-access-to-justice-project

Finding Legal Help – San Francisco Public Libraries Project:
www.sfpl.org/index.php%3Fpg%3D2000024801

Code, Laws and Legal Help/Oakland Public Library:
www.oaklandlibrary.org/online-resources/government-resources/code-laws-and-legal-help

Connecting resources:

www.clicklaw.bc.ca/
www.povnet.org/

Clicklaw BC Help Map: www.clicklaw.bc.ca/helpmap

Platforms to compile resources:
www.yourlegalrights.on.ca/videoshttp://vimeo.com/channels/yourlegalrights

Mobile phone: www.mobile.dudamobile.com/site/yourlegalrights

FLIP – Family Law Advice: www.legalaid.on.ca/en/getting/flip.asp

Use of video/audio:

Video tutorials from BC Courthouse library: www.courthouselibrary.ca/training/videos.aspx

Self Help materials:

What young mothers should know about Children’s Aid Societies: www.vimeo.com/75326555

Going to the tribunal work book: www.bccpd.bc.ca/docs/cppworkbook_web.pdf

PEI:

www.cliapei.ca/content/page/publications_court/
www.cliapei.ca/content/page/publications_family

Keeping PLEI resources “open”:

Declaration of an explicit grant of permission for attributed, non-commercial use:
[Courthouse Libraries BC and Clicklaw offer.](#)

Some PLEI providers have expressed concern that lawyers may discount research that clients have done because they perceive it as threatening the lawyer's role. It is difficult to gauge whether this concern is widespread or founded. Many lawyers, including John Paul Boyd, a leading proponent of integrating PLEI with delivery of legal services in the family law context, have suggested that an informed client is "not a threat, it is a blessing".

PLEI providers agree there is room for more coordination and opportunities to learn from each other, as well as a need for more creativity, collaboration, neutrality and rigour. Open licensing can be used to encourage borrowing and reduce duplication. There is an ongoing debate about the best ways to aggregate information, whether by linking web resources through portals or by other means. PLEI should not be framed as a complete answer to the public need for legal education, advice and representation, but it is a valuable starting point to assist people to connect to other resources.

Target: By 2030, 5 million Canadians have received legal capability training.

Milestones:

- Law as a life skill courses are integrated into public education curricula
- Legal capabilities training modules are available to specific groups during life transitions (e.g. newcomers to Canada, older adults at retirement, young adults entering the workforce)
- Legal capabilities training is embedded into workplaces and other environments where training can be sustained
- Lawyers integrate legal capabilities approaches and work with public legal education and information providers (PLEI) in their delivery of legal services

Actions:

- The CBA and PLEI organizations work with the Council of Ministers of Education, departments of education, school boards and other interested organizations to advocate for the integration

of law as a life skill courses into schools across Canada

- The CBA encourages lawyers to integrate PLEI materials and a legal capabilities approach in the delivery of legal services (where appropriate) and to assist PLEI organizations to develop and update materials
- PLEI organizations develop stronger partnerships with public and private sector organizations to integrate legal capabilities training into their existing programs, including those organizations serving members of the public experiencing life transitions (e.g. newcomers and seniors organizations)
- PLEI organizations develop, pilot and test national model legal capabilities training modules and protocols
- Justice system stakeholders work with PLEI organizations to develop and train rosters of law students, and current and retired lawyers and judges to deliver legal capabilities training in a variety of settings

What do you think?

- Any feedback or suggestions?
- Who should be involved?
- Are you willing to help?
(write to: equaljustice@cba.org)

Legal Health Checks

The access to justice literature has long recognized that preventing legal disputes is a key facet of an effective justice system. Prevention can be enhanced by better access to legal information and by public policy initiatives, such as no-fault insurance, proactive regulation or consumer protection, which remove the need for legal assistance to resolve problems by shifting the burden of demanding compliance to public bodies. Systemic advocacy to reform laws, regulations and institutions is often the only effective way to eliminate recurring problems because they can get at the root causes of repeated and often routine legal issues.

WHAT IS LEGAL HEALTH?

Everyone knows that by eating the right foods, having enough sleep and exercise and avoiding stress you can stay healthy, strong and be better able to ward off illness.

Just like your body, your “legal health” needs attention. By following some simple steps your legal health can also be strong and you can avoid or minimize problems that could otherwise be expensive, time consuming and stressful.

There are certain events that most people face in life, such as entering or exiting a relationship, buying, selling or renting a house, the death of a loved one and possibly being questioned or arrested by the police. By being informed and by following some simple steps you can be prepared for these life events, even the unexpected ones.

Women’s Legal Services, Tasmania

Lawyers have traditionally played a pivotal role in preventing legal disputes, by providing strategic advice and planning services. This role is diminished now when many people have limited access to lawyers, so we must consider new means to make preventative measures more available. For example, providing post-dispute resolution support can assist in preventing legal issues from recurring or resolving related problems before they also develop into legal disputes. This approach is often referred to as building resilience to future legal problems.

Initiatives that focus on legal health advance our capacity to prevent legal problems and build resilience to future or recurring legal problems. Just as the health system aims to both prevent and treat disease, so too the justice system should aim to prevent legal problems in addition to providing assistance when they arise.

The legal health checklist model ties together the ideas of prevention, resilience and building legal

capability. A number of legal practice websites encourage people to have an “annual legal health checkup” or offer checklists of situations in which legal needs or issues often arise. While to some extent these checklists are marketing tools, they could be a significant preventive measure if properly developed and employed. For example, Australian legal providers are developing legal health checklists that can be self-administered to create awareness of common legal problems and how to address them, or used by service providers to ascertain whether an individual who is seeking one form of assistance, say in a homeless shelter, has other types of problems that could be addressed through an appropriate referral. These checklists can also offer general advice on “how to stay legally healthy”.

Women’s Legal Services Tasmania has published an excellent booklet called *Legal Health Checkup – What shape is your legal health in?* It opens with an engaging introduction and definition of legal health. The booklet aims “to encourage people to take basic steps in their day-to-day life, which will help ward off legal nasties and other situations, which could otherwise be avoided.” It points out that both physical and legal health are important: “Taking basic steps like the ones outlined in this booklet and knowing your rights or where to go to get the right advice can be the difference between legal health and a legal disaster.”¹⁰⁹

According to the booklet, there are three essential items at the foundation of legal health: a will; a reliable post address; and a safe place for important documents. The booklet also provides checklists about legal issues that arise in ordinary day to day life, and in other more specific situations. These situations include: relationships (moving in together, getting married, having a baby, separation, divorce); putting a roof over your head (moving house, being a tenant, being a landlord, buying a house, selling a house); money money money (watching out for the credit crunch, mortgages, personal loans and other forms of finance, email offers and overseas lottery wins, rent to buy, financial abuse, bankruptcy); when someone dies

¹⁰⁹ Women’s Legal Services, *Legal Health Check Up: What Shape is Your Legal Health In?* (Tasmania, Australia, August 2013) http://www.womenslegaltas.org.au/uploads/booklets/Legal_Health_Checkup.pdf.

(registering the death, find the will, funeral plans); and the police.

Legal service providers, including legal aid plans and community-based clinics, have a particularly key role to play in contributing to legal health, both at the individual and systemic levels. In addition to administering or making available personal legal health checklists, with appropriate resources these organizations could also carry out broader health checks — providing valuable feedback about the incidence of legal problems in a community and potential systemic solutions. These organizations could offer an early warning system about general increases in certain types of legal problems with a view to timely intervention and prevention. In some communities, this work would need to be carried out in conjunction with trusted intermediaries. However best established for a particular community, the idea would be to enhance opportunities for contact between members of the public and service providers, creating more everyday opportunities for ameliorating social exclusion and disadvantage and creating equality.

At the Summit, Allan Seckel, CEO of the British Columbia Medical Association and former Deputy Attorney General for British Columbia, introduced the idea of “capitation” in the sense of assigning responsibility for the legal health of a community to a particular individual or organization. This idea takes the concept of legal health checks one step further. Both systemic legal health checks and the idea of assigning responsibility for the legal health of a community share the advantage of moving from an opt-in to an opt-out system. A valuable lesson from health care delivery is that services provided on an opt-out basis, such as vaccinations, have a much higher take up rate than those provided on an opt-in basis — particularly in reaching people living in marginalized conditions.¹¹⁰

We have a long way to go to integrate these insights, and develop measures of legal health and mechanisms to contribute more proactively to prevention. A commitment to rebalancing the emphasis on prevention and resolution requires us to broaden our thinking about how the justice system functions now. The concept of legal health

encourages the kind of ‘outside the box’ thinking required to make this profound shift.

Learn More: What is a legal health checklist?

From Canada

LAWPRO’s practicePRO initiative Annual Legal Health Check-Up:

www.practicepro.ca/practice/pdf/Annual-Legal-Check.pdf

From Around the World

State Bar of California, “How Is Your Legal Health? Legal Health Checklist”:

www.calbar.ca.gov/LinkClick.aspx?fileticket=REVCXS6ShNQ%3D&tabid=1322

The Women’s Legal Service Tasmania, “Legal Health Check Up: What Shape Is Your Legal Health In?”:

www.womenslegaltas.org.au/uploads/booklets/Legal_Health_Checkup.pdf

Legal Aid Act, Australia, “Legal Health Checklist”:

www.legalaidact.org.au/pdf/publications/legalhealthchecklist.pdf

YOUTUBE VIDEO! Queensland Public Interest Law Clearing House, “Legal Health Check Training Videos”: www.qpilch.org.au/cms/details.asp?ID=692

ChristieLaw, Australia, “A Legal Health Check – for Personal Needs” and “A Legal Health Check – for Small Businesses”: www.christielaw.com.au/a-legal-health-check-for-personal-needs/

Contact Law, United Kingdom, “Small business legal health check”:

www.contactlaw.co.uk/small-business-health-check.html

¹¹⁰ Mulherin at CBA Summit, *supra* note 73.

Target: By 2020, individual and systemic legal health checks are a routine feature of the justice system.

Milestones:

- Legal aid/assistance providers have a strong capacity to undertake follow up with clients on a routine basis, including, for example, through post-resolution follow up
- Legal aid/assistance providers have a strong capacity to carry out systemic health checks and routinely provide input to law and justice reform processes to enhance capacity to prevent/minimize frequent legal problems

Actions:

- The CBA partners with PLEI organizations to establish a universal Canadian legal health checklist and make it broadly available to individuals, to students as part of high school and other training curriculum, or by service providers to review with people using their services
- The CBA promotes the use of legal health checklists at Law Day and other forums and encourages other justice stakeholders to do the same
- Legal aid/assistance providers collaborate with each other and community groups to adapt the legal health checklist to their communities/specific contexts. The adapted checklist includes a tool kit with information on where to go for help and best practices guide for integrating checklists into service delivery
- The CBA collaborates with interested organizations to prepare an options paper on the broader concept of legal health and the prevention of legal disputes, including the use of legal health system checklists

What do you think?

- Any feedback or suggestions?
- Who should be involved?
- Are you willing to help?
(write to: equaljustice@cba.org)

Effective Triage and Referral to Navigate the Paths to Justice

There are many paths to justice and more are required to ensure that people are quickly and properly directed to services and assistance so they can effectively address their legal problems. The way people enter the system and the way they are treated on day one is the essence of a people-centred justice system.

People currently report finding it difficult to navigate the justice system. The need for improvement was highlighted in the Committee’s community consultations and on the street interviews:

“There should be a place that everyone should know about. If you have a legal issue, you can go explain your situation and they would tell you where to go, YWCA, website, etc. A sort of triage service to get you on the right track. Right now it’s all disjointed and hit or miss. It’s difficult to get good information.” **Single mother, Moncton**

“Have a central place with information and a “triage” service to point everyone in the right direction, e.g. both victims and offenders. Develop a checklist or questionnaire to identify people’s needs. Make sure it is flexible to respond to our realities, such as being available evenings and weekends, via telephone and the internet.” **Single mother, Moncton**

If I was a person who needed a legal service, I would have trouble knowing where to start. Most people just have no idea.... what programs are new, who do I call?

Woman in Victoria, Envisioning Equal Justice on the street interviews

The hurdles people typically encounter in navigating current paths to justice and locating the services they need is underscored by mapping projects, such as the Canadian Forum on Civil Justice’s Alberta Legal Services Mapping Project

and the American Bar Foundation's Access Across America Civil Justice Infrastructure Mapping Project. So often programs and services have been developed ad hoc, adding an agency here and a program there as unmet legal needs become apparent or funding and other resources are identified. There has been no overarching vision or plan, and correspondingly, a lack of integration among various services. A step back is required to reorder what is available, as the current paths to justice are too complex, sometimes even for service providers themselves to effectively navigate.

Services must be designed to meet individuals' needs at the particular stage they are at with their problems, rather than waiting for them to develop to the point that the formal justice system is involved. At the Summit, Mulherin noted that people do not always approach their legal problems or behave in the way that legal service providers expect or want them to. Australian research demonstrates though that people can learn about more effective pathways and "one of the indicators of what people will do with a problem this time is what they did last time." Reform efforts must also account for changes that reduce accessibility by "breaking pathways". For example, existing services may be de-funded, a service may be renamed, or a location or contact person may change.

Accessible services that help people resolve their issues without recourse to the formal justice system are critical. Often, providing specific appropriate services at the right time can avoid or ameliorate the problem without it getting worse and becoming a legal issue potentially implicating the formal justice system. Any triage system needs to recognize the role in preventing legal problems from developing initially, and intervening in a timely way to address those that do arise.

At present, points for people to access the civil justice system are highly decentralized. The advantage is that entry points tend to reflect the way people most often approach problems, for example through trusted intermediaries such as health care providers or social workers. The disadvantages are that it is uncertain where people will actually seek help, and their success relies too often on their degree of resilience and willingness to keep knocking on different doors,

repeating their stories, until they finally resolve the matter. With each additional step, more people become discouraged and many give up, often at significant personal cost.

Even in the current model, the paths to justice can be made easier to navigate through standardized or generic entry forms that simplify transitions. Another option is providing 'warm' referrals, where the organization approached takes responsibility for ensuring that a referral leads to follow up and action, rather than leaving that with the individual. Equal justice does not depend on an individual's resilience or 'stick-to-it-ive-ness' to effectively navigate the system and achieve a just outcome.

Perhaps the greatest single innovation required right now is an effective triage system in each jurisdiction. This is not a new idea. Community-based legal clinics or offices were initially designed to play this function, efficiently linking community resources and the justice system. Where clinics exist and resources permit, many continue this function. Significant steps have been made recently in some locations, including Family Law Information Centres in Alberta and Ontario, Justice Access Centres in British Columbia, and Centres de justice de proximité in Québec. Triage also takes place in some courthouses and many tribunals, but too often this is attributable to the skills and dedication of an individual staff person, like Louise, a well-known court case management coordinator in one Committee member's community.

Still, we are far from having "integrated well-designed, transparent and intellectually defensible" triage and referral systems.¹¹¹ The goal is to build an efficient and transparent sorting system to replace what Richard Zorza, a leading American access to justice scholar, of the Self-Represented Litigants Network, has described as "the multiple, inconsistent and non-transparent processes used by various separate programs and institutions". He has argued that this is an essential feature of reform and that the current US system is the "complete antithesis" of what is needed.¹¹² The situation is no better in Canada.

¹¹¹ *Ibid.*

¹¹² Zorza, *supra* note 102 at 866.

Zorza suggests that one reason for the lack of progress in access to justice has been a fear of “identifying individual cases in which services are required but cannot be provided for resource reasons.”¹¹³ Tackling this concern would require building a system that could be modified to match service need and availability, while setting priorities based on principles (e.g. protecting those with lower capacity or those facing the highest stakes and most difficult issues). This makes sense, but the lack of existing services cannot be used as a rationale for inaction. In fact, one of the benefits of an effective triage system is that it would make the ‘mismatch’ or gaps between people’s needs and capacities and the services available to them much more visible. It would build learning into the system.

Awareness of this problem is growing, but there is no consensus about how best to address it. Three main approaches are currently part of the conversation:

- enhanced single points of entry such as justice access centres;
- building well-networked referral systems based on the “no wrong number, no wrong door” philosophy; and
- putting services in the path of clients who are unlikely because of their geographic or social situation to come into contact with established entry points, including by working with trusted intermediaries.

More consideration should also be given to previous community-based options, including well-resourced community legal offices that serve as a clearinghouse for both legal and non-legal services, or an information and referral service to direct clients to the best sources of assistance for all aspects of their problems. Ontario’s community clinics provide a Canadian model.

Clinics provide services in areas of law that most affect low income individuals and disadvantaged communities, and particularly focus on issues around which a low-income “community of interests” can coalesce. Often clinics assist people with meeting their most

basic needs, such as a source of income, a roof over their heads, human rights, rights to education and health care, etc... Clinics provide these services through a variety of methods, including traditional casework, summary advice, self help, public legal education, community development and law reform initiatives. Clinic work often involves trying to effect systemic change on behalf of the broader community.¹¹⁴

These approaches should be seen as complementary, as long as they are a part of an effective overall triage and referral system.

The NAC Working Group on Prevention, Triage and Referral envisions triage and referral taking place

¹¹⁴ See, www.aclco.org/about_Clinics_overview.html. See also Andrea Long and Anne Beveridge, *Delivering Poverty Law Services: Lessons from BC and Abroad* (Vancouver: Social Planning and Research Council, 2004) [SPARC report], which surveyed legal service providers about the impact of the loss of community-based services following 2002 cuts to legal aid in British Columbia. See also findings summarized in Melina Buckley, *Renewed CBA Legal Aid Policy* (Ottawa: CBA, 2010) (unpublished 2009 background paper for *Moving Forward on Legal Aid*, on file at CBA National Office), including:

- cuts increased demand for advocate services, with several respondents indicating a doubling or tripling of their client caseload.
- opportunities for one-on-one client services substantially declined – a format many respondents identify as the most valuable type of assistance.
- impact is particularly strong for clients who experience other barriers to access such as language and literacy barriers.
- additional pressure on poverty law organizations, resulting in longer wait times for clients, increased stress for advocates, and a need to ‘triage’ clients to focus on crisis management rather than prevention.
- more clients simply giving up hope because there is nowhere to turn for assistance.
- lack of legal services is obliging women to return to, or remain within, unhealthy relationships.
- increase in the number of clients trying to represent themselves.
- outcomes for self-represented litigants tend not to be as good, and increase delays in the legal system when claimants lack adequate preparation.
- declining service quality and organizational support for providers.
- concerns about the place of appeals and judicial review, as legal representation is essential for these more complex and technical proceedings.
- limited availability of legal representation means that people’s rights are simply not being respected, and access to justice is accordingly compromised.

¹¹³ Zorza, www.accesstojustice.net/2013/01/30/sorting-hat-triage-article-now-posted/

at three stages: the early resolution stage before a dispute crystallizes; on entry to the larger justice and advocacy system; and after entry into the formal system.¹¹⁵ Others have focused on a single court-based system, an option discussed later in the section on transforming formal justice.

In the Committee's view, it is critical to move to a well-designed, sufficiently resourced and effective triage system, staffed by highly-trained and capable staff. Different approaches are likely needed to meet the needs of different communities within an overarching province- or territory-wide system. As with all major innovations proposed, it is critical that we evaluate and compare different triage and referral services to understand what works, and to integrate this knowledge on an ongoing basis.

Target: By 2020, each provincial and territorial government has established effective triage systems guiding people along the appropriate paths to justice.

Milestones:

- Triage and referral demonstration projects, including an evaluation component, are in place in each province and territory, building on existing initiatives and experience
- A national mechanism is in place to integrate evolving knowledge on the effectiveness of triage and referral services, policies and protocols, including the evaluation of demonstration projects
- A best practices guide is available presenting Canadian research and knowledge

Actions:

- Provincial and territorial governments work with PLEI organizations, legal aid providers and other service providers to prepare and maintain a comprehensive list of early resolution, legal and related services in each jurisdiction or region

¹¹⁵ National Action Committee on Access to Justice in Civil and Family Matters, Prevention, Triage and Referral Working Group, *Final Report: Responding Early, Responding Well* (February 2013) at 15 <http://www.cfcj-fcjc.org/sites/default/files/docs/Report%20of%20the%20Prevention%2C%20Triage%20and%20Referral%20WG%20.pdf>.

- Provincial and territorial governments work with PLEI organizations, legal aid providers and other service providers to develop an agreed upon set of core principles to guide the design of triage and referral processes, including a common intake form. Some of this work could take place on a national basis or through the development and testing of prototypes in one jurisdiction to avoid duplication of effort.
- Provincial and territorial governments work with PLEI organizations, legal aid providers and other service providers, to develop and implement training in support of triage and referral policies and protocols

What do you think?

- Any feedback or suggestions?
- Who should be involved?
- Are you willing to help?
(write to: equaljustice@cba.org)

Learn More: about some effective Triage and Referral initiatives

National Action Committee on Access to Justice in Civil and Family Matters, *Report of the Working Group on Prevention, Triage and Referral*:

<http://www.cfcj-fcjc.org/sites/default/files/docs/Report%20of%20the%20Prevention%2C%20Triage%20and%20Referral%20WG%20.pdf>

Family Law Information Centres: Alberta:
<http://www.albertacourts.ab.ca/fjs/flic.php>

Family Law Information Centres: Ontario:
<http://www.attorneygeneral.jus.gov.on.ca/english/family/infoctr.asp>

Family Mediation Services: Ontario:
http://www.attorneygeneral.jus.gov.on.ca/english/family/family_justice_services.asp

Justice Access Centres in British Columbia:
<http://www.ag.gov.bc.ca/justice-access-centre/>

Centres de justice de proximité in Québec:
<http://justicedeproximite.qc.ca/>

Inclusive Technology Solutions

Canada’s justice system lags behind other sectors for integrating technology. Technology (including information technology) can be harnessed to improve access to justice and is an integral part of all three major strategies for change discussed in this report: facilitating everyday justice; transforming formal justice; and reinventing the delivery of legal services.

Technology can:

- automate current processes and make them more efficient and accessible to individuals
- create new pathways to justice
- provide direct access to justice services (e.g. online dispute resolution).

While technology can support justice innovation

generally, it is particularly useful for facilitating everyday justice. At the same time, careful planning is needed to prevent technological innovations from creating or reinforcing existing barriers to equal justice.

Trends in Harnessing Technology to Improve Access

Technology is increasingly used as a tool to both deliver information and expeditiously link people to the services that best contribute to equal access to justice. A recent Australian report on harnessing the benefits of technology in this context provides a helpful framework¹¹⁶:

¹¹⁶ Australian Government, *Harnessing the benefits of technology to improve access to justice – Analysis paper* (Sydney: Commonwealth of Australia, 2012) [Australian Report].

Access to justice benefit

	Providing access to information	Supporting the delivery of services	Providing seamless & integrated services
How does technology support this?	<ul style="list-style-type: none"> • assisting people to access and understand the law and information about how to resolve problems early and cost-effectively 	<ul style="list-style-type: none"> • improving access to other third party support and assistance such as ADR, court services and tribunals • improving the efficiency and scope of service delivery to the public on a cost effective basis 	<ul style="list-style-type: none"> • providing a ‘no wrong door approach’ for entry into the civil justice system • integrating delivery of services across agencies/ organisations
Examples of technology initiatives	<ul style="list-style-type: none"> • legal information and referral websites • apps • social media 	<ul style="list-style-type: none"> • videoconferencing • online dispute resolution • e-court services such as e-filing and e-lodgement • online transaction services 	<ul style="list-style-type: none"> • whole of government web portals • integrated information systems that share information e.g. between government agencies

Today, the Canadian focus is primarily on applying existing technology initiatives, such as the internet and software applications, telephone and audio-visual technology, to improve access to justice. However, internationally, some sectors of the civil justice system are also applying emerging technologies, such as online dispute resolution, social media, cloud computing, smart phones, mobile software applications and mobile computing. In some jurisdictions, civil justice sector agencies and organizations are using websites for more than just providing information. There is increasing use of websites and Web 2.0 initiatives (such as blogs and social media) to both engage the public and gather information, for example, through polls, surveys and online consultations. Five main trends are identified in the Australian report:

- interactive web initiatives
- integrated legal assistance services
- online dispute resolution and telephone-based ADR services
- increased use of technology in courts and tribunals, and
- 'one-stop shops' for government services.

In this section, the Committee includes examples from Canada and abroad to demonstrate how technology is currently being harnessed to facilitate everyday justice. The use of technology by courts and tribunals is discussed in the next section.

Learn More: about Online Dispute Resolution and Telephone-based ADR services

HiiL online divorce program:

www.hiil.org/project/divorce-online

Online family mediation in the Netherlands:

www.adrresources.com/adr-news/802/online-family-mediation-netherlands-tilburg-university-tisco

Other examples:

www.equibbly.com/

www.odr.info/

www.mediate.com/odr/

www.europa.eu/rapid/press-release

MEMO-13-192_en.htm

Smartsettle is aimed at conflict resolution and dispute prevention for different decision making and negotiation situations, ranging from complex negotiations to simpler single issue disputes—eg family and small claims disputes. It is based in Vancouver, Canada but the software can be used for eNegotiations worldwide. It can provide parties with more control to decide, with a facilitator, on a combination of online and face-to-face meetings for their particular situation:

www.smartsettle.com/

Consumer Protection BC has a self-help online tool for consumers to settle disputes with businesses. This is a relatively simple form of ODR that is delivered by email:

www.consumerprotectionbc.ca/odr

Remote mediation by teleconference is another obvious choice, but these services tend to be available in fewer areas, and often only for those who can afford to pay and are represented by legal counsel on both sides to coordinate it: www.odr2013.org/

Technology can increase the channels of communications and access between legal assistance providers and community service providers to assist people living in marginalized conditions or in rural and remote areas far from most services. Properly employed, technology can improve access for Aboriginal persons, and for people with disabilities, from culturally or linguistically diverse backgrounds and in low socio-economic situations. A key consideration is to ensure that people receive the support they require at the first point of contact to avoid 'referral fatigue'. Integrated web and telephone assistance services, telephone and audio-visual technology, social media and mobile software applications can all be recruited toward this end.

Best Practices – Example:

MIDLAS community legal centre in Western Australia has implemented a highly effective social media campaign to share relevant and up-to-date information and advocacy options with clients, while raising awareness about the plight of the disadvantaged, offering information and building stronger connections within networks. MIDLAS currently has six dedicated and integrated social media platforms: www.midlas.org.au/media/socialmedia/

Australian Report, note 116

The Australian report concluded:

...while technology can offer great benefits in simplifying processes, reducing costs, improving communication and promoting access to justice as a whole, implementing technology solutions without a clear strategic purpose and policies underpinning their implementation may diminish the effectiveness of the solution. There is the risk of resources being wasted if the procurement and implementation of these initiatives is carried out without well thought out strategies.¹¹⁷

The report also noted that the civil justice sector's

¹¹⁷ *Ibid.*

slow progress in developing policies and strategies around the use of emerging technology has delayed the uptake of these initiatives. This delay can be partly explained by the interconnection between technology initiatives and technical and information management issues relating to confidentiality, privacy, identity security, record keeping and storage of information.¹¹⁸

US reports reach similar conclusions about trends in harnessing technology to facilitate access to justice. A growing number of technology tools are used by legal aid providers, courts tribunals and others, and new tools appear frequently. Adoption of the best tools is sporadic, and their use is far from widespread.¹¹⁹ Two US experts, Linda Rexer and Phil Malone, have identified barriers to adopting effective technology strategies for improving access to justice:

- a) Lack of uniformity, standardization and simplification;
- b) Perception that using technology is not full justice;
- c) Resistance to change and planning for usability and quality;
- d) Lack of top leadership support and impediments in large programs;
- e) Lack of adequate and appropriately targeted funding;
- f) Lack of guidelines for making technology decisions;
- g) Lack of adequate policy framework and unauthorized practice of law; and
- h) Fragmentation of the delivery system and lack of national support mechanisms.¹²⁰

Many of these barriers overlap or interrelate. For example, being able to make good technology

¹¹⁸ *Ibid.*

¹¹⁹ Linda Rexer and Phil Malone, "Overcoming Barriers to Adoption of Effective Technology Strategies for Improving Access to Justice" in James E. Cabral, Abhijeet Chavan, Thomas M. Clarke, John Greacen, Bonnie Rose Hough, Linda Rexer, Jane Ribadeneyra & Richard Zorza, "Using Technology to Enhance Access to Justice" (2012) 26:1 Harvard Journal of Law & Technology 243 at 305.

¹²⁰ *Ibid.*

decisions may be negatively affected, not only by a lack of guidelines but also by resistance to change, inadequate executive-level support for using technology or a fragmented delivery system with too few common systems to maximize resources.

Rexer and Malone propose ways to overcome these barriers:

- Incentives
- Money for evaluation
- Bring leaders together to provide them with info about IT
- Accurate info about costs of projects (upfront, support and maintenance)
- Cost savings can be achieved by consolidating hardware and software for multiple organizations into shared, virtual servers.
- Technology funding should be seen as iterative, rather than one-time, and funders should be mindful of the need for ongoing support and maintenance.¹²¹

Q Wonder about an app that would show wait times for different processes.

Or, one to empower people to provide feedback about the system and gather important information

A Yay – great idea !!

***From discussion at Summit workshop
on Administrative Tribunals***

An intriguing way to foster innovation and engage public and private sectors is to sponsor “app development” competitions. This is an innovative and cost effective way to encourage new ideas, as the value of the apps created generally far exceeds the prize money offered to the winning entrants.¹²²

There is significant scope for further growth in this area and public expectations for accessibility are likely to increase. For example, people will increasingly expect to access up to date information through mobile media devices.

The CBA Legal Futures Initiative is also taking a close look at how new technology platforms can impact the delivery of legal services. Its June 2013 report summarizing preliminary research, “The Future of Legal Services: Trends and Issues,”¹²³ concludes that none of the critical change factors currently in play is more important than the rapid growth in innovation and adoption of new technology. It notes an uneven adoption of technology by law firms and lawyers; there have been few incentives and because of partnership structures and tax laws, very few firms re-invest profits in basic research and development, new processes, services and technology. Some key technology trends affecting the practice of law are online dispute resolution, an electronic marketplace (including virtual law firms), computer intelligence systems with capacity to manage and access data, solve problems, and draw conclusions and social networking.

¹²² *Ibid* at 12.

¹²³ www.cbafutures.org/trends

¹²¹ *Ibid*. See also discussion in Australian Report, *supra* note 116.

Learn More: about Using Technology

Youtube videos for unrepresented clients going to court (Pro Bono Law Alberta and the CBA-Alberta Branch): www.pbla.ca/news/

Australian national A2J website: www.nationalprobono.org.au/page.asp?from=5&id=287
www.accesstojustice.gov.au/Pages/default.aspx

20 Territory Growth Towns – Talking posters: www.adc.nt.gov.au/media/2012/ADC_talking_posters.pdf

South Korea downloadable mobile applications from their websites provide information on various everyday justice initiatives run by their government: http://english.mw.go.kr/front_eng/al/sal0401s.jsp?PAR_MENU_ID=1002&MENU_ID=100205

Illinois Legal Aid Online: www.illinoislegalaidonline.org/

Immigration Advocates Network : www.immigrationadvocates.org/nonprofit/

Pine Tree Legal Assistance: www.ptla.org/

SelfHelpSupport.org: www.selfhelpsupport.org/

LawHelp.org: www.lawhelp.org/

The Self-Help Assistance Regional Project (“SHARP”) uses videoconferencing equipment to link four court-operated self-help centers in California. This means one supervising attorney and minimal support staff can offer assistance through workshops and individual support to more than 1200 people monthly: www.lawhelpca.org/organization/self-help-assistance-and-referral-program-sha?ref=85a6G

Techno.la Blog – Julia Gordon, Project for the Future of Equal Justice, Equal Justice and the Digital Revolution: using Technology to meet legal needs of low income people: www.clasp.org/admin/site/publications_archive/files/0110.pdf

LSNTAP - Legal Services National Technology Initiative Project: www.lsntap.org/

LSNTAP provides technology leadership to the poverty law community through on-site assistance, tutorials & training, online information & services, and promoting successful technology tools that improve efficiency or client services. NTAP receives funding from the Legal Services Corporation Technology Initiative Grants, and is supported by over 50 legal aid programs across the country. LSNTAP’s wiki site for information on training and legal aid technology tools being used across the country: <http://lsntap.org/>

Nonprofit Technology Network: <http://www.nten.org/>

Self-Represented Litigants Network: <http://www.representing-yourself.com/bibliography>

Contra Costa, California Self Help: <http://cc-courthelp.org/index.cfm?fuseaction=Page.ViewPage&pageId=5818>

Center for Access to Justice & Technology (Chicago-Kent College of Law): <http://www.kentlaw.iit.edu/institutes-centers/center-for-access-to-justice-and-technology/self-help-web-center>

Concerns about IT Solutions

Integrating technology solutions into justice system reform while ensuring that those solutions advance equal justice and inclusivity requires us to identify existing barriers and avoid creating new ones. Bonnie Hough, a US legal aid lawyer, has said about the adoption of new technology: “let’s not make it worse”.

Hough is concerned about the “specter of a digital divide that institutionalizes a two-tiered system incapable of delivering appropriate justice to low-income persons.”¹²⁴ She says:

Technology offers many options for the largely underserved rural population. It can assist those who do have web access by providing legal information online and allowing litigants to access court files, pay fines and fees, and file documents remotely. Legal aid programs have also succeeded in using videoconferencing to reach rural residents. Videoconferencing and telephonic appearance procedures are also making it possible for rural residents to participate in some court proceedings without incurring the cost of traveling to the courthouse... However, [these developments are] not possible in all areas because of significant technological challenges. Indeed, many rural service providers do not have access to high-speed Internet connections, some lack cell phone reception, and others have little nearby access to fax machines. In addition, rural areas have high levels of illiteracy, which limits the value of text-based information. For these reasons, courts and legal aid providers must maintain traditional services even as they expand into new technological frontiers.¹²⁵

She also points out that while technology can be particularly helpful in providing meaningful access to information and the courtroom for people with disabilities, other disabilities get in the way of accessing the internet and gateways commonly used to offer information and help. Thoughtful web design can overcome many challenges, but it

¹²⁴ Bonnie Rose Hough, “Let’s Not Make it Worse: Issues to Consider in Adopting New Technology” in Cabral et al, “Using Technology to Enhance Access to Justice”, *supra* note 119 at 256.

¹²⁵ *Ibid* at 261-262.

cannot change the fact that fewer adults living with a disability use the Internet, compared to adults without a disability.¹²⁶ Even ‘smart’ programs with built-in ratings/assessments/feedback features cannot reach or help people who for whatever reason will not use it to begin with, or try it once or twice but then give up.

For service or information providers, one of the greatest challenges to using technological solutions to increase access to justice is the lack of personal contact with an individual, contact that allows the provider to better gear what is offered to the needs of that particular individual. That personal contact can be the key for successfully navigating either informal or formal justice sectors, pursuing a process through to a satisfactory conclusion and achieving a just outcome. Integrating technology and access to justice must not replace personal assistance where it is needed to ensure equal justice.

Fostering Inclusive IT Innovation and Planning

The Committee proposes that by 2020, all justice sector organizations will have plans to harness technology to increase access to justice, ensuring inclusivity by eliminating barriers to underserved populations and avoiding new barriers. Developing and implementing these plans will be done in a way that ensures technology is integrated in a systematic, efficient and inclusive manner.

To accomplish this ambitious goal, Canada’s justice community could consider principles developed in other jurisdictions. The California Judicial Council commissioned an independent agency to survey California legal service providers and self-help centre staff to identify potential benefits and barriers from increased use of technology for low-income persons. The Council eventually adopted guiding principles that articulate fundamental core values for future use of technology in the courts, and offer guidance to courts and court partners on how to avoid barriers to access to justice.

The principles suggest considerations for court technology decision makers, rather than mandating

¹²⁶ *Ibid*.

any particular step.¹²⁷ They recognize the need for those implementing court technology to not only ensure that innovations improve access to justice, but also that the innovations lead to appropriate and neutral substantive outcomes. They say that the first and most fundamental principle is to “Ensure Access and Fairness”, recognizing that the unique needs of certain groups of litigants must be at the forefront in technology planning.

Other main principles address real concerns about technologically assisted access by underserved populations, as several groups face particular challenges with using technologies:

- Preserve traditional access for those persons challenged by technology — encourage but do not mandate technological solutions
- Provide education and support to potential users of these services on an ongoing basis
- Secure private information including by informing individuals of risks associated with use of public computer terminals and ways to mitigate those risks.¹²⁸

Courts and legal aid providers should also consider hybrid legal service systems that integrate human and automated assistance. The question of inclusive design can be addressed in the early phases of planning and development, rather than left to the implementation stage. For example, software developers and web designers must recognize that features making an application ‘friendly’ for unsophisticated users may make it ‘unfriendly’ for those who use the application more frequently: “unsophisticated users are best served by an application that leads them step-by-step, whereas more frequent users are best served by an application that allows the fastest and most efficient data entry possible”.¹²⁹ In some cases, two or more versions of an application may best meet the reasonable needs of both types of users.

¹²⁷ See, Court Technology Advisory Committee, Judicial Council of California, *Advancing Access to Justice through Technology, Guiding Principles for California Judicial Branch Initiatives* (2012) www.courts.ca.gov/documents/SP12-05_State_Bar_of_CA_COAF.pdf, cited in Hough, *ibid* at 257.

¹²⁸ *Ibid.*

¹²⁹ *Ibid.*

A tremendous body of knowledge has developed around the strengths and weaknesses of particular technologies, strategies for choosing appropriate technologies, the challenges of effectively implementing and maintaining valuable technologies, and the effectiveness and return on investment of particular tools. To be most effective, courts and organizations deploying access to justice technologies need to be able to build on and leverage these experiences and best practices to design and implement their projects as state-of-the-art and integrated solutions, rather than reinventing the wheel and making avoidable mistakes. Beginning new projects from the strongest possible knowledge base prevents organizations from going down technology paths that end up conflicting with or excluding other valuable options and avoids wasteful mid-course corrections.

Linda Rexer and Phil Malone, “Overcoming Barriers to Adoption of Effective Technological Strategies for Improving Access to Justice”, note 119.

Inclusive integration of technology should be supported on a national basis. Taking stock regularly will build a better understanding of how the current use of technology initiatives is doing to promote access to justice in the civil justice sector. Gaps, emerging trends and opportunities can be identified and inform a strategic approach for implementing technology initiatives that promote access to justice.

In the US, there are a number of national sources of information: National Technology Assistance Project, National Center for State Courts Information and Resources, Future Trends in State Courts reports, the Self-Represented Litigation Network and its www.selfhelpsupport.org collection

of materials, and the LSC TIG grant program.¹³⁰

Several annual conferences present sessions on access to justice technology topics, including the LSC TIG conference, NCSC Court Technology Conferences and e-Courts conferences, and portions of the ABA Equal Justice Conference. Many states share specific examples of best practices and lessons learned with one another. The Kleps Award process in California's courts involves a committee of judges and court staff who review and select innovations to improve court proceedings, with mechanisms for evaluation to assess effectiveness.

In Canada, the important national information sharing and evaluation role has been filled to some extent by the Canadian Forum on Civil Justice and the Canadian Centre for Court Technology, but more is needed. A comprehensive source for lessons learned, best practices and opportunities for more in-depth exchange about what works well could avoid repetitive research and duplicative efforts in developing new technology. Shared learning and joint evaluations would also promote technology that is holistic, strategic, efficient, and inclusive. A national strategy to ensure equal justice should include this critical component.

Target: By 2020, all justice sector organizations have plans to harness technology to increase access to justice, ensuring inclusivity by eliminating barriers to underserved populations and avoiding the creation of new barriers

Milestones:

- *Evaluation and feedback mechanisms for internet-based and other technology-assisted solutions assess user experience*

¹³⁰See: National Technology Assistance Project, www.lsnatp.org/; National Center for State Courts Information and Resources, www.ncsc.org/Information-and-Resources.aspx; Future Trends in State Courts report, www.ncsc.org/~media/Microsites/Files/Future%20Trends%202012/PDFs/TRENDS%202012%20BOOK.ashx; Self-Represented Litigation Network and its selfhelpsupport.org collection of materials, www.srln.org/ & www.selfhelpsupport.org/; LSC TIG grant program, www.tig.lsc.gov/.

as well as the reasons people do not use the technology or try to use it and give up

- *Grants and other incentives foster the development of inclusive access to justice technologies*

Actions:

- *Technological innovations preserve traditional access for people challenged by technology, including access to a service provider, and the use of technological solutions is not mandatory*
- *Justice system stakeholders survey legal services and community services providers, court staff and others to identify potential benefits and barriers posed by increased use of technology for low-income persons*
- *Justice system service providers offer ongoing education and support to people using technology to accessing their services*
- *Justice system service providers provide active warnings to people about the need to secure private information and protect confidentiality; users receive messages about the limitations of the technology-based service and value of review by a legal service provider*
- *The National Action Committee, its successor, or another national organization:*
 - 1) *develops guiding principles for justice system stakeholders on how to avoid barriers to access to justice when using technology;*
 - 2) *provides centralized support for making good technology decisions, including by developing an evaluation tool for investments in new technology, and*
 - 3) *offers knowledge, experience and data about using technology to advance the planning and delivery of justice services for the most disadvantaged and vulnerable populations. The Federation of Law Societies, law societies or the CBA Ethics Committee, provides guidance on ethical and professional obligations when using technology to deliver legal services*

What do you think?

- Any feedback or suggestions?
- Who should be involved?
- Are you willing to help?
(write to: equaljustice@cba.org)

Transforming Formal Justice

Courts around the world are engaged in a process of transformation. At the Summit, Zorza described this as a “thousand year change.” His point is that the last time courts changed this dramatically was when they became people’s courts. He describes a metamorphosis from courts as we have known them to “access to justice institutions”. There are two major dimensions to this process: external changes to the relationship of courts to other aspects of the civil justice system and internal changes to the functioning of the courts.¹³¹

Many of these developments are a response to challenges and pressures on court systems, including changes in demands, limited resources and enhanced knowledge about the multifaceted nature of people’s legal problems. The goal of reform of the formal justice system is to complement informal everyday justice innovations, and eliminate gaps between formal and informal justice to create one seamless civil justice system. Here too, the central theme is forging more effective paths to justice and a greater variety of processes to ensure fair procedures and just outcomes, while at the same time building greater coherence. HiiL, an advisory and research institute for the justice sector, frames this as the need to focus on both specific justiciable problems as well as “justice supply chains.”

Transformation is a strong word, suggesting thorough, dramatic change. The Committee’s view is that it is the appropriate term for the challenges facing courts today, in Canada and elsewhere. Justice remains a cherished public good, and

¹³¹ Richard Zorza, “Access to justice: The emerging consensus and some questions and implications” (2011) 94 *Judicature* 156 at 157.

courts and an independent judiciary are essential to our public justice system and democracy itself. Court innovation need not threaten these bedrock constitutional principles. Indeed, transforming formal justice has the potential to ensure the continued vitality of courts by halting a growing disaffection on the part of the public attributable to costs and delay, and inspiring increased public confidence in judicial conflict resolution.

Global Trends and Strategies

Many court systems around the world are undergoing transformative processes but the purpose and direction of the changes are not always clear. Based on its international scan, HiiL sets out three possible scenarios for the future role of civil courts: courts as the forum of last resort; courts as the solver of legal issues; and courts as the central service responsible for adjudicating people’s problems.¹³² HiiL makes the following points about these three scenarios.

Courts as a last resort

- A place to go when all else fails.
- Legitimizing the view that people should avoid courts and solve their own problems instead.
- Courts should deal with only the most complicated cases.
- All routine issues dealt with elsewhere.
- Procedural issues, not the substance of the conflict, are more likely to dominate the litigation process.
- Maybe only role is checking whether other decision-makers did an acceptable job.
- Means courts cannot ensure application of the law to everyone.
- Courts may lose some of their legitimacy because they are further from contact with people.

¹³² HiiL, “Three Implied Strategies and Their Implications” (Hague: 17 June 2013) www.futureofcourts.org/strategies/.

Courts as solvers of legal issues

- Courts are there to provide answers to legal questions.
- The court “will not go into the conflict itself, but is the help desk for the legal problem or for qualification of facts under the law”.
- This model matches the tradition of legal education and refers users to other professions for other types of help.
- Mismatches between legal, psychological and technical expertise, perhaps leading to procedural issues and extended litigation. Risk of being too bureaucratic or legalistic: “A lawyer’s paradise, but not necessarily a paradise of justice.”

Courts as adjudicators of problems between people

- Courts are THE service that adjudicates problems: crimes and disputes as they are experienced by people in their personal lives, in in business or in dealing with their government.
- Deal with large volumes of cases in a standardized way quickly.
- Problem solving courts will use many techniques to stimulate settlement and make decisions when settlement efforts fail.
- Great added value to society as they can be counted on to solve any serious issue in a fair way.
- Courts will need to adapt to new demands and some judges may find it difficult to adopt these new skills.
- Funding may be a serious issue and the system would depend on cooperative lawyers.

This framework provides a useful starting point to discuss the implications of court reform. The first two scenarios would result in a de-centring of courts in the civil justice system, and a corresponding decrease in their accessibility and role in people’s lives. The last scenario is favoured

by the Committee, involving re-centring of the courts to be the main path to dispute resolution processes and referral to other services for non-legal aspects of people’s problems.

This re-centring of courts would involve transformation and overarching innovations. Global trends offer insight into which tools and approaches are most effective for court-based reform. These include a systems approach that integrates the wider context, using new information technology, distinguishing the minority of complicated cases from standard cases, distinguishing high and low value users, involving the private sector and empowering communities, users and staff.¹³³ Some specific reforms have proven to be particularly effective, such as court specialization.¹³⁴ Good results have also been obtained from making early hearings focused on providing advice about possible settlement options and early neutral evaluation the normal starting point. These early hearings would be followed by a second hearing a few weeks later.

Transcending the SRL Phenomenon

One of the greatest pressures on civil courts in Canada and the US today is the exponential growth of unrepresented or self-represented litigants. From one perspective, this is and should be the driving force of reform: courts should change to be more directly accessible to litigants without representation. While recognizing the immediate need to accommodate people without representation, the Committee questions this as a principled foundation for reform. There is mounting evidence that unrepresented litigants are at a high risk of not receiving meaningful access to justice. It is also unfair to all involved for judges and court staff to be responsible for finding solutions to a critical systemic problem resulting from failures of the justice system as a whole, notably including governments and the legal profession.

¹³³ Sandford Borins, “Public Management Innovation: Toward a Global Perspective” (2001) 31 *American Review of Public Administration* 5.

¹³⁴ Sam Muller, Maurice Barendrecht, Robert Porter, Wilfried de Wever, Eva Pouwelse and team, *Innovating Justice: Developing new ways to bring fairness between people* (The Hague: HiiL, 2013) at 55-58 <http://www.hiil.org/data/sitemanagement/media/Sneakpreview%20Innovating%20Justice.pdf>.

Certainly, short-term strategies must include accommodating unrepresented litigants and ensuring fair treatment (including by opposing counsel), as outlined in the Macfarlane study, but the ultimate goal should be to transcend the unrepresented litigant phenomenon by providing more seamless delivery of legal services to everyone, including representation when required. This perspective does not mean that there will be no unrepresented people by the Committee's suggested target date of 2030, but it does mean that unrepresented litigants will no longer be considered a "problem". Some people will self-represent, not because there is no viable alternative, but because they are able to do so competently given the nature of their problem or dispute, the process and their capacity to participate fully and effectively with available supports.

Court-based Triage and Referral

Effective triage and referral to appropriate services and processes is key to transcending the unrepresented litigant phenomenon and transforming courts to be fully centred in the broader civil justice system. Re-centred courts will develop capacity for triage and referral that complements and works in coordination with the jurisdiction-wide and community based networks that facilitate everyday justice, as proposed in the previous section.

Zorza has developed two models for court-based triage, one based on an individual decision-maker and the other on a computerized algorithm.¹³⁵ The aims and general approach of the two models are fundamentally the same. Either model would unify the two sorting processes required; to determine how a court will handle a case and how litigants will obtain the services they need to interact with the court and other players. (This would include situations in which going to court would not be involved.)

Zorza and other US civil justice researchers, including Russell Engler, have written extensively about the importance of understanding the

relationship between court processes and providing services for litigants. These are "moving targets" and the goal is to "figure out how the two processes can work together to provide both optimum case handling from the court's point of view and access from the litigants' point of view."¹³⁶ An embedded centralized triage system would take into account innovations on both fronts, again serving as a focal point for learning and integrating new insights.

Zorza's models are well-developed and offer an excellent starting point for an initiative of this type in Canada. He recommends that the system be based not on categories of cases, but on the tasks required of the litigant and the court or other decision-maker. He identifies the following potential "court tracks":

- Non litigation situations (which would jump to the next step, with the process possibly then managed by a services program rather than by the court)
- Uncontested cases requiring no court involvement beyond approval
- Uncontested cases requiring non-judicial court involvement to optimize agreement and decisions for fairness and finality
- Contested cases amenable to alternative dispute resolution
- Contested cases requiring single final resolution between parties
- Contested cases requiring extensive supervision of the pre-trial process
- Contested cases likely to require ongoing decision making and compliance activity.¹³⁷

Breaking down litigant tasks and sub-tasks (such as preparing pleadings, presenting evidence, preparing analysis and judgments) so litigant capacity can be assessed is a complex task. However, a growing body of research in this area centred on the experience of unrepresented litigants to date can be

¹³⁵ Zorza, *supra* note 102.

¹³⁶ *Ibid.*

¹³⁷ *Ibid.*

harnessed to develop principled criteria.¹³⁸

Court Specialization

Specialized courts, both by problem type and target group, have been demonstrated to contribute to access to justice and quality of decision making. Indeed, the administrative law revolution was based on this premise. Despite the knowledge that specialized courts generally enhance efficiency, there is substantial resistance to this trend in the legal community. At the Summit, Muller spoke about the dichotomy between generalization and specialization, and the tension between the two. He emphasized that most innovation comes from specialization and so allowing for specialization is a positive goal.

Court specialization goes hand in hand with community-based justice models and integrated support systems able to assist people in a more holistic and collaborative way. Often these models and systems focus on criminal law matters and the intersection between people facing particular challenges, such as drug addiction or mental illness, and minor crime. In the civil context, specialization and holistic approaches have mainly been developed in the family law area and there is much scope for expansion on this front. Some specialized courts, including domestic violence courts, deal with overlapping criminal and civil matters. Others focus on a particular group of people, rather than an area of law. For example, there is a strong movement in Canada to approach issues faced by people with Fetal Alcohol Spectrum Disorder as an access to justice issue and to develop specialized approaches to the multiple legal problems experienced by members of this vulnerable group (child welfare, family, criminal, guardianship and trustee), including fully integrated preventative measures.¹³⁹ This approach acknowledges that

¹³⁸ Some examples include the work of Engler, *supra* note 25 or Sandefur, *supra* note 25 and 32. Also, see report on online family mediation by Tilburg University's Institute for Interdisciplinary Studies of Civil Law and Conflict Resolution Systems in the Netherlands: www.adrresources.com/adr-news/802/online-family-mediation-netherlands-tilburg-university-tisco.

¹³⁹ Consensus Development Conference on Legal Issues of FASD held in Edmonton Alberta, September 2013 www.fasdedmonton2013.ca/FASD-Legal/Default.aspx. See also, Canadian Bar Association Resolutions 10-02-A and 13-12-A.

access to justice involves systemic issues and is not simply about how individuals can handle legal problems.

Learn More: about Good Practices in Court Specialization

Ontario - Domestic Violence Court (DVC) Program:

www.attorneygeneral.jus.gov.on.ca/english/about/vw/dvc.asp

New Brunswick – Mental Health Court:

www.mentalhealthcourt-sj.com/home.html

British Columbia - First Nations Court:

www.lss.bc.ca/aboriginal/firstNationsCourt.php

Alberta - New Ways for Families initiative:

www.newways4families.com/HCI-Articles/current-program-locations.html

UK - Specialist Domestic Violence Courts 2013:

www.cps.gov.uk/publications/equality/vaw/sdvc.html

US - San Diego Superior Court Launches Behavioral Health Court:

www.internationalbipolarfoundation.org/san-diego-superior-court-launches-behavioral-health-court

Australia - Mental health court diversion and support program:

www.mentalhealth.wa.gov.au/mentalhealthchanges/Mental_Health_Court_Diversion.aspx

New Zealand - Family Court of New Zealand:

www.justice.govt.nz/courts/family-court/what-family-court-does/mental-health

and, about Unified Family Courts -

www.attorneygeneral.jus.gov.on.ca/english/family/famcourts.asp

www.court.nl.ca/supreme/family/index.html

www.gov.mb.ca/justice/family/law/englishbooklet/chapter2.html

Courts as Learning Organizations

Re-centred courts would have increased capacity and resources to engage in sustained innovation and more assertively become learning organizations. A learning organization is one that can continually transform itself by integrating evidence-based practices and facilitating individual and shared learning and systemic thinking.¹⁴⁰ This model would assist in meeting the challenges of change by replacing structures and individual thinking, which tends to grow rigid and be best suited for short term or single loop learning, with an evolving understanding and problem-solving capacity. Learning organizations develop responsive cultures that maintain knowledge about new processes, understand the outside environment and produce creative solutions using the combined knowledge and skills in the organization.¹⁴¹ This requires cooperation between individuals and groups, strong communication and a culture of trust.¹⁴²

In the context of courts, learning involves soliciting feedback from the people accessing court services and effectively using that feedback to inform innovations and reforms. Learning also involves developing and testing prototypes for procedures and evaluating them to ensure that reform is evidence-based to the greatest extent possible. Much can be gained by sharing best practices between courts and tribunals and by coordinating reforms across different courts to minimize

duplication of efforts. The Canadian Institute for the Administration of Justice already facilitates an important dialogue between courts and administrative tribunals, but these opportunities for exchange should be increased.

Global developments and initiatives can also contribute to innovation in Canada. The International Centre for Court Excellence is developing a framework for court excellence that includes draft global measures for court performance to help courts improve their operations. The global measures consist of eleven “focused, clear, actionable, core court performance measures” consistent with “universally accepted judicial values and areas of court excellence”.

These measures deconstruct the key question, “How are we doing?” The measures are court user satisfaction, access fees, case clearance rate, on-time case processing, pre-trial custody, court file integrity, case backlog, trial date certainty, employee engagement, compliance with court orders, and cost per case. The measures and particularly public reporting on them contributes to both transparency and accountability. At the same time, while responsibility for performance is mainly assumed by the courts, it must be shared by all actors and organizations engaged in justice. It is ambitious but possible to imagine that by 2030, courts around the world, including Canadian courts, will report in a common framework of this type on their websites.¹⁴³

To achieve equal justice, judges, and particularly those in positions of judicial leadership, must advocate for reform within and beyond the court, and be concerned about the functioning of the civil justice system as a whole. Canada is fortunate to already have powerful role models in this regard. This critical role would be supported by the robust internal structure of the court as a learning organization. These issues are discussed more fully in Part III, including the US experience with access to justice commissions, where judicial leadership is often cited as the main prerequisite for success.

¹⁴⁰ See, for example: M. Pedler, J. Burgogyne, and T. Boydell, *The Learning Company: A strategy for sustainable development*, 2nd ed (London: McGraw-Hill, 1997); T. O’Keefe, “Organizational Learning: a new perspective” (2002) 26:2 *Journal of European Industrial Training* 130; C.L. Wang and P.K. Ahmed, “Organizational learning: a critical review” (2003) 10: 1 *The Learning Organization* 8; D. McHugh, D. Groves and A. Alker, “Managing learning: what do we learn from a learning organization?” 5:5 *The Learning Organization* 209; David R. Schwandt and Michael J Marquardt, *Organizational Learning* (Boca Raton: St. Lucie Press, 2000); Peter M. Senge, *The Fifth Discipline: The art and practice of the learning organization* (New York: Doubleday, 1990); Peter Senge, Art Kleiner, Richard Ross, George Roth and Bryan Smith, *The Dance of Change* (New York: Currency Doubleday, 1999); P.M. Senge, “The art and practice of the learning organization” in *The new paradigm in business: Emerging strategies for leadership and organizational change* (1990) at 126-138 www.giee.ntnu.edu.tw/files/archive/380_9e53918d.pdf.

¹⁴¹ C. Argyris, *On Organizational Learning* (2nd ed) (Oxford: Blackwell Publishing, 1999).

¹⁴² *Ibid.*

¹⁴³ See the work of Hiil at www.hiil.org/.

Expanding Judicial Functions

As members of the justice community, many of us share a traditional and limited conception of the role of judges, presiding over trials, hearing and evaluating evidence, finding facts, applying the appropriate legal standards, making judgments and dispensing justice. Particularly during the pre-trial phase of civil cases, judges have traditionally assumed a fairly passive role, allowing lawyers to control the progress and pace of the litigation. In the words of Lord Denning, he or she “must wear the mantle of a judge and not assume the robe of an advocate”. Judges must be free of bias and perceived as neutral and impartial at all times, and a more active role can suggest that the adjudicator has taken sides and prejudged the facts, evidence or credibility.

At the same time, judges have an overarching responsibility to ensure fairness of the proceedings and the efficiency and effectiveness of court procedures. At the Summit, Ottawa-based mediator and arbitrator Ian Mackenzie discussed contemporary challenges to the traditional role of judges, noting that it assumes:

- parties are well represented,
- truth will emerge from a contest of positions,
- parties will ensure that the public interest is reflected in evidence and arguments, and
- lawyers will be officers of the court (not relevant for unrepresented litigants).

According to Mackenzie, these traditional assumptions will be challenged by the “excessive adversarialism” that can result when parties are not represented. Unrepresented parties often lack knowledge about substantive law, procedures and rules, do not understand why processes need to be followed, lack objectivity or advocacy skills, and possibly have misplaced confidence in their abilities.

A more expansive view of the judicial function has developed in response to current challenges. This expansion is centred on more active case management, increased judicial dispute resolution and more active adjudication. Administrative tribunals have led the way in these developments, due in part to their greater institutional flexibility.

Many courts around the world have already embraced an expanded view of judicial roles and responsibilities in individual cases. In Canada, acceptance and comfort with this expansion varies widely in the judiciary and the bar, with enough discomfort to slow, and in many cases halt, reform. The Committee proposes that by 2025, these processes will have become mainstream in all courts and courts will be performing new functions in line with their re-centred status in the civil justice system. In some cases, effective implementation of novel functions will require courts to have a broader range of quasi-judicial officers with specialized functions, such as alternative dispute resolution.

Courts and judges must be provided with the knowledge and resources to make these changes effectively. There are also implications for the judicial appointment process, such as the need to allow consideration of candidates’ openness to and suitability for broader judicial functions.

Active Case Management

Case management was adopted by Canadian courts from the 1990s onward to address costs and delays in the justice system. Parties traditionally controlled the timing of case events within the overarching structure of court rules. Case management systems proscribe the timing of events to a greater degree. ‘Active’ case management means the judge takes responsibility for improving efficiency in the court, displacing the role of lawyers in this regard. This judicial function is essential both in the pre-hearing and hearing phases.

Summit participants cautioned that it is uncomfortable for many in the justice system to challenge or suggest changes to traditional approaches to the respective responsibilities of judges and lawyers. Some judges are more willing to take on the responsibility of preventing unnecessary delays. Also, active judicial case management can lead to other problems such as increased complaints of judicial bias and lawyers relying too heavily on case managers. Changes in this area must be fully supported by effective rule making and measures to promote cultural change through education. An iterative implementation process with enhanced opportunities for feedback and evaluation about how more active case

management is in fact being implemented is necessary.

Judicial Dispute Resolution

The Committee proposes that by 2025, re-centred courts will offer more tailored dispute resolution processes, with a greater range of approaches to timely settlement. In some cases, this could mean referring parties outside of the court to more suitable processes, but it could also involve a greater capacity for judicial dispute resolution, particularly for the range of mediation processes.

Some Canadian courts and judges have embraced judicial dispute resolution, while others maintain the view that judges are appointed to decide. Similarly, the legal profession is not uniformly supportive of these developments. However, at least one provincial court has a new regulation for the judicial selection committee, allowing that committee to explore applicants' capability and willingness to engage in new dispute resolution methods. The Ontario Bar Association is also engaged in a two-year study on judicial dispute resolution aimed at fostering similar developments. "The courts in Alberta administer a judicial dispute resolution program that provides litigants with an opportunity to schedule a confidential dispute resolution session with a Superior Court or Court of Appeal judge. Research undertaken in respect of the efficacy of this program suggests that approximately 90% of the cases subject to judicial dispute resolution... settle in whole or part."¹⁴⁴ Still, there

¹⁴⁴ National Action Committee, Court Simplification report, *supra* note 68 at 14. At footnote 33, the Working Group notes that, "[a] review of all of the provincial rules of court indicates that settlement conferences are generally in use across the country. For example, British Columbia's Court of Appeal offers judicial settlement conferences (see British Columbia Court of Appeal Practice Directive, "Judicial Settlement Conferences"); the Queen's Bench Rules in Saskatchewan contemplate judges assisting with settlement (see rR 1-3(1)-(4), 4-7(1)(e)); judges hearing a case management conference in the Northwest Territories can facilitate settlement and as a means of doing so, assist with settlement discussions or even hold a mini-trial in which he or she can provide a "non-binding advisory opinion" (see Rules of the Supreme Court of the Northwest Territories, R-010-96, pt. 19, r 292); a judge-assisted settlement conference process, which was recently expanded, has been in place in Quebec for a number of years now (see *Code of Civil Procedure*, R.S.Q., c. C-25); Nova Scotia, Newfoundland and Labrador and New Brunswick also have judicial settlement conference regimes (see respectively Civil Procedure Rules of Nova Scotia, pt. 4, r 10.11-10.16; Rules of the Supreme Court, 1986, S.N.L. 1986, c. 42, Sched. D, as amended at r 39; and Rules of Court, N.B. Reg. 82-73, r 50.07-50.15)."

are remaining concerns about the availability of dates for this process, and the cost and complexity for the preparation of materials, which limits how accessible these options actually prove to be.

Active Adjudication

Judges engage in active adjudication by taking on a greater role in ensuring that the court has the evidence it requires to make a just decision. At its most basic, this approach suggests a judge simply looks at the decision required and determines what is needed to make that decision. This is a direct response to the growing number of unrepresented litigants and recognition that the adversarial process does not serve them well. Mackenzie describes active adjudication as "bending" the adversarial process to make it more amenable to unrepresented people without actually 'breaking' it and becoming an inquisitorial system. The major concern is that judges may 'cross a line' of involvement and appear to be biased – this is particularly valid when one party is represented and the other is not.

Zorza describes active adjudication as judges being engaged while remaining neutral. At the Summit, he described a research project that videotaped hearings with unrepresented litigants in courtrooms in four states. The videotapes were then shown to the litigants and judges separately, and each had the opportunity to explain what they were trying to say and what they saw happening. Litigants also offered their views on characteristics of 'good judges', as those who:

- are good at framing their cases – explain what happened in last court hearing, what is expected to be discussed that day, remind that all decisions are in best interests of the children (if family), explain that the judge will be asking questions
- are good at probing – trying to identify the issues and resolving them; questioning and framing the questions and reminding that the judge is asking questions because they need to get to the facts
- explain decisions very clearly
- use reassuring language – affirming without judging, saying things like, "I'm not judging you

as people” or “I really appreciate you both love your children”

- discuss when the next court hearing will be or what will happen next
- have effective body language, for example “using hands to convey equality”
- use simple clear respectful caring words.¹⁴⁵

Mackenzie described a model of active adjudication currently employed for some cases by the Ontario Human Rights Tribunal (in others the hearing is run like a traditional trial). Tribunal rules say the:

Tribunal can define or narrow issues, limit evidence or submissions, require witness statements, and require narrative at beginning of the hearing. An adjudicator can conduct examination in chief and cross-examination, can prescribe stage at which preliminary procedural or interlocutory matters are dealt with, and require party to adduce evidence or call witnesses “reasonably within their control”.¹⁴⁶

Mackenzie describes his “active adjudication toolkit” as including the following skills:

- Defining or narrowing the issues to be decided
- Limiting evidence or submissions on any issue
- Requiring witness statements
- Permitting a party to give a narrative before questioning
- Determining the order of evidence and issues
- Conducting examination-in-chief and cross-examination
- Prescribing the stage at which preliminary, procedural or interlocutory matters will be dealt with
- Requiring a party to adduce evidence or call witnesses “reasonably within their control”.

Other assistance provided to unrepresented litigants by judges and adjudicators includes less active forms of intervention, such as directing

litigants to resources available on the internet that may apply to their case, advising of other available resources including public mediation services, and at the trial management conference, offering litigants a summary of what will be expected of them at their forthcoming trial.

Supporting Court Innovation: Technology and Rules

The task of transforming formal justice should begin by considering broad strategies for reform, the implications of those strategies for the structures and processes used by courts, and the courts’ relationship to external service providers and the civil justice system as a whole. Closely connected are questions related to the judicial functions needed to meet these new roles and responsibilities, and how to support those functions by integrating technology to re-engineer processes and communication with users of court services and to support management functions. Court rules and administration can also play a key role in either supporting or deterring innovation.

The Australian report on enhancing access to justice through technology provides an overview of how courts and tribunals are increasingly using technology. Initiatives include a move to virtual courtrooms that allow documents to be filed electronically (e-filing) and, in some instances, for formal submissions, directions and other orders in pre-trial matters to be conducted by electronic means. There is also some progress toward integrated court management systems to give all courts and tribunals a single, integrated technology platform and set of applications, rather than having them work across different systems.¹⁴⁷

In Canada, similar initiatives are underway. British Columbia’s Court Services Online provides electronic searches of court files, online access to daily court lists and e-filing capacity. E-filing initiatives are in place in several courts, including the Alberta Court of Appeal, the Superior Court in Newfoundland and Labrador (in estate matters) and the Federal Court of Canada. An Alberta Court of Appeal practice direction supports

¹⁴⁵ www.accesstojustice.net/2013/08/04/tools-for-srl-courtroom-observation-project/.

¹⁴⁶ www.hrto.ca/hrto/index.php?q=en/node/28.

¹⁴⁷ Australian Report, *supra* note 116.

e-appeals if both parties consent or the court orders them.¹⁴⁸ Other initiatives include internal web-based tracking of court files, online access to court record information, electronic storage and retrieval of court documents, interactive court forms, e-hearings so proceedings can be held entirely electronically, and online information to assist self-represented litigants.¹⁴⁹ Examples of online information include the Montréal Bar’s “best practices guide” to assist individuals with different aspects of litigation, Newfoundland and Labrador and the Public Legal Information Association’s booklets on a range of legal topics at the courts, Clicklaw in British Columbia, the Ontario Attorney General’s self-help guides about family court rules and procedures and LawHelp Ontario’s information booklets and how-to manuals for unrepresented litigants to assist in preparing court documents and participating in certain court processes. Québec has also recently implemented a Justice Access Plan with increased and new uses for technology to enhance access to justice, such as by obtaining testimony through videoconferencing.

A concrete example of the potential of technology highlighted at the Summit was in the area of family law. Segments of the Canadian population move around the country for employment. This results in multi-jurisdictional family law issues, which can be difficult to navigate without legal help. Use of information technology for court processes across jurisdictions could transform these issues. One participant noted that: “interjurisdictional child and spousal support orders take months, or sometimes years, to flow through the system in two jurisdictions. Making efficient technology available to allow for the transmission of documents and attendance at hearings electronically could substantially impact how mobile families (and other litigants) access the justice system.”

Simplifying court processes and rules to support the transformation of formal justice is another important path to equal justice. As Muller highlighted at the Summit, rules should not lead the innovation process, as rulemaking is too rigid a process compared to problem-solving methods.

¹⁴⁸ National Action Committee, Court Simplification report, *supra* note 68.

¹⁴⁹ *Ibid* at 5.

Further, our rapidly changing environment and the need to tailor processes to particular types of disputes suggest that flexible guidelines may often be more useful than rules. Rules that are permissive, as those discussed above in the Ontario Human Right Tribunal context, may be most effective. Some Summit participants spoke about the ways that rule changes can have a mixed impact on access to justice. For example, they can contribute to judicial efficiency but also add costs for litigants (particularly those requiring documents submitted in writing before court appearances). Zorza has proposed guidelines for choosing measures for court simplification:

1. Work for all stakeholders
2. Help ensure focus on law rather than technicalities
3. Help ensure parties are fully heard by decision maker
4. Increase transparency
5. Underlying substance of law should be able to be applied in simplified process
6. Result in less time, less cost
7. Prevent reintroduction of complexity.¹⁵⁰

The focus on learning through feedback from users of court services and rigorous evaluation is essential for ensuring that changes are doing what they were intended to do. Evidence from other jurisdictions is mounting on what rule changes work best to enhance access to justice, with fixed trial dates within two years of commencement at the top of the list (unless the dispute is not ripe for settlement, e.g. a personal injury case when it is too early to assess damages).

¹⁵⁰ Richard Zorza, “Some First Thoughts on Court Simplification: The Key to Civil Access and Justice Transformation” (2013) 61 Drake Law Review 845.

Learn More: about Court Reform and Rule changes

National Action Committee, Court Simplification Working Group Report:

www.cfcj-fcjc.org/sites/default/files/docs/2013/Report%20of%20the%20Court%20Processes%20Simplification%20Working%20Group.pdf

Hague Institute for the Internationalisation of Law (Hiil): www.hiil.org/

Rechtwijzer 2.0: www.rechtwijzer.nl/www.hiil.org/project/rechtwijzer

Roger Smith, "Can digital replace personal in the delivery of legal aid?" A discussion paper for the conference of the International Legal Aid Group, 2013: www.ilagnet.org/jscripts/tiny_mce/plugins/filemanager/files/The_Hague_2013/Session_Papers/5.1_-_Roger_Smith.pdf

Canadian Centre for Court Technology: www.ccct-cctj.ca/

E. Rowden, A. Wallace, D. Tait, M. Hanson & D. Jones, "Gateways to Justice: design and operational guidelines for remote participation in court proceedings" (Sydney: University of Western Sydney: 2013), accessed from: www.uws.edu.au/justice/justice/publications

Association of Canadian Court Administrators: www.acca-aaaj.ca/

Laboratoire de cyberjustice laboratory, University of Montreal and Towards Cyberjustice project: www.site.cyberjustice.ca/en/Home/Home

International Centre for Court Excellence: www.courtexcellence.com/

Global Measures of Court Performance: www.courtexcellence.com/~/_media/Microsites/Files/ICCE/Global%20Measures_V3_11_2012.ashx

BC Property Assessment Appeal: www.assessmentappeal.bc.ca/

BC Civil Resolution Tribunal: www.ag.gov.bc.ca/public/WhitePaperTwo.pdf

Centre for State Courts: www.ncsc.org/Topics/Technology/Technology-in-the-Courts/Resource-Guide.aspx

Re-centring Courts

Re-centred courts will offer tailored public dispute resolution services with effective internal and external triage and referral processes, and will employ a wide range of quasi-judicial officers to assist litigants to achieve just and timely outcomes. Re-centred courts will be dedicated to innovation, learning and integration of evidence-based best practices. They will be open to feedback from users of court services and to developing transparent performance evaluation measures. As a result, judges will need to be ready to integrate new functions and approaches, potentially including active case management, judicial dispute resolution, specialization, court simplification and active adjudication models. Many Canadian courts have already taken steps in these directions and should be supported in these reform efforts. Reaffirming the role of courts at the centre of the civil justice system also involves building a new type of relationship between courts and other justice organizations. Issues for relationship building, structures for collaboration and leadership functions are discussed further in Part III.

Target: By 2025, courts are re-centred within the civil justice system and resourced to provide tailored public dispute resolution services with effective internal and external triage and referral processes.

Milestones:

- All courts have effective triage and referral systems
- All courts have the capacity to provide a range of dispute resolution processes and provide tailored, simplified processes
- Courts employ a wide range of quasi-judicial officers to assist litigants to achieve just and timely outcomes
- Courts have the resources to carry out this range of functions

Actions:

- Courts develop and employ a range of mechanisms to solicit feedback from people

accessing court services and use these perspectives to inform innovations and reforms

- Courts develop and test prototypes of specialized procedures for priority categories of cases. Piloting different prototypes in each jurisdiction within an overarching strategy could maximize use of resources, avoid duplication of effort and enhance evidence-based reform
- The National Action Committee, its successor or another national organization develops an evidence-based best practices guide to assist courts in their access to justice innovations
- Judicial appointment processes take into consideration candidates' openness to and suitability for broader judicial functions, including active case management and judicial dispute resolution methods
- The CBA champions this re-centred role for the courts within a coherent civil justice system: a central role not based on traditional, status quo role of the courts but on this people-centred vision

What do you think?

- Any feedback or suggestions?
- Who should be involved?
- Are you willing to help?
(write to: equaljustice@cba.org)

Re-inventing the Delivery of Legal Services

The third lane of the bridge to equal justice is reinventing the delivery of legal services. Both everyday justice and formal justice depend on having a spectrum and continuum of legal services available to meet the range of legal needs. The goal is seamless legal services delivery: to ensure meaningful access to justice in every case without the 'legal assistance deserts' in the current inequitable landscape of services.

The Committee believes that the first step is to define the concept of essential legal needs and then to find ways to meet those needs. **Essential**

legal needs are those that arise from legal problems or situations that put into jeopardy a person's or a person's family's security – including liberty, personal safety and security, health, employment, housing or ability to meet the basic necessities of life. A main objective of equal justice efforts must be to provide the necessary legal services to meet all essential legal needs.

The Committee's *Proposed Responsibility for Legal Needs* connects the spectrum of legal service providers and the continuum of legal services with categories of essential legal needs. A range of approaches is needed to reach this goal, along with a commitment to finding new and creative ways to address existing gaps in legal services. Some essential legal needs can be fully met by the private market, while others can only be adequately met through publicly funded legal services. Over the past two decades, the centre area of the spectrum between these two sources of legal services has grown in response to failures of both private and public providers to meet the most pressing and/or essential legal needs. Organized pro bono efforts and other specialized services, many based on public-private partnerships, have developed and expanded greatly during this period to fill gaps in legal service provision.

Reinventing legal services for equal justice involves meeting three challenges:

- ensuring the most effective delivery of both private and public legal services;
- achieving a consensus on where responsibility for meeting legal needs falls on this spectrum, from private to public service deliverers; and
- reaching a better understanding of the structure and role of service providers in the middle area between private and public services.

As shown in the diagram below, the Committee proposes that the main targets of reform should be to improve capacity at both ends of the publicly funded/private spectrum, to provide meaningful access to justice for people experiencing legal problems related to essential legal needs. Pro bono organizations and programs and public-private partnerships are best positioned to deliver legal services for important but non-essential and specialized needs that people cannot meet within the private market. This section also discusses the significant contribution of law schools and law societies to reaching equal justice.¹⁵¹

Two competing pressures on legal representation services cut across the spectrum of service providers: the increasing unaffordability of legal services has given rise to a demand for piecemeal or partial services delivered by a broader range of providers, while the growing understanding that legal problems are often intertwined with non-legal problems has led to a demand for more holistic approaches that meld legal and non-legal services. Health care and dental care services are increasingly delivered in teams, for cost-effectiveness and quality of service, and legal services providers are at an early stage of incorporating this service delivery model.

¹⁵¹ The extent to which law firms and practitioners can innovate to better address the range of legal needs is also being examined by the CBA Legal Futures Initiative in the areas of business structures and innovation, legal education and training, and ethics and regulation of the profession.



Limited Scope Retainers

The greatest potential for achieving meaningful access to justice and fair and lasting outcomes comes from a comprehensive, holistic approach. Yet, a current trend to make legal services more affordable to clients or reduce cost to the providing organization is moving away from the holistic approach, and to limited scope retainers or unbundled legal services. This issue cuts across the service delivery spectrum, affecting lawyers in private practice, legal aid and those working pro bono, as well as those providing other forms of legal assistance, also increasingly in a limited, piecemeal fashion.

Limited scope services often rely on clients to sort out what services they need and when. Delivering these services also pressures lawyers to help clients find their way to other services.

Lawyers and legal regulators have been somewhat wary about this development. Professional obligations require a cautious approach to isolating elements of legal services for limited representation. This does not mean that it cannot be done, only that it must be done in a manner that ensures protection of individual clients and the overall public interest. Five law societies have provided detailed guidance to their members on how to meet their professional obligations when providing unbundled services.

Empirical research to date has found that limited scope services are of questionable benefit to many people participating in adversarial proceedings. An unbundled service is not the same as having legal representation. The Australia Law Reform Commission concluded that “unbundling can really only work for educated, articulate litigants in routine matters”.¹⁵² A US study found that SRLs have to carry out an average of 193 tasks to prepare for and participate in a formal hearing.¹⁵³ Further, individuals need to “pull it all together” which many SRLs, including the majority of participants in the

¹⁵² LAW report, *supra* note 23.

¹⁵³ Ronald W Staudt and Paula L Hannaford, “Access to Justice for the Self-Represented Litigant: An Interdisciplinary Investigation by Designers and Lawyers” (2002) 52 *Syracuse L Rev* 1017 at 1021.

Macfarlane study, find very difficult.¹⁵⁴ Other specific concerns are lawyers’ ability to offer sound advice without the full picture of their clients’ situation and how to ensure that an individual understands and is able to follow through on the instructions provided by the lawyer.

It is at least possible that the unbundled model, despite serving many more low-income people, might actually be making inefficient use of resources. To use a simplified analogy: If there exists a finite supply of AIDS drugs to distribute in sub-Saharan Africa, should it be divided equally among those who want it, even if this requires lowering the dose to an untested level that has not been proven to improve survival rates? Or should a full dose of medication, proven to boost survival, be provided to a smaller number of AIDS patients, with the remainder of the population required to wait for the next shipment of drugs? Unless and until it is proven that limited intervention on behalf of low-income clients is successful in producing better outcomes than litigants can attain on their own, a return to the traditional model of full representation for fewer clients--a proven model of success--should at least be considered, and resource and policy decisions should be made to facilitate increased access to full representation.

Jessica Steinberg (see note 62)

From an equal justice perspective, the question is whether limited scope services in a particular context are consistent with the **meaningful access to justice** standard?¹⁵⁵ To answer this question we need to consider who may benefit from what types of limited legal services and in which situations. Meaningful access is advanced when

¹⁵⁴ Macfarlane study, *supra* note 6.

¹⁵⁵ See *infra* at 61.

these services are provided to capable litigants through an effective relationship between lawyer and client. For example, coaching, particularly during a hearing, can mean the difference between ineffective or effective assistance. However, limited scope services are not the solution for everyone.

The Committee proposes an overarching goal should be to ensure that limited scope services are only offered where the “meaningful access” standard is met. Overall this requires a range of private market and publicly funded solutions aimed at making representation more accessible. It also requires a new model of lawyering based on a reciprocal partnership between the provider of legal services and the client and where the service provider knows about alternate sources of information useful to their clients and collaborative networks with other service providers. This point underscores the importance of lawyers and other legal service providers collaborating with PLEI providers.

Target: By 2020, limited scope legal services are (only) offered in situations where they meet the meaningful access to justice standard.

Milestones:

- *Best practice guidelines, based on empirical studies of emerging limited scope service models and their impact on meaningful access to justice are in place.*

Actions:

- *All law societies provide detailed guidelines to lawyers providing limited scope services, including advice and precedents for limited scope retainers*
- *Bar associations, law societies and legal aid organizations develop resources to assist lawyers to provide limited scope services in an integrated, seamless way by equipping lawyers to inform clients about other service providers and sources of information*
- *The CBA provides professional development on coaching and other skills that support the delivery of effective limited scope services*

- *The CBA, law societies, other bar associations and legal aid organizations work with PLEI organizations to inform the public about limited scope services*
- *The CBA and the Federation of Law Societies ensure the integration of existing research and evaluations of limited scope service models to formulate evidence-based best practices and identify further research needs*

What do you think?

- Any feedback or suggestions?
- Who should be involved?
- Are you willing to help?
(write to: equaljustice@cba.org)

Team Delivery of Legal Services

Recognizing the value of a continuum of legal services approach means recognizing the importance of increased diversity and specialization among legal service providers and enhanced capacity to provide comprehensive, cost-efficient services through teams of lawyers, other legal service providers (like paralegals) and providers of related services (like social workers). Teams can deliver more comprehensive and holistic services tailored to people’s needs.

Advances have been made in the team delivery of legal services in both law centres and community-based and specialized courts. Inter-professional collaboration in one agency has many advantages: allowing clients to “one-stop-shop” and avoid referral fatigue, making legal services more time and cost effective by relieving legal staff from lengthy counseling sessions they may be ill equipped to handle and providing in-house education for legal staff through regular meetings and ad hoc consultations with other staff professionals.¹⁵⁶ The presence of other professionals can also give legal staff a different and useful perspective about client circumstances.

¹⁵⁶ SPARC report, *supra* note 114.

Learn More: about Integrated Legal Assistance Services

See, Australian report (note 23), specifically Ch 10:

A Holistic Approach to Justice:

[www.lawfoundation.net.au/ljf/site/templates/LAW_SA/\\$file/LAW_Survey_SA.pdf](http://www.lawfoundation.net.au/ljf/site/templates/LAW_SA/$file/LAW_Survey_SA.pdf)

Multifaceted Justice for Diverse Needs:

[www.lawfoundation.net.au/ljf/site/templates/LAW_SA/\\$file/LAW_Survey_SA.pdf](http://www.lawfoundation.net.au/ljf/site/templates/LAW_SA/$file/LAW_Survey_SA.pdf)

Tailoring Services for Specific Demographic Groups:

[www.lawfoundation.net.au/ljf/site/templates/LAW_SA/\\$file/LAW_Survey_SA.pdf](http://www.lawfoundation.net.au/ljf/site/templates/LAW_SA/$file/LAW_Survey_SA.pdf)

Accessible Legal Services:

[www.lawfoundation.net.au/ljf/site/templates/LAW_SA/\\$file/LAW_Survey_SA.pdf](http://www.lawfoundation.net.au/ljf/site/templates/LAW_SA/$file/LAW_Survey_SA.pdf)

More Integrated Services:

[www.lawfoundation.net.au/ljf/site/templates/LAW_SA/\\$file/LAW_Survey_SA.pdf](http://www.lawfoundation.net.au/ljf/site/templates/LAW_SA/$file/LAW_Survey_SA.pdf)

Tailoring Services for Specific Legal Problems:

[www.lawfoundation.net.au/ljf/site/templates/LAW_SA/\\$file/LAW_Survey_SA.pdf](http://www.lawfoundation.net.au/ljf/site/templates/LAW_SA/$file/LAW_Survey_SA.pdf)

Canadian examples:

Youth Criminal Defence Office – Alberta:

In addition to providing counsel, YCDO has youth workers authorized to assist clients with broad spectrum support - ranging from bus tickets to advocacy for suitable residential placements - to address the issues they face from a holistic perspective:

www.legalaid.ab.ca

Legal Aid Alberta, Calgary Legal Guidance and Edmonton Community Legal Centre are working to develop a common intake form that will assist with cross referrals to provide more efficient services to clients.

Legal Aid Nova Scotia:

For Newcomers to Canada: www.legalinfo.org/i-have-a-legal-question/newcomers-to-canada/

Mi' Kmaw Legal support network: www.cmmns.com/Legal.php

Legal Services Society (British Columbia)

Aboriginal services: www.lss.bc.ca/aboriginal/index.php

Legal Aid Ontario:

Interactive Voice Response (IVR) so clients receive automated services from the help line 24 hours a day

Automated call back systems that permit prioritization of calls (eg people with domestic violence complaints spend less time in the queue)

Instant messaging and social media software for call centre reps to engage with staff and management

Online mapping tools to allow reps to locate specific community resources and provide accurate directions to clients

Fixed telephone lines and voice over internet protocol (VOIP) softphones with computer screen interfaces.

While there has been some resistance to these developments in the legal profession, there is a growing consensus that it is a “win/win” situation, providing services to clients at a more affordable rate and lawyers with adequate income.

The Committee proposes that as a profession and legal community we increase the diversity and range of services available to clients through the integrated team delivery of legal and related services, so that by 2030 the vast majority, in the range of 80%, of personal people law legal services are provided through a team approach. To smooth the way for team delivery of legal and related non-legal services, licensing, insurance and professional and ethical issues such as confidentiality and solicitor-client privilege, have to be resolved. Some Canadian law societies have examined alternative delivery of legal services, focusing on paralegals. Diversification in the legal profession also contributes to a team approach to service delivery. Other countries recognize a broader range of legal service providers with regulations and protections in place. For example, the UK has eight categories of legal practitioners and the State of Washington recently began providing limited licenses to legal technicians.¹⁵⁷

Target: By 2030, 80% of lawyers in people law practices work with an integrated team of service providers; in many cases these teams will operate in a shared practice that includes non-legal services and services provided by team members who are not lawyers.

Milestones:

- Evidence-based best practice guidelines for team delivery of legal and non-legal services in people law practices are available

Actions:

- The CBA prepares a discussion paper and models for team legal service delivery and coordination of legal and non-legal services for

¹⁵⁷ Although outside its mandate of examining changes to the legal profession, the CBA’s Legal Futures Initiative may ultimately determine these innovations to be in the public interest as they deliver increased access to legal services.

both private market and publically-funded legal services

- The CBA offers professional development materials and online discussion groups
- Law societies develop comprehensive regulatory frameworks for alternate delivery of legal services
- Law offices partner with other service providers facilitating team delivery of services

What do you think?

- Any feedback or suggestions?
- Who should be involved?
- Are you willing to help?
(write to: equaljustice@cba.org)

Reorienting The Practice of Law

This section looks at three proposals for changing the practice of law to enhance equal justice: establish sustainable people law practices; learning from the European experience about the potential of legal expense insurance; and enhanced regulatory approaches.

Sustainable People Law Practices

Our models for providing personal services law, or people law practices, have often not kept pace with the changing demands of our clients and pressures in the justice system. Changes are needed to:

- provide a greater range of legal services to respond to client needs
- provide a more predictable idea of costs to clients, and
- deliver services through a more engaged/participatory relationship between the client and lawyer.

Making people law practices more attractive to lawyers is also a key component of reinventing the delivery of legal services. Lack of affordability is perceived to be the main barrier to legal services but research in Canada, the US and the UK

shows that deciding whether to hire a lawyer is influenced by a range of factors.¹⁵⁸ These issues are canvassed in the Committee’s discussion paper on *Underexplored Alternatives for the Middle Class*.¹⁵⁹

Here the Committee highlights strategies to build and maintain sustainable people law practices through different organizational models from the current model of legal partnerships. In the US, the UK, and Australia in particular, there are already many examples. Law firms operate virtually and use alternative business practices to enhance flexibility and reduce overhead, for example, allowing them to reduce the cost of legal services to clients.

Alternative organizational models for providing legal services that focus on meeting the legal needs of people with low and moderate income are emerging and should be supported in a manner that contributes to reaching equal justice. This approach garnered much support in the Committee’s consultations and at the Summit. The Summit discussion was energized in particular by the work of Andrew Pilliar, a lawyer and doctoral candidate at the University of British Columbia Faculty of Law, who advocates for a reinvigorated sense of entrepreneurship for young lawyers keen to build viable social justice/access to justice practices and broader definitions of professional success. His master’s thesis investigates the experience of Pivot LLP, a law firm established as a social enterprise and funding source for the public interest work carried out by Pivot Legal Services. Pivot LLP also pursued associated goals, including providing affordable legal services.

Pilliar offers a “toolbox for legal entrepreneurs” based on his case study of the Pivot experience and related research.¹⁶⁰ These tools set out 11 challenges for law firm models attempting to provide accessible legal services to a greater range of people: focus; recruiting; income stream; support staff; mentorship; keeping overhead low;

¹⁵⁸ Andrew Pilliar, “Exploring a Law Firm Business Model to Improve Access to Justice and Decrease Lawyer Dissatisfaction” www.cba.org/CBA/cle/PDF/JUST13_Paper_Pilliar.pdf.

¹⁵⁹ CBA Access to Justice Committee, *Underexplored Alternative for the Middle Class* (Ottawa: CBA, 2013) www.cba.org/cba/equaljustice/PDF/MidClassEng.pdf.

¹⁶⁰ *Supra* note 158. Note that Pivot LLP no longer exists, but Pivot Legal Services continues its work.

using existing work forms; location; branding; decision making models and sources of business. The legal profession can help to build and expand these tools, and so assist in what they can offer in reaching equal justice.

In the UK and Australia, regulations have been modified to allow law firms to seek outside investment or operate under external ownership. As a result, alternative business models are becoming common. For example in England and Wales, co-ops now offer legal services¹⁶¹ and in Australia, Melbourne, Slater & Gordon became the world’s first publicly traded law firm.¹⁶² In the US, innovation has found its way into law firms in other ways. The alternative legal practice making the largest impact is Axiom,¹⁶³ which describes itself as “a place where lawyers are passionate about practicing law, not billing hours”. Axiom has found innovative ways to offer quality legal services cheaper and more efficiently. As a result, it has grown exponentially to a 1000-person firm operating in 11 offices and four delivery centres across three continents. Other US examples include Gateway Legal Services and Chalmers Consulting, both building ‘self-supporting legal services programs’ through sliding scale fees, contingency fee awards and payments from third party beneficiaries.

In Canada, alternative models are starting to emerge as well. An innovative firm in Vancouver, Miller Titerle¹⁶⁴ has developed around the principle of “helping people do good things”. The firm is structured as an open office space and operates “in the cloud” at all times. They reduce overhead by outsourcing legal research and other work to contract lawyers and paralegals who prefer to work from home. They offer flexible work arrangements for lawyers and support staff, and flexible fee structures for clients, including fixed fee arrangements. Recently, the firm has started offering a value guarantee, which allows clients to discount their bills by 25% if they believe the value guaranteed was not met. The firm is developing innovative programs to allow clients to access their

¹⁶¹ www.co-operative.coop/legalservices/.

¹⁶² www.slatergordon.com.au/investors/.

¹⁶³ www.axiomlaw.com/.

¹⁶⁴ www.millertiterle.com/.

corporate records and start new businesses online, including incorporation, corporate structuring, organization, and basic corporate/commercial transactions, at a low fixed cost.¹⁶⁵

Some other particularly innovative law firms in Canada include Cognition LLP, Conduit Law, Sky Law, Wise Law, AnticIPate Law, Heritage Law, and Valkyrie Law Group.¹⁶⁶ These law firms are re-designing the legal service delivery model based on entirely new propositions about what clients identify as the value they receive from their lawyers, and eradicating paradigms like the billable hour while doing so.¹⁶⁷

Bar associations and law societies have an important role in fostering and supporting the development of alternative organizational models for viable and sustainable people law practices. Support from the legal profession as a whole is needed to facilitate the transition to these new models to ensure that by 2025, a wide range of alternative organization models for delivering legal services exists to meet the legal needs of low and moderate income Canadians, including those living outside major urban centres.

The legal profession can foster initiatives through ‘incubator programs’ that help recent law graduates transition into sustainable practice situations to serve individuals and small businesses, as well as through virtual practice arrangements.

In the US, ‘law school incubator’ programs successfully help graduates transition into sustainable practice. Incubators accelerate the development of start-up companies by providing entrepreneurs with instruction in financial management, marketing, networking and sound business practices. The idea started at City University of New York in 2007 and spread quickly

throughout the US. In some cases, law firms and other service providers donate office space and money.

In some law schools this takes the form of ‘legal residency programs’ where recent graduates offer low-cost legal assistance while attending seminars on obtaining and billing clients, malpractice insurance and setting up a law office. Another approach is through ‘solo and small firm institutes’ or facilities, where recent graduates receive substantial training or have access to a facility for hands on training, including in some cases office space, office assistance, access to lawyer mentors and law practice guidance. All of this is geared to assisting young lawyers to launch their own practices. ‘Entrepreneurial lawyering’ classes help students develop business plans provided participants are committed to establishing a solo or small firm practice and helping underserved populations after completion of their incubator training. They are generally encouraged to provide pro bono and low-bono services to increase access to civil legal services for those in need.

New initiatives are especially significant outside urban centres, where barriers to accessing legal services are even more acute. Various legal organizations have worked collaboratively, particularly in Manitoba, Alberta and British Columbia, to encourage the practice of law outside major centres. Virtual legal practices should be fostered including through expanded forums for learning, sharing and networking about these innovations.

¹⁶⁵ See their recent newsletter: www.millertiterle.com/2013WinterUpdate.pdf.

¹⁶⁶ www.cognitionllp.com/, www.conduitlaw.com, www.skylaw.ca/, www.wiselaw.net/, www.anticipatelaw.com/, [www.British Columbia, heritagelaw.com/](http://www.BritishColumbia.heritagelaw.com/), www.valkyrielaw.com/

¹⁶⁷ The CBA Legal Futures Initiative highlighted international examples of innovative service delivery models in its background paper, “[Innovations in Legal Services: 14 Eye-Opening Cases](#),” and expects to highlight more examples of innovations through the recommendations of its Business Structures and Innovations Team.

Learn More: about Service Delivery Options

Andrew Pilliar - Master's thesis:

www.circle.ubc.ca/handle/2429/43478

[CUNY's solo-focused Community Legal Resource Network](#)

Law Society of Alberta, Alternate Delivery of Legal Services Committee, "Alternate Delivery of Legal Services: Final Report" February 2012:

www.lawsociety.ab.ca/files/adls/ADLS_Final_Report.pdf

Manitoba's Forgivable Loans program - The Law Society offers a forgivable loan to selected students from under-served Manitoba communities, if they are accepted into the University of Manitoba Faculty of Law. 20% of the loan is forgiven for each year after call to the bar that the recipient practices in the home community:

www.dcb.org/for_lawyers/resources/publications/washington_lawyer/january_2010/access_justice.cfm

Lawyers in Vancouver and Red Deer provide legal advice to remote communities in British Columbia and Alberta through Skype and other Internet services.

Legal residency:

www.colorado.edu/law/careers/information-employers/legal-residency-colorado-law

Bala, Nicholas, "Reforming Family Dispute Resolution in Ontario: Systemic Changes and Cultural Shifts" in Michael Trebilcock, Anthony Duggan & Lorne Sossin, eds, *Middle Income Access to Justice* (note 32):

<http://www.jstor.org/stable/10.3138/j.ctt2tv2dr>

Beg, Samreen & Lorne Sossin. "Should Legal Services Be Unbundled?" in *Middle Income Access to Justice* (note 32):

<http://www.jstor.org/stable/10.3138/j.ctt2tv2dr>

Fedorak, Jeanette, "Unbundling Legal Services: Is the Time Now" (2009) 12 *News & Views on Civil Justice Reform* 14.

Kent Roach and Lorne Sossin, "Access to Justice and Beyond" (2010) 60:2 *University of Toronto Law Journal* 373.

Report of the British Columbia Unbundling Legal Services task force:

http://www.lawsociety.bc.ca/docs/publications/reports/LimitedRetainers_2008.pdf

http://www.lawsociety.bc.ca/docs/publications/reports/legalservices-tf_2010.pdf

<https://consult.justice.gov.uk/digital-communications/transforming-legal-aid>

Target: By 2025 a wide range of alternative organizational models for the provision of legal services exist to meet the legal needs of low and moderate income Canadians, including those living outside of major urban centres.

Milestones:

- An evaluation of the effectiveness of sustainable people law practices at filling legal services gaps and providing meaningful access to justice is carried out, and the results are broadly shared to encourage learning, further innovation and best practices
- All jurisdictions have legal practice incubator programs.

Actions:

- The CBA provides professional development materials, and hosts a PD webinar and online discussion groups to foster conversation and learning about alternative organizational models for providing people law services
- The CBA develops a “startup package” for alternative organizational models for sustainable people law practices comprising for example, a handbook, contracts, other documents and training materials
- A consortium of bar association, law society, law schools, law firms and business enterprises support the development of one or more accessible legal practice incubators in at least three jurisdictions
- The CBA supports the establishment and maintenance of networking among these incubator programs to facilitate information exchange, development of best practices and continuous improvement
- The CBA and law societies provide ongoing opportunities for mentoring and peer-to-peer sharing of best practices for sustainable people law practices, and consider how the recommendations of the CBA’s Legal Futures Initiative can be used to support lawyers in the creation of alternative service delivery models
- The CBA coordinates a roster of experienced

justice system participants, including law practice management consultants, to carry out awareness campaigns for law students, young lawyers and members of the profession (not just law firms) about alternative organizational models for delivering legal services

What do you think?

- Any feedback or suggestions?
- Who should be involved?
- Are you willing to help?
(write to: equaljustice@cba.org)

Legal Expense Insurance

The holder of legal expense insurance (LEI) has a commitment from an insurer to pay some or all of the legal costs arising from certain legal situations. Insurers support legal services by both lawyers and paralegals and customers may include individuals, families and small to mid-size businesses.

LEI is popular in Europe and provides basic access to legal assistance for people who can afford to buy the insurance, often in conjunction with home insurance or tenant insurance policies. Approximately 40% of all Europeans have LEI, and in the UK 59% of families have some coverage under home insurance policies. In Sweden coverage has been mandatory since 1997 and its development ran parallel to decreases in the availability of legal aid.

LEI has not caught on in Canada to the same extent. In contrast to Europe, Canadians purchase only about \$11-12 million of coverage per year. LEI has mainly taken hold in Québec, attributable in large part to efforts by the Barreau du Québec, which spent \$2 million on a campaign to encourage Québécois to take advantage of LEI. Their ads are explicitly aimed at people who make too much for legal aid, but too little to comfortably afford counsel should a legal event occur. While the campaign saw the number of subscribers double, only about 10% of Québécois have coverage and only about 12 insurance companies provide the

product. In his 2008 report on legal aid in Ontario, Professor Michael Trebilcock concluded that the law society and Legal Aid Ontario should “accord a high priority to promoting the role of legal insurance.”¹⁶⁸

At the Summit, Barbara Haynes, the CEO of DAS Canada, summarized the current market for LEI in Canada outside Québec. DAS is a global leader of LEI operating in 18 countries including in Canada since 2010, marketing itself as providing affordable justice for the middle class. Haynes explained that LEI is not yet understood or accepted in Canada. Research is needed to understand why it is not currently purchased. This may be attributable to restrictions on the coverage provided by LEI. For example, family law matters are not included by most insurers at present. There is a perception that the premiums are high, but in fact the average annual stand alone premium for a family is \$150-200 and a group purchase through a homeowner’s policy is about \$50. Some concerns have also been raised about the ability to retain choice of legal counsel and to clarify who instructs the lawyer in a given matter, the insurer or the individual client.

The CBA has endorsed LEI that is adapted for the Canadian market by including family law services as one mechanism to increase access to justice. LEI is not a panacea, but the evidence from jurisdictions where it is commonly used shows that it could help many people get much of the legal help they need. The Committee proposes that by 2030 the vast majority of Canadians should have legal insurance as one part of a seamless provision of legal services. Reaching this goal requires working to overcome current limitations on understanding and availability of LEI.

The low uptake of LEI in Canada outside Québec appears largely because many people are unaware of its value. Unlike health, people often don’t expect to incur legal costs. They probably don’t know anybody who has LEI. If they thought about it, they might believe LEI to be expensive. People with limited discretionary income tend not to buy insurance and policy limits can mean that coverage

¹⁶⁸ He noted that the Law Society of Upper Canada had considered and endorsed LEI as far back as 1993, but that it had not yet made its way into the mainstream.

I would like to share my knowledge of the usefulness of what seems to be an almost universally covered legal insurance system in parts of Europe – in particular, Denmark. When my son, who lives there, was wrongfully dismissed, he was able to access enough legal insurance to obtain the services of a lawyer who negotiated a settlement on his behalf. He could not have done this on his own considering he was up against a large multinational corporation. Legal insurance is included in his house insurance and apparently is included in tenants’ insurance. Since everyone contributes, the cost is small. Obviously there are ceilings on the amount covered but it helps both working poor and middle class access services that are not covered by legal aid because of issue and eligibility cut offs. Also, this is operated by the private sector (unusual for Scandinavia) rather than government. Administrative costs are likely low as they are piggy backed on to a larger insurance scheme.

*Anne Beveridge, comment during
Committee consultations in British
Columbia*

does not extend to the types of cases that arise most often. Lawyers also seem to lack awareness of LEI or question its value, and this disinterest or distrust may be compounded by apprehensions that LEI will be bad for business. On the other hand, le Barreau du Québec was primarily responsible for the success in spreading LEI in Québec.

In August 2012, the CBA Council adopted a resolution directing the CBA:

- to collaborate with legal insurance providers to communicate to CBA members, government leaders and the public the potential for legal expense insurance to improve access to justice to the middle class in Canada and
- to ask insurance providers to adopt measures to safeguard and inform consumers, and adapt

policies to address the legal needs of the Canadian market, requiring family law services to be included at reasonable cost.

Following this resolution, the Committee has attempted to start a discussion about these issues with the insurance industry. The Committee is committed to encouraging the expansion of LEI both in terms of uptake and the scope of coverage provided, particularly for family law matters. At the same time, a growing acceptance of LEI is also a matter of public policy and there is a role for government on these issues. This is discussed further below in relation to universal legal aid coverage.

Target: By 2030, 75% of middle income Canadians have legal insurance.

Milestones:

- Insurance providers offer a range of LEI policies that assist in advancing meaningful access to justice to middle income Canadians, including on family law matters
- Options for mandatory legal expense insurance are being fully considered

Actions:

- The CBA communicates that making LEI more available contributes to access to justice and is compatible with the profession's interests
- The CBA develops a strategy, building on the Barreau du Québec initiative, to increase public awareness of the benefits and relatively low cost of LEI, through speeches, articles and testimonials
- The CBA continues to collaborate with insurance providers to encourage them to develop more LEI policies for Canadians, including for family law matters
- The CBA works with governments to explore the feasibility of mandatory legal insurance based on existing European models

What do you think?

- Any feedback or suggestions?
- Who should be involved?
- Are you willing to help?
(write to: equaljustice@cba.org)

Regulation and Access to Justice

The regulation of legal services has an impact on the availability and cost of legal services. This is a key point of intersection between CBA's Equal Justice and Legal Futures initiatives.

These issues were canvassed at the Summit in a workshop developed by the Canadian Association for Legal Ethics. Speakers emphasized how regulation is increasing the price of offering legal services and reducing innovation in the legal service marketplace, exacerbating access to justice problems. Noel Semple, from the University of Toronto Faculty of Law, described three primary legal regulation tools:

- Barriers to entry: to offer legal services, a series of hurdles must first be overcome (undergrad, LSAT, law school, articles, licensing exam, etc.)
- Market conduct regulations: what must be done on an ongoing basis to offer legal services (pay dues to law society, attend professional development classes, etc.)
- Business structure regulations: that forbids certain business structures from offering legal services to the public.

The main purpose of professional regulation is to protect the public by ensuring the quality of legal services, but regulation can also limit access by restricting options for the delivery of legal services. Conversely, scaling back on regulation is likely to increase access but the trade-off may be less public protection.

During the Summit workshop, Professor Richard Devlin of the Schulich School of Law advocated for a more active role for law societies and provided his list of things that law societies must do to support access to justice:

- Enhance paralegal services (so far Ontario, British Columbia and Alberta have taken steps to do so)
- Permit alternative business structures ABS (described more below)
- Become brokers of legal services (there is a pilot project in Manitoba where law society matches clients with family law lawyers, and lawyers accept a reduced fee. However, the law society guarantees payment.)
- Make pro bono mandatory
- Make ethical infrastructures mandatory
- Promote financial transparency through the publication of lawyer remuneration.

Devlin also noted that countries like the UK and Australia have liberalized their legal services regulation, and asked the question: What price have they paid?

Professor David Wiseman of the University of Ottawa Faculty of Law provided an overview of the issues in the move to permit alternative business structures (ABS). ABS are businesses that provide legal services not owned or managed under the control or direction of lawyers. The main advantages of ABS are that they supply more capital and business expertise (organizational management, product development, branding, market research etc.) compared to current law firm structures. ABS may assist in addressing unmet legal needs by investing time and resources to reach out to more people who lack legal services. ABS may also increase access through marketing to clients that need services and may be more user friendly, accessible and inviting.

Hesitancy over ABS arises from a concern that allowing corporate legal practice will create ethical dilemmas and conflicts. Wiseman called this concern “overblown” given the existing tension lawyers face now, between their duty to the court and the client, and their need to also make a living. Regulators can address these issues directly. For example, in Australia, the profession outlined a hierarchy of obligations for ABS – court, client, and then owners. A serious concern is the potential to exploit vulnerable persons through marketing.

From the Committee’s perspective the central question is whether ABS will increase meaningful access to justice by those currently underserved by lawyers in private practice. Who will benefit from ABS? What ‘pain’ is addressed through this development? Wiseman stated that the supposed gains in equal justice are speculative at this point. There is an active and growing debate on ABS in Canada, and it is now under consideration by several law societies and the CBA Legal Futures Initiative, which acknowledges in its early research that ABS may migrate to Canada as markets become more closely connected. The initiative is examining ABSs from the perspective of increased access to legal services. Last year, ABA rejected a resolution permitting ABS in the US. More research and evaluation is needed on the access gains by ABS before it can be considered a priority for reaching equal justice.

Regenerating Public Legal Services

Public-funded legal services, generally referred to as legal aid programs, are an indispensable component of a fair, efficient, healthy and equal justice system. At present, Canada’s legal aid system is inadequate and underfunded, and there are vast disparities between provinces and territories on who is eligible for legal aid, what types of matters are covered and the extent of the legal services provided. Legal aid alone will not cure all barriers to access and it is important not to conflate legal aid with access. At the same time, our justice system cannot operate fairly and efficiently without a healthy legal aid system.

I found, first of all, that there is a huge consensus that the current system isn’t working, that the disparities and gaps in legal aid are truly deeply troubling, challenging to our core shared values, democracy, our shared citizenship, our understanding of justice and fairness. There’s a huge consensus that what we have isn’t good, that the disparities are unsupportable.

Alex Himelfarb

At the Summit, Karen Hudson, Executive Director of Nova Scotia Legal Aid, proposed the REACH framework for regenerating legal aid: Research, Eligibility, Advocacy, Coverage and Holistic services. These vital elements are woven into the discussion in this section.

Three main components are needed to regenerate legal aid:

- national legal aid benchmarks with a commitment to their progressive implementation, monitored through an open, transparent process;
- reasonable eligibility policies that give priority to people of low and modest means but provide graduated access to all residents of Canada who are unable to retain private counsel (including through contributory schemes); and
- effective legal service delivery approaches and mechanisms designed to meet community needs and the meaningful access to justice standard.

National Benchmarks

At its inception over 40 years ago, the federal government envisioned “the establishment of a coast-to-coast federally funded legal aid system that would cover both civil and criminal cases”, modeled on the Canadian medicare system. This vision was never met¹⁶⁹ and Canada is further away from this goal in 2013 than when the program was created. National benchmarks for legal aid are completely non-existent and there is an unacceptable disparity in service provision between jurisdictions.

The Committee proposes the development of national benchmarks as the basis for a principled framework for this key social program, to counterbalance the sole focus on reducing

expenditure as the key driver of legal aid reforms. National benchmarks should be focused and concrete, but leave scope for local priority setting and innovation. Benchmarks should be aspirational rather than setting a minimum threshold and include targets for progressive implementation.

National benchmarks should be established on the basis of evidence about legal needs and legal assistance required to ensure meaningful access to justice. This is a rapidly growing body of knowledge that provides a platform for developing generic and more refined standards. Where evidence is lacking, steps must be taken to fill the knowledge gaps.

The central feature of national benchmarks would be agreement on a definition of essential public legal services, based on a shared understanding of the legal issues or problems that involve fundamental interests. Responses to the Committee’s discussion paper on National Legal Aid Standards suggest that it would not be difficult to achieve a broad consensus. Essential public legal services include situations where basic human needs are at stake. These include: criminal law; child protection; family law; domestic violence; landlord tenant matters where an individual faces eviction; employment law where an individual is not represented by a union; refugee and immigration; and social benefit cases. Within this overall category of essential public legal services, cross-cutting issues would have to be addressed by national benchmarks, including the complexity and consequences of the issues; priority characteristics of individuals; the type of legal assistance from the continuum of available services required by the various factors at play; and assistance in addressing non-legal factors with a significant impact on the legal matter.

Several US initiatives have been established to empirically demonstrate where a right to publicly funded counsel is in fact essential. The Boston Bar Association’s Civil Gideon Project and the California legislature’s Access to Justice Statute, known as the Shriver Pilot¹⁷⁰, are models that could be considered as we work together to frame national legal aid benchmarks in Canada.

¹⁶⁹ National Health and Welfare did indeed propose a combined criminal and civil program at that time, but the Department of Justice opposed it and the criminal cost sharing program emerged. Health and Welfare developed civil legal aid funding under the Canada Assistance Plan as a default. See Dieter Hoehne, *Legal Aid in Canada* (Lewiston, NY: Edwin Mellen Press, 1989); Ab Currie, “Down the Wrong Road” (2006) 13:1 *International Journal of the Legal Profession* 99.

¹⁷⁰ See: www.bostonbar.org/prs/nr_0809/GideonsNewTrumpet.pdf; www.courts.ca.gov/documents/20110429itemp-revt.pdf

In addition to defining legal aid coverage based on essential public legal services, national benchmarks should also address eligibility and quality of legal aid services by employing services according to the continuum of legal services described above, in a manner consistent with the meaningful access to justice standard.¹⁷¹ Eligibility and delivery of legal services are discussed in the next two sections.

Rather than a minimum threshold, national benchmarks should be aspirational and include targets for progressive implementation. Benchmarks will supply a principled basis for legal aid funding decisions, be focused and concrete, while still leaving scope for local priority setting and innovation.

Target: By 2020, national benchmarks for legal aid coverage, eligibility and quality of legal services are in place with a commitment and plan for their progressive realization across Canada.

Milestones:

- *Federal, provincial and territorial governments establish a national working group with representation from all stakeholders including recipients of legal aid, to develop national benchmarks*

Actions:

- *The CBA works with all interested justice sector, service providers and community-based organizations to increase public awareness about the importance of legal aid and the costly personal and social consequences of inadequate legal aid*
- *The CBA works with all interested justice sector, service providers and community-based organizations to develop a broad alliance of individuals and groups to support and champion the regeneration of legal aid and the development of national benchmarks*
- *The CBA and the Association of Legal Aid Plans, in consultation with other justice*

¹⁷¹ The continuum is discussed *infra* at 93 and the standard *infra* at 61.

system stakeholders, prepare draft national benchmarks as a means of engaging stakeholders and fostering dialogue and action

- *The Association of Legal Aid Plans consults with the Federal-Provincial-Territorial Permanent Working Group on Legal Aid on an action plan to initiate work on national legal aid benchmarks*
- *The CBA and the Association of Legal Aid Plans, in consultation with other justice system stakeholders, carry out research to develop and refine the empirical basis for understanding 'essential legal needs' and 'meaningful and effective access to justice'*

What do you think?

- Any feedback or suggestions?
- Who should be involved?
- Are you willing to help?
(write to: equaljustice@cba.org)

Eligibility

The process described above for developing national legal aid benchmarks should also consider eligibility for publicly funded legal services. At present, some legal aid services such as public legal information are available to all, but most forms of legal assistance and representation from legal aid are available on the basis of a means test. Generally, an individual or family must receive social assistance or earn just above this threshold to qualify for legal aid. In many regions, people working full time for minimum wage do not qualify. In Alberta, even recipients of Assured Income for the Severely Handicapped are ineligible. The Barreau du Québec has implemented an advocacy campaign to raise eligibility to include those earning minimum wage. Québec has very recently announced a significant change to its eligibility standards so that more people will qualify for help¹⁷².

¹⁷² www.justice.gouv.qc.ca/english/ministere/dossiers/aide/aide-a.htm.

At the Summit, Nye Thomas from Legal Aid Ontario (LAO) noted that LAO offers a range of legal aid programs and covers a range of essential legal issues, but has a lower eligibility threshold than all legal aid standards in Canada and the US. In a recent study, LAO analyzed its financial eligibility guidelines against Statistic Canada’s Low income Measure (LIM) – a commonly used measure of poverty. The LIM is an income threshold below which a family is likely to spend a larger share of household income on the necessities of food, shelter and clothing than the average family.

As discussed in Part 1, LAO has itself noted a growing gap between its financial eligibility criteria and the LIM in Ontario. Since 1996, all demographic groups have lost ground. Without corrective action, things will get worse, meaning more hardship, less access to justice, more court delays, more court ordered counsel, and more unrepresented litigants.

Thomas emphasized that expanding financial eligibility does not have a linear or automatic correlation to legal aid costs: “There are a lot of ways to improve accessibility which doesn’t mean you need to double costs. The money discussion is more nuanced than it is often portrayed.”¹⁷³ This highlights the critical relationship between coverage, eligibility and the type and extent of legal services provided by legal aid, and the strategic policy choices required to ensure meaningful access to justice.

There is a clear consensus that legal aid should be available to a wider range of people than at present. The stumbling block is not that this is a bad idea, but that it is impractical and unaffordable. A more difficult question is, if eligibility should be extended, how far should it go: To everyone living below the LIM? To those earning a minimum wage? To people of modest means? To all Canadians?

At the Summit, the Committee invited Alex Himelfarb, former Clerk of the Privy Council, and Sharon Matthews, a lawyer at Camp Fiorante Matthews Mogergerman in Vancouver, to debate the question: should there be a national justice care program in Canada? This was an opportunity to explore whether legal aid should be a universal

or targeted social program, a question raised frequently during the Summit.

Both speakers based their positions on an understanding that a national justice care system, similar to the universal healthcare system, is a noble idea and reflects good public policy. Himelfarb argued in favour of adopting a vision of a national justice care system and building it in increments. Research has demonstrated that “if you target your social program to those in need, sooner or later that program gets starved”¹⁷⁴, because the political commitment wavers when many people aren’t benefiting from it. People need to see what their tax dollars are buying for them. The current dismal state of legal aid targeted only at the neediest of the needy reinforces his position. The more people have a stake in the quality of the system, the better it will be. Targeted social programs also tend to be ineffective in that they can unjustifiably exclude

In short, the legal aid system, despite the important normative rationales that underpin it, is not a system in which most middle class citizens of Ontario feel they have a material stake. As a percentage of the population, fewer and fewer citizens qualify for legal aid, and many working poor and lower middle-income citizens of Ontario confront a system which they cannot access and which they are expected to support through their tax dollars even though they themselves face major financial problems in accessing the justice system (as witnessed most dramatically in the family law area, but also in various areas of civil litigation).

This leads me to suggest that both LAO and the Government of Ontario, through the Ministry of the Attorney General, need to accord a high priority to rendering the legal aid system more salient to middle-class citizens of Ontario (where, after all, most of the taxable capacity of the province resides).

Trebilcock 2008 (note 47)

¹⁷³ Thomas, panel presentation at Summit, *supra* note 38.

¹⁷⁴ Alex Himelfarb, former Clerk of the Privy Council, Presentation at CBA *Envisioning Equal Justice* Summit (Vancouver: April 2013).

people who require services. Professor Michael Trebilcock of the University of Toronto Faculty of Law has made this same argument.¹⁷⁵

For purposes of this debate, Matthews, a long time advocate for legal aid, argued that while a national justice care system should be the ultimate goal, Canadians are not ready for it. The CBA-BC Branch, as part of its legal aid advocacy campaign, highlighted how little most people know about legal aid and so, do not really understand its importance. Given the low public traction of legal aid, Matthews argued that it is better to focus limited resources on improving legal aid for those most in need, rather than providing justice care for people who can afford to pay. In her words, “without a foundation of public support we can’t make real changes and we don’t have the foundation of popular support.” She suggested that it is best to meet the needs of the most vulnerable and build from that base in an incremental and affordable way.

Following the ‘ambitious but possible’ theme used to set its targets, the Committee proposes that eligibility for legal aid be increased gradually over time, so that by 2020 all Canadians living at and below poverty level are eligible for full legal aid coverage for essential legal services and by 2025 those services are available to low-income Canadians, defined as those with incomes less than two times poverty levels.

The Committee also proposes that we fully canvass, develop and encourage an informed public dialogue about options for a national justice care system.

Funding options include client contribution schemes (based on ability to pay) and public insurance schemes (whether mandatory or opt-out). Eligibility can be approached flexibly: it does not have to be uniform for different types of services.

Professors Sujit Choudry and Michael Trebilcock and James Wilson have developed a proposal for a non-profit legal expense insurance scheme for Ontario that would operate through the province’s legal aid plan. The proposal would address shortfalls in

¹⁷⁵ Trebilcock, *supra* note 47.

access to justice, while remaining grounded in the public interest, in contrast to for-profit private market legal expense insurance plans discussed in an earlier section. Under their proposal, everyone would be assumed to subscribe to the insurance scheme, with allowance for people to opt out.¹⁷⁶

Another option is offered by popular reforms enacted in Finland in 2002, which raised the proportion of households eligible for assistance with their legal costs to 75%, with cost sharing on a sliding scale. (The figure is below 30% in most English-speaking common-law countries.)¹⁷⁷ Coverage encompasses criminal and civil matters, ranging from simple estate inventories to complex litigation. The main criteria are the seriousness of the matter and how well the applicant can handle it alone, rather than the area of law.

Targets:

By 2030, options for a viable national justice care system have been fully developed and considered.

By 2025, all Canadians whose income is two times or less than the poverty line (Statistics Canada’s Low Income Measure) are eligible for full coverage of essential public legal services.

By 2020, all Canadians living at and below the poverty line (Statistics Canada’s Low Income Measure) are eligible for full coverage of essential public legal services.

Milestones:

- *The working group on national benchmarks (see Milestone for ‘Regenerating Publicly funded Legal Services’) develops a proposal for a gradual expansion of eligibility for legal aid*
- *A vigorous public policy dialogue about the value and feasibility of a national justice care system is underway*

¹⁷⁶ S Choudry, M Trebilcock and J Wilson, “Growing Legal Aid Ontario into the Middle Class: A Proposal for Public Legal Expenses Insurance” in *Middle Income Access to Justice*, *supra* note 32.

¹⁷⁷ www.lawyersweekly.ca/index.php?section=article&articleid=787.

- *Federal, provincial and territorial governments commit to continue increasing funding for legal aid to ensure progressive implementation of the national benchmarks (see Targets under 'Reinvigorated Federal Government Role')*

Actions:

- *The CBA works with the Association of Legal Aid Plans and other interested stakeholders to prepare draft national benchmarks on eligibility as a means of engaging stakeholders and fostering dialogue and action*
- *The CBA works with interested public policy institutes and think tanks to develop an options paper for a national justice care system building on existing research and considering universal legal aid models in Canada and abroad*

What do you think?

- Any feedback or suggestions?
- Who should be involved?
- Are you willing to help?
(write to: equaljustice@cba.org)

Legal Aid Services Delivery

Today legal aid plans offer an array of legal services that vary widely from jurisdiction to jurisdiction. In some places, services include the full continuum from legal information to representation, while in others legal aid provides a narrower range of services, such as duty counsel and representation. In addition to direct service, the continuum of services can include strategic advocacy and test case litigation on issues affecting low income people, so that problems can be addressed on a systemic basis instead of dealing repeatedly with individual cases. Strategic advocacy contributes to efficiency in courts and tribunals and the proper functioning of our legal system. Services are provided by a mix of employees, often operating through legal centres or clinics and by lawyers in private practice working for rates generally far below market rates.

Legal aid plans in Canada have spent many years making do with less, and have become adept at

doing so. Although many provincial and territorial governments have increased legal aid funding in the past 5 to 10 years, demand continues to far exceed the capacity of most legal aid plans. This approach is unsustainable. Changes to legal aid services should be driven by the legal needs of the communities served, not by a drive to decrease expenditures in every way possible.

There is a gap between the information available to legal aid providers and the perspectives of the broader community as to how well current services address the public's legal needs. While legal aid program evaluations including client satisfaction components are generally strong, the Committee's community consultations and other recent public forums have provided less positive feedback. Complaints are heard about the inadequacy of and lack in flexibility in legal aid, but also the quality of service offered (for example, delays in getting service, service providers not caring, not doing thorough work, not fighting hard enough for clients, or not listening to or respecting clients). Many felt the underlying cause of these problems is that legal aid lawyers are overworked and underpaid. Related to this observation, many of those consulted believed that people with low incomes are given second-class service relative to private legal services.

"Unless you have lots of money, you cannot access justice." **Single mother, Moncton**

"Once you finally get there and you get an order, there is nobody there to enforce it. This is what I needed. Now that I have an Order, it's not being respected and there is no one to do anything." **Single mother, Moncton**

"To me, legal rights are an unfulfilled promise." **Person with Disability, Toronto.**

"If you don't know what your rights are, how can you have them protected?" **Single mother, Kentville**

"Their (legal aid lawyers) case load is so big that they cannot go through every detail of the case. It's hard when you are trying to prove your innocence and they are not willing to fight for you." **Aboriginal person, Saskatoon**

“Legal aid lawyers burn out, so justice isn’t served. They need to open it up more; the lawyers lose passion when they are overworked and underpaid, which is unfair to lower class society.” **Aboriginal person, Saskatoon**

The Committee also surveyed legal aid lawyers, paralegals and community legal workers across Canada and received over 700 responses. Respondents expressed a widespread belief that legal aid services are not meeting the ever-increasing demand for services and basic needs of the community:

“Many clients are left with the prospect of no legal assistance with their divorce or spousal support claims and with their criminal charge, and so on.”

“Why do we even talk about “clients” if they aren’t getting services? And these are in the two chief areas where legal aid actually does provide service, family and criminal. Confused.”

“Current Legal Aid Services are inadequate to meet the needs of today’s clients and communities, let alone those of the future.”

“Even though Legal Aid is supposed to fund family and criminal law matters, very limited matters in each are actually covered.”

“Those not able to get spousal or child support or a fair divorce settlement can end up in poverty.”

Service deliverers also expressed serious concerns about their ability to meet their professional obligations given the demands and constraints they face in their work:

“Duty counsel are overworked and fewer private counsel are accepting certificates.”

“The danger is that the quality of legal services provided do not live up to professional standards expected of lawyers.”

Quite a few lawyers expressed a lack of trust between legal aid management and providers of legal aid:

“Proper planning for the future must recognize increasing demand for services but also that services must respond to wider community needs and a more comprehensive view of the costs of inadequate legal aid.”

None of this should be taken as a critique of legal aid plans or of the lawyers doing legal aid work: both are doing their best in difficult circumstances. In some cases, positive innovations have resulted from efforts of plans to keep within budgetary targets. Many Canadian legal aid plans have developed and implemented innovative and cost-effective service delivery models, working closely with communities, pro bono organizations, and other justice service providers.

Overall, legal aid innovation is characterized by a greater mix of legal services designed to reduce the divide between full legal representation and no representation, in a situation of scarce resources. The predominant trend is to provide information and limited assistance, putting the onus on the litigant (or accused) to “self-help” with various levels of support.

Learn More: about Emerging Best Practices for Holistic, Coordinated, Comprehensive Delivery

- Involve multiple service providers on the same team
- Get all service providers on the “same page”
- Encourage dialogue between service providers, e.g. through case conferences
- Ensure everyone understand each other’s roles

See various examples in Committee discussion paper on Future Directions for Legal Aid Delivery: [http://www.cba.org/CBA/Access/PDF/FutureDirectionsforLegalAidDelivery .pdf](http://www.cba.org/CBA/Access/PDF/FutureDirectionsforLegalAidDelivery.pdf)

See also, specific Canadian examples:

Nova Scotia focus on holistic, coordinated service delivery: www.nslegalaid.ca/resources.php

Connecting Ottawa: a social worker and lawyer offer consulting services to frontline workers: <http://connectingottawa.com/about>

Pro Bono Law Alberta, with Calgary Legal Guidance and Legal Aid Alberta collaborate to provide legal services in a northeastern community of Calgary. The partners provide intake, assessment, advice, referral and follow up in a community centre to a population that would otherwise be underserved.

BC’s integrates legal services with community partnerships: www.lss.bc.ca/assets/legalAid/CPOManualSept2013.pdf

Nova Scotia, Alberta, Saskatchewan and Manitoba now have expanded duty counsel models for criminal matters, and most plans offer duty counsel for family matters. In Nova Scotia, legal aid funds family duty counsel in two locations full time, and part time in other locations, without means testing.

Alberta’s Legal Services Centres and Family Settlement Services focus on front end dispute resolution: www.informalberta.ca/public/service/serviceProfileStyled.do?serviceQueryId=1228

In 2012, LAO announced a new mental health strategy to provide criminal lawyers whose clients have mental health needs with funding to support their clients’ specialized needs: www.legalaid.ab.ca/AnnualReport2013/Strategy/Pages/FamilySettlementServices.aspx

Multi disciplinary approach in Alberta (family resource facilitators) and Nova Scotia (family support assistants).

Alberta’s Family Settlement Services (FSS) offers financially eligible clients in Edmonton, Calgary and Lethbridge up to five hours of dispute resolution services for family law issues except child protection matters. Participants are screened to ensure they are capable of effective participation.

Yukon: www.yukoncourts.ca/courts/territorial/cwc.html

LAO: www.legalaid.on.ca/en/getting/type_civil-mentalhealth.asp

At the Summit, Nova Scotia Legal Aid Executive Director Karen Hudson listed examples of recent innovations by legal aid plans in the child welfare area:

- in British Columbia, Aboriginal community legal workers are targeted specifically for child welfare matters
- in Ontario and Newfoundland and Labrador, enhanced duty counsel determines legal aid eligibility prior to or at the first appearance, and provides post docket negotiation, social worker assistance, representation at pre-trial conferences and even at hearings
- in Newfoundland and Labrador, legal aid teams are comprised of lawyers, paralegals and social workers
- Nova Scotia offers specialized professional development
- Ontario has partnered with law schools to develop a clinical course in child welfare
- the Territories are using ADR approaches to get the parties together with counsel early on (even before a protection application is brought), coupled with ongoing and timely disclosure

Another important trend is to become more inclusive by incorporating services that meet the unique needs of particular disadvantaged communities. For example, legal aid plans are using court support workers familiar to local communities to respond to clients with mental health needs. LAO recently launched a mental health strategy that includes improved access to advocacy, enhanced training, increased capacity of service providers, and developing a research agenda. The strategy also provides criminal lawyers whose clients have mental health needs with funding to support those special needs.

Alberta has launched a Cultural Liaison Specialist project, to provide language and other services to newcomers to Canada.

British Columbia's Legal Services Society has launched an Aboriginal section on its website¹⁷⁸, with information about different available options specifically intended to address the needs of Aboriginal people, including Gladue reports, Gladue courts, aboriginal community legal workers, aboriginal child protection, mediation and circuit courts, and expanded duty counsel.

As noted earlier in this report, the community legal clinic movement, which has operated both separate from and in some cases in conjunction with legal aid, involved a more holistic approach at its inception. Evidence is clear that holistic services are what people want and what is best able to supply just, lasting outcomes. Our central objective must be to move away from piecemeal self-serve models and toward comprehensive holistic approaches which value the client as an engaged participant. When we think of justice access centres or multi-disciplinary, multi-function centres, and outreach, we should be thinking about them in the context of legal aid.

National benchmarks should set out criteria determining the type, quantity and quality of services. To the greatest extent possible, criteria should be based on evidence-based practices. Criteria should take into account whether the individual can take some initial steps, perhaps with some advice, and whether or when the individual would require in person service. Where appropriate

¹⁷⁸ www.lss.bc.ca/aboriginal/index.php

because of the complexity of the case, or the challenges facing the individual, full representation should be provided. The standards should assist in identifying the point at which the individual requires on-going assistance, including from the outset. Assistance with mediation or other settlement processes should be included, when appropriate for the case.

National benchmarks should encourage innovative and collaborative legal aid services. Consideration should be given to mandating specific legal services, like duty counsel, to provide summary advice at an early stage in proceedings and to facilitate dispute resolution.

What can be done to support legal aid innovation to improve meaningful and inclusive access to justice?

1. Enhance outcome-based evaluation of programs and monitoring of developments and sharing of knowledge gained
2. Dedicate resources to establish and maintain mechanisms to share best practices between legal aid plans
3. Increase opportunities for legal aid providers to come together to share and learn – perhaps through an annual or biennial conference.
4. Online learning opportunities – webinars.

The Association of Legal Aid Plans (ALAP) plays an important role in fostering innovation but is not resourced to fully meet this need. Many legal aid lawyers participated in the Summit and voiced a strong need for a regular forum.

Target: *By 2025, all legal aid programs provide meaningful access to justice for essential legal needs through inclusive and holistic services that respond to individual and community needs and integrate evidence-based best practices.*

Milestones:

- *Legal aid providers develop an increased capacity for outcome-based evaluation and research, as well as monitoring and sharing information about developments to facilitate*

evidence-based best practices

- Prototypes of innovative holistic legal aid service delivery models have been developed and tested. Results are integrated into practice and broadly shared to encourage learning, further innovation and best practices.

Actions:

- Legal aid providers build and strengthen relationships with other social service organizations to develop more holistic service delivery
- The Association of Legal Aid Plans is resourced to play a national leadership role in support of strong, innovative legal aid service delivery including through research, monitoring and sharing developments
- The Association of Legal Aid Plans develops measures of inclusivity to integrate into evaluation frameworks
- The Association of Legal Aid Plans completes its work on a common framework for data collection for all legal aid providers
- The Association of Legal Aid Plans increases opportunities for legal aid providers to come together to share and learn (e.g. regular webinars, an annual or biennial conference)

What do you think?

- Any feedback or suggestions?
- Who should be involved?
- Are you willing to help?
(write to: equaljustice@cba.org)

Bridging the Public-Private Divide

As innovations in private service delivery and an increased commitment to publicly funded legal services build up the ends of the spectrum of meeting legal needs, gaps in service that remain can be addressed through public-private collaborations. Pro bono efforts have been an important aspect of these collaborations, and the profession has demonstrated its commitment to

offering those services as an aspect of professional responsibility. At the same time, there is a growing need to clarify the relationship between legal aid and pro bono, to ensure that they work well together into the future. According to Access Pro Bono Executive Director, Jamie Maclaren, “we view it as high time that legal aid and pro bono be genuinely treated as mutually supportive systems.”¹⁷⁹

In addition, law schools are enhancing practical opportunities for law students, through clinical education, experiential learning and more, not only better equipping students with applied skills once they graduate but also developing awareness of social justice and the public’s unmet legal needs and instilling a pro bono ‘culture’ in young lawyers.

The Place for Pro Bono

The combination of private market and public legal services currently available in Canada cannot meet the demand for access. One of the main mechanisms to bridge the divide between public and private legal services is organized pro bono services. The Committee defines pro bono work as providing legal services without fee to people or organizations that can’t otherwise afford them and which have a direct connection to filling unmet legal needs.

There has traditionally been some debate in the profession about the extent to which expanding pro bono services is likely to undercut public commitment to legal aid. The Committee’s consultations revealed a strong division in views about the profession’s responsibility to provide pro bono and the extent to which a tension between pro bono and legal aid exists.¹⁸⁰ Some individuals and organizations objected to the suggestion that there is a tension at all, but most of the feedback supported the idea that while there does not need to be tension, it does indeed exist. Further,

¹⁷⁹ Legal Services Society, *Submission to Public Commission on Legal Aid* (Vancouver: 1 September 2010) <http://www.lss.bc.ca/assets/aboutUs/reports/submissions/submissionToPublicCommissionLegalAid2010.pdf>.

¹⁸⁰ For more discussion, see the Access to Justice Committee’s discussion paper, “*Tension at the Border: Pro Bono and Legal Aid* (Ottawa: CBA, 2012) www.cba.org/CBA/groups/PDF/ProBonoPaper_Eng.pdf.

it is exacerbated by the serious underfunding of public legal services and competition for those scarce funds. Law firms may prefer to focus on pro bono contributions rather than taking on legal aid files or advocating for better legal aid services. At the same time, there is a remarkable degree of effective collaboration between legal aid and pro bono services, and this collaboration should be encouraged and supported.

Perhaps more fundamentally, there is a strong division in views on whether it is acceptable that the volunteer efforts of lawyers be considered a formal part of the justice system. This also raises questions about the sustainability of a system increasingly dependent on volunteer efforts. At one end of the debate are those that believe pro bono contributions, either in cash or kind, should be mandatory. At the other end are those who believe an increased emphasis on pro bono is problematic, in that it accepts that a fundamental aspect of citizenship and democracy is not an entitlement to justice but that access to justice may depend on the charitable impulses of others. Concerns are also expressed about how organized pro bono, no matter how well-motivated, simply reproduces power imbalances and injustice experienced by vulnerable clients, and unfairly distributes responsibility for filling the void created by an underfunded justice system to the least powerful

In creating these pro bono organizations, the well-off in the profession, whether judges with generous salaries and pensions, tenured law professors, or secure practitioners who have the wherewithal to serve as governors of the profession, are essentially organizing and deploying the labour of the legal proletariat: students, those struggling to become established in practice, and so on. These volunteers join the ranks of the low-paid legal aid lawyers, and the practitioners who eke out a living serving the disadvantaged, in delivering needed services.

Mary Eberts, "Lawyers feed the Hungry"
(note 52)

or most 'socially committed' members of the profession.

The predominant view is a pragmatic one: lawyers do pro bono because they see a great, unmet need and they are able to help. Lawyers who normally practice outside the personal legal services field may enjoy volunteering as a complement to their regular, business-oriented practices. In addition, some see the profession's pro bono contributions as a kind of bargaining chip to deflect criticism when it calls for increased legal aid funding.

Others emphasize the importance of pro bono in maintaining a legal profession committed to public service. Indeed, the CBA has long promoted the legal profession's engagement in pro bono services. Twenty years ago, the CBA *Wilson Task Force on Gender Equality in the Legal Profession* recommended that students be required to engage in some pro bono work before they are granted their law degrees to "send a very clear message to students about the importance of such work and ... help connect students to the community" and "reverse the trend toward commercialization of the practice of law and restore the professionalism and virtues of public service." In 1997, the CBA *Systems of Civil Justice Task Force* recommended that the CBA develop a program to "monitor, promote and publicize pro bono work carried out by lawyers and notaries." Emphasis was placed on the value of law firms setting targets and creating incentives for lawyers to provide pro bono services and for the profession as a whole to recognize the importance of these efforts.

Learn more: about Pro Bono Developments

Jamie Hartman and Jane Park, Making Pro Bono Work: 8 proven models for community and business impact (with case studies) (San Francisco: Taproot Foundation):

http://www.taprootfoundation.org/docs/8_Models_Whitepaper.pdf

The Judges' Toolkit on Pro Bono Legal Assistance (Missouri): <http://www.courts.mo.gov/page.jsp?id=3933>

US - ABA Rural Pro Bono Project: http://www.americanbar.org/groups/probono_public_service/projects_awards/rural_pro_bono_project.html

Australia, National Pro Bono Resource Centre, "Pro Bono Partnerships and Models: A Practical Guide to WHAT WORKS" (2013):

https://wic041u.server-secure.com/vs155205_secure/CMS/files_cms/Pro%20Bono%20Partnerships%20and%20Models%20-%20A%20Practical%20Guide%20to%20WHAT%20WORKS.pdf

Australia: The State of Pro Bono Service Delivery in Australia (Speech delivered by John Corker, Director, National Pro Bono Resource Centre): https://wic041u.serversecure.com/vs155205_secure/CMS/files_cms/Pro%20Bono%20Partnerships%20-20The%20State%20of%20Pro%20Bono%20Service%20Delivery%20in%20Australia%20-%20Brisbane%20May%202013.pdf

Australia - National Law Firm Pro Bono Survey - Australian Firms with More than Fifty Lawyers: https://wic041u.server-secure.com/vs155205_secure/CMS/files_cms/National%20Law%20Firm%20Pro%20Bono%20Survey%20Final%20Report%20Dec%202010.pdf

Pro Bono Institute: <http://www.probonoinst.org/projects/global-pro-bono/>

Pro Bono Net: a national nonprofit organization based in New York City and San Francisco working in partnership with nonprofit legal organizations across the US and Canada to increase access to justice for poor people who face legal problems every year without help from a lawyer.

Pro Bono Net offers 4 technology products:

Advocate website tool (probono.net)

Public legal help tool (lawhelp.org)

Document assembly national server (npado.org)

Law firm pro bono management tool (probono.net/pbm)

PBLO (Pro Bono Law Ontario) and PBLA (Pro Bono Law Alberta) have built web sites on the Pro Bono Net platform. PBLO also participates in the document assembly project that builds online forms using HotDocs and A2J.

Pro bono clinics in both Alberta and BC are using Skype, video conferencing and other Internet services to provide legal advice to remote communities.

Access Pro Bono, Pro Bono Law Alberta and Pro Bono Law Ontario worked with the federal Department of Justice to develop three pilot projects in their respective provinces which engaged public sector lawyers in the provision of pro Bono legal services.

Access Pro Bono, Pro Bono Law Alberta and Pro Bono Law Ontario are working with the federal Department of Justice on pilot projects in the respective provinces to engage public sector lawyers in providing pro bono services.

Pro bono organizations in several provinces and the national Pro Bono Students Canada have made great strides in increasing access to justice. Biennial conferences have contributed to information sharing and development of best practices among pro bono lawyers. Pro bono organizations are an important part of the justice system in the communities and provinces where they exist. Pro bono organizations have developed innovative programs to better serve client needs. For example:

- as of May 2013, Access Pro Bono in British Columbia is actively seeking lawyers to staff 2 hour clinics once or twice a month, by speaking to pre-screened clients by phone or Skype for half hour interviews. This allows the client to be matched to a lawyer experienced in the required area of law, and lawyers to contribute pro bono help from their offices. It also addresses the lack of legal help available in many rural and remote locations.
- In 2009, Pro Bono Law Alberta announced a partnership with a law firm and an Edmonton Health Centre's Housing program, with the goal of ending homelessness.
- Pro Bono Law Ontario has established a medical/legal partnership providing legal services to families of critically or chronically ill children being treated at Sick Kids in Toronto or the Children's Hospital in London.

Pro bono programs can also assist young lawyers in their professional development through specialized training and mentorship, and opportunities to enhance practice skills through experience.

Despite these advances, pro bono services vary greatly from one jurisdiction to another, and even within provinces and territories. An international scan shows that pro bono developments also vary dramatically from one country to another. In the US, pro bono services are fully accepted as the main mechanism to promote access to justice.¹⁸¹

¹⁸¹ This is clear from the extent of coverage of pro bono related topics at the American Bar Association's Equal Justice Conference, its emphasis in the Presidential initiative on Access to Justice, many access to justice commission mandates, and more. See www.americanbar.org/content/dam/aba/events/probono_public_service/2013/05/equal_justice_conference/equal_just_conf2013_programbookWEB_authcheckdam.pdf.

However, in Australia pro bono plays a limited role in meeting peoples' legal needs. A recent survey revealed that over 60% of the pro bono work undertaken there by large law firms is for organisations rather than individuals.¹⁸²

The Committee's long term vision of equal justice is one in which all essential legal needs are met by public and private legal service providers (supported by legal expense insurance as appropriate). A justice system permanently based on volunteer efforts is too ad hoc and unsustainable to provide effective and durable access. Regardless of how extensive the legal profession's efforts, pro bono cannot possibly fill the current gap created by public-private legal service providers. According to Maclaren, "although we have the highest level of pro bono engagement in the country, we simply cannot meet the overwhelming demand for legal representation in this province."¹⁸³

The late Alan Parker, QC, a recognized pro bono leader in British Columbia, said it this way:

Wherever I have been associated with new service delivery initiatives, the latent demand surfaces. This is true every time Access Pro Bono opens a new clinic around the province. A recent example was our yearly Advice-a-Thon public clinics that we hold in open area-settings in Vancouver, Victoria and Kelowna. When we put up legal advice tents in Victory Square one day last month, we were, literally, swamped by walk-in clients. In short, if you build it, they come in.¹⁸⁴

Where does this leave pro bono and public-private partnerships? As these service providers are neither designed nor equipped to provide a predictable and secure response to essential legal needs, their energies are more appropriately streamed toward

¹⁸² National Pro Bono Resource Centre, *National Law Firm Pro Bono Survey: Australian Firms with Fifty or More Lawyers: Final Report* (January 2013) at 29 www.wic041u.server-secure.com/vs155205-secure/CMS/files_cms/National%20Law%20Firm%20Pro%20Bono%20Survey%202012%20-%20Final%20Report.pdf.

¹⁸³ Legal Services Society, *Submission to Public Commission on Legal Aid* (Vancouver: 1 September 2010) www.lss.bc.ca/assets/aboutUs/reports/submissions/submissionToPublicCommissionLegalAid2010.pdf.

¹⁸⁴ *Ibid.*

important but non-essential legal needs, such as resolving disputes that have a significant impact on the individuals involved but may not put their security or ability to meet basic needs at risk. Consumer protection issues could fall within this category, for example. Test case and public interest litigation are essential aspects of publicly funded legal services. In addition to the litigation carried out or funded by legal aid plans and other public interest advocacy clinics, this is also a good area for pro bono contributions and a great opportunity for partnerships between legal aid and pro bono.

Lawyers acting pro bono and pro bono organizations should continue to work in collaboration with legal aid organizations to provide seamless delivery, but with greater clarity on the line between their responsibilities. Pro bono programs are nimble, flexible and can marshal resources quickly, and so are also arguably well suited to emergent and emergency situations as a stop-gap measure.

Lawyers should continue to consider pro bono as a professional obligation and pro bono organizations should continue to play an important role in encouraging and facilitating these volunteer efforts. The focus should be on encouraging pro bono contributions by lawyers who do not regularly provide people law services, such as lawyers in large law firms, corporate counsel and government lawyers. Until the targets proposed by this report are met, it can be expected that the level of unmet legal needs in Canada will continue to be a serious concern, one that pro bono efforts by the profession contributes in significant ways to alleviate. It is important to view the many targets in this Report as a whole, in terms of how they fit together. The Committee is not suggesting that there will be no place for pro bono in its vision of equal justice – but rather a refocused place that better dovetails with what legal aid and the private market provide.

This transition in pro bono priorities and participation should be tracked through a survey of the legal profession. In Australia, the National Pro Bono Resource Centre conducts an annual survey of national law firms that could serve as a model.

Targets: By 2025, the justice system does not rely on volunteer legal services to meet people’s essential legal needs.

By 2020, all lawyers volunteer legal services at some point in their career.

Milestones:

- *Pro bono programs work with legal aid and other service providers to phase out dependence on volunteer legal services to meet people’s essential legal needs and reprioritize their work to meet other gaps in the availability of legal assistance*

Actions:

- *All law societies and legal employers remove barriers to participation in pro bono programs*
- *The CBA Pro Bono Committee collaborates with pro bono organizations to develop and carry out a national survey of pro bono contributions in Canada*

What do you think?

- Any feedback or suggestions?
- Who should be involved?
- Are you willing to help?
(write to: equaljustice@cba.org)

Law Schools, Legal Education and Law Students

Law schools support both private and public delivery of legal services and have a direct role in providing legal services through legal clinics. An important avenue for advancing access to justice is by engaging the legal academy to a greater extent than at present. One promising development is that the Council of Canadian Law Deans has established an access to justice committee to review the role of law schools in this area.

Students need opportunities to learn about, reflect on, and practice the all encompassing responsibilities of legal professionals. The other professions employ well-elaborated case studies of professional work while law schools, which pioneered the use of case teaching, only occasionally do so. Lack of attention to practice and the weakness of concern with professional responsibility are the unintended consequences on a single, heavily academic pedagogy to provide the crucial initiation into legal education.

*Doug Ferguson, 2010, speaking
about Educating Lawyers:
Preparation for the Practice of Law
(Sanford: Carnegie Foundation, 2007)*

Overview of Law School Involvement

The Big Picture

In preparation for their review, the Council of Canadian Law Deans prepared a summary of current law school access to justice initiatives. Many schools have initiatives to encourage and support students from communities that are under-represented within the legal profession.

The Federation of Law Societies' list of 'competency' requirements¹⁸⁵ does not include an access to justice component, or a requirement for

¹⁸⁵ See: www.flsc.ca/en/a-profession-with-high-admission-standards/.

experiential legal education. Some law schools have attempted to address access to justice by weaving relevant issues into mandatory basic courses, optional seminars and clinic courses.

Examples from Law School Courses

The University of Windsor Law School offers a mandatory full year course in access to justice for first year law students. The signature aspect of this course is collaborative projects for justice (P4J). Students must research a real life barrier to justice, prepare a background paper, and propose a solution. Some creative innovations have been proposed, including a public awareness campaign, a business plan, a software application, a policy paper, a public service announcement, a series of brochures and a guided interview 'app' for a particular legal document.

Osgoode Hall Law School requires its graduates to take part in an experiential legal education course, and provide 40 hours of community service.

Student Legal Clinics

All but three of Canada's law schools operate some form of legal clinic. Western University clinic director Doug Ferguson¹⁸⁶ has categorized these legal clinics into five types: representational; informational; placement; advocacy and simulations. Representational clinics are the most common and fill a gap in providing legal services. Hundreds of law students assist thousands of low income persons who don't qualify for legal aid and have no place to turn. Representational clinics are in every Canadian law school except those in Québec (where students are not allowed to appear in court) and New Brunswick.

All clinics provide some form of experiential learning for law students and assist individuals and non-governmental organizations in various ways. However, some argue that despite some progress, Canadian law schools are still not doing enough to integrate practice and ethics into legal studies. The Association for Canadian Clinical Legal Education (ACCLE) is a group of individuals and clinics who

¹⁸⁶ Also a member of the CBA Access to Justice Committee since August 2013, and member of the CBA Legal Futures Initiative's Education and Training Team.

came together to improve experiential education and to facilitate connection and collaboration between clinics across Canada. More recently a parallel student organization (ACCLES) with similar objectives was established.

Pro Bono Students Canada

Pro Bono Students Canada has chapters in 21 law schools, providing additional practical training and opportunities to increase access to justice. Executive Director Nikki Gershain, reports that 90% of volunteers plan to offer pro bono services once they graduate from law school, and 55% said their participation in pro bono had an impact on that decision. No longitudinal studies have been carried out to demonstrate this impact.

US Developments

Some US law schools require students to take experiential learning courses as a graduation requirement. For example, Washington and Lee University has transformed their third year into experiential learning. As noted earlier, many law schools sponsor 'incubator programs' to assist recent graduates in developing accessible legal practices. Some law schools have similar programs that involve law students, such the Justice Bridge program at Northeastern University.

Learn more: about Law School Initiatives

Pro Bono students Canada: <http://www.probonostudents.ca>

Canadian summary of law school experiential learning initiatives:

www.cba.org/pdf/Experiential-Learning-Programs.pdf

Association for Canadian Clinical Legal Education: <http://accle.ca/>

Initiatives by Canadian law school clinics: <http://accle.ca/links/>

US summary of law schools access to justice initiatives: <http://www.justice.gov/atj/atj-campus.html>

Street Law – “a nonprofit organization that creates classroom and community programs that teach people about law, democracy, and human rights worldwide”: www.streetlaw.org

Link for P4J at UWindsor: <http://www1.uwindsor.ca/law/p4j/registrar/>

Legal Help Centre of Winnipeg - “a not-for-profit organization that was set up by community volunteers working together with faculty and students from both the University of Winnipeg and University of Manitoba. Our vision is to assist disadvantaged members of our community to access and exercise their legal and social rights”: <http://www.legalhelpcentre.ca/>

Law Practice Program in Ontario: <http://www.lsuc.on.ca/WorkArea/DownloadAsset.aspx?id=2147489848>

Alternative clinical legal education programs, such as Street Law in Washington, DC engages students to work with community members to develop self-help tools and capabilities, as well as systemic and preventive solutions to recurring justice issues.

The Family Law Education Reform Report¹⁸⁷ from the Association of Family and Conciliation Court Services, William Mitchell College of Law and Hofstra University Faculty of Law emphasizes the

¹⁸⁷ www.flerproject.org/?q=node/1.

need for students to learn about their place as a lawyer in the range of service providers. This approach could be generalized to other subject areas that particularly impact low and moderate income people.

The ABA *Recodification of Accreditation Standards* requires that: “A law school shall offer substantial opportunities for student participation in pro bono activities.” Schools are also encouraged to address “the obligations of faculty to the public, including participation in pro bono activities.”

Access to Justice Research

Research on access to justice is not a priority in all Canadian law faculties. Civil justice research often lags behind research on criminal justice issues, where departments such as criminology and sociology have made great strides. There are reasons to be optimistic that civil justice research is on the rise, including through collaborative research alliances. This issue is discussed further in Part III.

Future Directions

The Summit included a rich discussion on the role of law schools, law students and legal education in fostering greater access to justice. Some ideas discussed include:

- Law students can do more to address unmet need if given the opportunity and support by law schools.
- Law schools have a critical role in shaping professional identity to highlight public service as a component of ethical lawyering.
- Rewarding research on access to justice.
- Law societies and law regulators should consider changing the monolithic entry structure for the legal profession (the UK or England and Wales) has 8 different legal licensed occupations).
- Criteria for promotion, tenure, and renewal could be adjusted to give appropriate weight to experiential learning in courses, service to the profession, service to the community, and encouraging pro bono activities.

Professor Bruce Elman advocates for law schools

to take a leadership role in modeling the lawyer of the future by formulating an aspirational statement for every law student. That statement includes a community service component and integrates this approach in all aspects of law school life. Elman has developed detailed proposals to this end and sees this as making a substantial contribution to equal justice.

Law students are a vigorous force for change and many law faculties are also keen to increase experiential learning opportunities and make stronger contributions to access to justice. At the same time, education and training goals do not always coincide with access goals. Students can make an important contribution, but cannot be expected to address the vast range of unmet needs.

At the Summit, there were discussions about how law schools could become more engaged in contributing to equal access to justice. The CBA, law societies, and members of the legal profession have an important role to play in advocating for and supporting these changes. The new Law Practice Program in Ontario will also support more experiential learning to enhance access to justice.

To the extent they are not already doing so, law schools should take a dual focus to integrating access to justice into education, by establishing requirements for all students and supporting opportunities for those particularly interested in access to justice. All graduating law students must have a basic understanding of issues relating to access to justice and know that fostering access to justice is an integral part of their professional responsibility (i.e. think systemically, act locally). Steps could be taken to encourage students who want to contribute more in this area, such as special internships, supporting innovations and research paper prizes.

Targets: By 2030, three Canadian law schools will establish centres of excellence for access to justice research.

By 2030 substantial experiential learning experience is a requirement for all law students.

By 2020, all graduating law students:

- **have a basic understanding of the issues relating to access to justice in Canada**
- **know that fostering access to justice is an integral part of their professional responsibility.**
- **have taken at least one course or volunteer activity that involves experiential learning providing access to justice.**

By 2020, all law schools in Canada have at least one student legal clinic that provides representation to low income persons.

- The Council of Canadian Law Deans supports development of access to justice curricula
- Each law school appoints a staff member to serve as champion/leader for engaging discussion between the school and justice system stakeholders, including the public, about the role of law schools in supporting equal access to justice
- Law students have opportunities to become involved in CBA access to justice initiatives, including discussions of this report

What do you think?

- Any feedback or suggestions?
- Who should be involved?
- Are you willing to help?
(write to: equaljustice@cba.org)

Milestones:

- Law school curricula examined and adjusted as needed to meet the targets

Actions:

- The CBA adopts a statement on the 'Model Lawyer of Tomorrow' to encourage and foster dialogue on the role of lawyers in promoting access to justice
- The CBA adopts a resolution encouraging law schools to offer substantial opportunities for experiential learning in the access to justice context. This ties into the Legal Futures Initiative, which is considering legal education and training of the next generation of lawyers
- The Federation of Law Societies includes an access to justice component in its competency requirements
- Law schools expand the access to justice content of their curricula
- Law schools expand the availability of experiential learning to their law students



PART III

making the equal justice vision real

Making the equal justice vision real

This report is an invitation to act, or as one person attending the Summit put it, to “just(ice) do it”. A fundamental step to reaching equal justice is laying the foundation for ambitious but possible targets for an equal, inclusive justice system by 2030. At the same time, the Committee recognizes the barriers to even modest improvements to access to justice, let alone the type of change the Committee advocates.¹⁸⁸

The Equal Justice initiative was designed to consider four systemic barriers that have hindered substantive progress on access to justice reform and to propose means to overcome them. The barriers are:

- Lack of public profile of access to justice
- Inadequate strategy and coordination between those seeking improvements
- No effective mechanisms for measuring change
- Gaps in our knowledge about what works and how to achieve substantive change.

In this part, the Committee examines these barriers more closely to consider how best to overcome them, so we can move from the current situation of unequal justice to the vision of equal justice. Here the focus shifts to the three structural supports in our conceptual bridge to equal justice:

- increased public engagement, participation and ownership of the justice system;
- improved collaboration with effective leadership; and
- enhanced capacity for justice innovation.

¹⁸⁸ As in Part 2, when the Committee refers to “courts” in the general or conceptual sense in this Part, it views this term as potentially encompassing court-like tribunals that adjudicate disputes for individuals.

Shared responsibility.
Change the conversation.
Bring the cheque book.

Two perspectives frame this discussion. First, access to justice is a ‘wicked problem’, meaning it is a complex policy problem that defies quick fixes and simple solutions. A second and related point is that given the scale of change required, we need to go beyond conventional approaches. One could say a ‘superhero’ is required, but certainly, effective leadership is fundamental.

Access to Justice is a ‘Wicked Problem’

Decision making theory refers to very complex problems as ‘wicked’ problems, not in the sense that they are actually ‘evil’, but because they are highly resistant to resolution. In its 2007 report, *Tackling Wicked Problems: A Public Policy Perspective*, the Australian Public Service Commission outlines characteristics of these problems:

- They are difficult to clearly define: the nature and extent of the problem depends on who is asked as different stakeholders have different views of what the problem is.
- They are often interdependent or co-exist with other problems and there are multiple causal factors.
- They go beyond the capacity of any one organization to understand and respond to.
- There is often disagreement about the causes of the problems and the best way to tackle them.
- Usually, part of the solution to wicked problems involves changing the behaviour of groups of people or all members of society.¹⁸⁹

All these characteristics apply to the access to justice problem in Canada today. Further, like many

¹⁸⁹ Australian Public Service Commission, *Tackling Wicked Problems: A Public Policy Perspective* (Commonwealth of Australia, 2008) at 3-5 http://www.apsc.gov.au/_data/assets/pdf_file/0005/6386/wickedproblems.pdf.

wicked problems, attempts to solve the access to justice problem have generally been unsuccessful or have met with partial but disappointing levels of success, and even to unforeseen negative consequences. These chronic policy failures give access to justice problems an appearance of being intractable and diminish support for change. It is easy to see equal, inclusive justice as simply too hard a goal to achieve and to give up or set our sights on minimal reform objectives. Rather than depressing action, however understanding the nature of the challenge can empower us to bolder solutions.

Tackling wicked problems requires a bold approach founded on a shared recognition and understanding that there are no quick fixes and simple solutions. The Australian Public Service Commission report discusses key ingredients in solving or at least managing wicked problems:

- Holistic rather than partial or linear thinking – need to grasp the big picture including the interrelationships between the range of causal factors and policy objectives;
- Innovative and flexible approaches;
- Successfully working across both internal and external organizational boundaries;
- Engaging citizens and stakeholders in policy making and implementation;
- A principle-based rather than a rule-based approach;
- Iterative processes involving continuous learning, adaptation and improvement; and
- Developing innovative, comprehensive strategies or solutions that can be modified in the light of experience and on-the-ground feedback.¹⁹⁰

The Australian report concludes that wicked problems require governmental and non-governmental agencies to work together in new ways and through novel processes. This shift must be facilitated through:

- supportive structures and processes;
- a supportive culture and skills base;

¹⁹⁰ *Ibid* at 9-12.

- facilitative information management and infrastructure;
- appropriate budget and accountability frameworks; and
- ongoing forums of exchange.¹⁹¹

The Committee has integrated the Australian framework and suggested approaches into the targets, milestones and actions for the structural supports to our bridge. Together, they suggest that collaboration and coordination will be required to reach equal justice.

Is a ‘Superhero’ Required?

The Committee has concluded that partial solutions are incapable of addressing the current access to justice gap and effectively contributing to equal justice. This conclusion is supported by the wicked problems literature¹⁹², which emphasizes the importance of holistic thinking and the need to confront the big picture and deal with the interrelationships between a range of causal factors and policy objectives. This report rejects the status quo and calls for action on a more fundamental scale as required by the depth, breadth and urgency of the problem.

At the Summit, there was a consensus that we need access to justice champions. The role of those champions is discussed in the sections that follow. Justice innovation literature¹⁹³ suggests that access champions come forward organically, often from a grassroots perspective, armed with a keen understanding of a specific access problem, a creative solution and an unwillingness to take ‘no’ for an answer.

The question remains though whether champions will be enough, as those people do emerge from time to time. It seems that instead something truly extraordinary may be required to achieve our ambitious shared objectives. The Committee found

¹⁹¹ *Ibid* at 21.

¹⁹² See, for example, Richard H Beinecke, “Leadership for Wicked Problems” (2009) 14:1 The Public Sector Innovation Journal www.innovation.cc/scholarly-style/beinecke1.pdf.

¹⁹³ See, for example, the work at Hiil, *supra* notes 132, 134 and 143.

itself asking: is a superhero required? This image is hard to avoid, as a special champion would need extraordinary powers and be fervently dedicated to protecting the public. Rather than a comic book hero, however, the Committee is suggesting someone more like a Tommy Douglas and his heroic efforts to build a universal healthcare system in Canada. He is the iconic social policy superhero.

In posing the question this way, the Committee does not mean to trivialize the efforts required. The Committee believes it is important to encourage the latent champion in each of us and reiterate the invocation that we all need to think systemically and act locally. At the same time, the notion of superpowers is appropriate to describe the effort required to reach equal justice. In particular, the Committee is concerned that change efforts will continue to flounder as no one individual or entity is responsible for ensuring access to justice in Canada. And so, our targets include a typically Canadian proposal for an additional function in the justice system: an access to justice commissioner in each jurisdiction with modest but novel 'super' powers.

Building Public Engagement and Participation

Civil justice is a low priority for the Canadian public, and so has low political priority. Polling shows broad public support in principle for legal aid, but still there is no public outrage at the current deficiencies, or any broad movement urging change. Criminal justice issues tend to dominate the media and have more public profile. The lack of awareness of the importance of a functioning justice system for non-criminal matters means civil justice issues receive little attention. Overall, justice concerns have lower priority than other parts of our social safety net, notably education and healthcare.

On average, healthcare takes over 40 cents of every dollar of public spending. The whole civil justice system is less than one cent of the same dollar. How can we possibly be doing that?

The answer is because the public demands healthcare and so far, they are not demanding access to justice.

Those who most need publicly funded legal services often have no voice in determining priorities, because poor people have little political capital, as do other vulnerable groups affected by inadequate access, including, for example, children.

In addition, many people believe that legal problems happen to other people, not them. Another common misperception is that most people's justice needs are already met. There is a widespread disconnect between Canadians and their justice system: there is no sense of ownership. The public feels disenfranchised and helpless to change the system. Our elected representatives broadly reflect the population, and are unlikely to act on issues that they know are unimportant to their constituents.

As the statistics in Part I vividly illustrate, justice has lost ground relative to other important social programs. Political attention to equal justice is unlikely given the current lack of public recognition or support. So, increased public engagement is a necessary condition for reaching equal justice. This engagement could be fostered by governments regularly using community roundtables, town hall meetings, or other public gatherings to engage in dialogue with the public about justice. Governments should be able to demonstrate that the public perspective has informed the foundations of the justice system.

Changing the Conversation

The long-term strategy for increasing public engagement with the justice system and building a public commitment to equal justice is linked to improving individual legal capability, beginning with early education to build law as a life skill. The objective is for Canadians to have a greater sense that they own the justice system, that it's a system intended to serve them, rather than a system for lawyers and judges to exert power over them. In the shorter term, a comprehensive public engagement campaign is required. We need a convincing answer when people ask: "why should I care about equal justice?" While each justice stakeholder group has a role, the legal profession and the CBA have a leadership role in developing this campaign.

Lack of public interest in justice system reform is further harmed by conflicting messages about access to justice. When justice leaders speak out they are often accused of acting out of self-interest. Messages that emphasize or reinforce a negative or jaundiced view of legal and court processes, the legal profession and the judiciary have great currency. Genn has noted with dismay this “damaging justice rhetoric” that “presents court proceedings as an unnecessary drain on public resources, and public funding for civil and family disputes through legal aid as an incitement to litigate rather than a means of facilitating access to justice.”¹⁹⁴ Justice system stakeholders can contribute to this negativity and confusion in a dialogue marked by finger-pointing and attributing fault to others.

The Envisioning Equal Justice initiative focused on changing the conversation among justice system stakeholders to move beyond damaging rhetoric arising from competition over scarce resources and protecting turf. The next stage is to change the conversation further by expanding it to include more members of the public in more meaningful ways.

The point is not to challenge and resist in order to preserve the status quo, but to engage in the debate, to argue for the benefits of public justice while recognizing where and how the public justice system and legal practice needs to change and to offer a realistic program for improvement in order to meet the needs of disputing parties seeking justice through the legal system.

Dame Hazel Genn

Increased public engagement is a necessary condition for reaching equal justice, but politicians are unlikely to embrace the issue given the lack of public recognition or support. The importance of strategies that bring the public into conversations about equal justice featured prominently in the Summit discussions about obstacles to change and how to overcome them.

¹⁹⁴ Genn, *supra* note 22.

Summit participants also emphasized the need to stop “singing to the choir” and develop mechanisms to engage the public more directly and open the discussion up significantly. People need to know that:

- They are not immune from legal problems: “it” can happen to “you”
- Everyone will likely be touched by the justice system at some point
- The value of legal help when people have serious legal problems
- The benefits to society as a whole when we provide equal justice
- That justice needs can be as important as health care needs
- The economic and social cost of doing nothing.

Another key message is the strong interconnection between health, education and justice; understanding that spending on justice will save money elsewhere (in addition to avoiding suffering). Also, equal justice is interrelated to other more accepted social goals, such as alleviating child poverty, improving the GDP and dealing properly with mental health issues.

Summit participants were also clear that the goal must be community ownership of the justice system, and that can only be achieved through active engagement. The public is very much a part of the justice community. Justice system stakeholders are not instigating dialogue with the public but rather tapping into a justice dialogue that is already going on. The problem is that the two conversations – the justice system dialogue and the community justice dialogue – are disconnected. We need to replace the weak links between the two conversations with a strong connection.

As noted above, wicked problems must be widely discussed by all relevant stakeholders to get to a full understanding of their complexity. The Australian Public Service Commission Report confirms that changes cannot be imposed on people: “Behaviours are more conducive to change if issues are widely understood, discussed and owned by the people whose behaviour is being

targeted for change.”¹⁹⁵ At a Summit workshop, Mary Ellen Hodgins, an entrepreneur and a public representative involved in several access to justice initiatives, emphasized practical reasons for engaging the public as *partners* in justice dialogue. Public engagement builds trust, reduces the potential for unintended consequences, builds capacity and contributes to innovation because the public offers valuable contributions. In addition, it is the right thing to do because people are part of the justice community.

Increasing Public Participation

Initiatives to build general public understanding of, support for, and ownership in the justice system is one key strategy. A second is to develop effective means for public engagement and participation as active justice system stakeholders.

HiiL’s *Innovating Justice* handbook emphasizes the importance of involving users early on and throughout the process. While acknowledging that this takes time, it is essential because it is only by listening to the people involved in a judicial process that we will be able to understand the problems from the perspective of users. People using justice system services “are not always able to clearly articulate their deepest needs”.¹⁹⁶ The main mechanism employed today is user satisfaction surveys but these only scratch the surface. Actual conversations may be required to explore past and present experiences, attitudes and emotions surrounding these topics. The justice system has much to learn from market research and other more sophisticated tools and approaches.

Pain is a mere signal. It is crucial to diagnose exactly what hurts most and what the needs are. So involving users from the outset, and throughout the process, is not just ‘a good idea’ or something ‘to be aimed for’, it is essential to the development of an efficient effective, innovation.

HiiL, Innovating Justice, note 134

¹⁹⁵ Australian Public Service Commission, *supra* note 189.

¹⁹⁶ *Innovating Justice*, *supra* note 134.

The broader question is how to fully engage the public in a way that will build the sense of ownership required for fundamental change. This challenge seems particularly daunting given the paucity of policy dialogue in Canada. Those working for improvements are not an organized national movement, but advocates who are already often overworked and underpaid.

In *A Voice for All: Engaging Canadians for Change*, the Institute on Governance has developed a framework to facilitate active participation and citizen engagement.¹⁹⁷ Principles include shared agenda-setting by all participants, a relaxed timeframe for deliberation, an emphasis on value-sharing rather than debate, and consultative practices based on inclusiveness, courtesy and respect. In her remarks at the Summit, Maria Campbell advocated for steps to recognize and transcend the power differentials between institutional and professional voices and community voices. Conversations based on reciprocity, where the contribution of all perspectives and forms of knowledge is equally recognized and valued is key. Steps must be taken to ensure the dialogue is culturally appropriate and addresses barriers to communication. As Campbell pointed out: “Our language is different. Because I speak English doesn’t mean that I understand or comprehend what you’re talking about.”

For its community consultations, the Committee developed a consultative framework integrating the principles outlined in this section. The framework is appended to this report.

In facing the difficult challenge of beginning to build greater public engagement and ownership of the justice system, successful existing models can serve as the foundation for concerted, widespread efforts. We can also learn from successful campaigns to change public policy and public behaviour in other fields, such as changing the cultural acceptability of drinking and driving, and smoking in public places.

Smaller scale successes have been made in justice

¹⁹⁷ Institute on Governance, *A Voice for All: Engaging Canadians for Change Conference on Citizen Engagement October 27-28, 1998* (Ottawa: 1998) http://iog.ca/wp-content/uploads/2012/12/1998_October_cereport.pdf.

Reciprocity has to be the essence of the work... that we do. If you're always giving and I'm always taking there's no way that empowers me and there's no respect that's gained between the two of us. We can teach each other all sorts of things... We can do that if we can have even one or two classes a month in the community where we can bring in different kinds of community people and we share. You're able to give us the kinds of information instead of in a handbook but also they can teach you and that becomes a reciprocal thing. It empowers both of us and it's the empowering and the process that makes the change.

*Maria Campbell, Metis Elder,
Envisioning Equal Justice Summit, April
2013*

system public engagement strategies. In her post-Summit reflections, Anne Beveridge, a long time legal aid lawyer in British Columbia, attributed the decline in public support for legal aid to the removal of local community law offices, which had carried out regular extensive consultations with local community members. As a result, the community felt they "owned" the province's legal aid plan and successfully went to bat for it when the government sought to cut services in 1997. Community law offices are essential to community engagement.

More recently, the CBA British Columbia Branch successfully raised the profile of legal aid and other access to justice issues through a concerted public engagement campaign. At the Summit, Matthews said that an important and promising insight gained through the campaign is that the highest support for legal aid comes from those with the most knowledge. After a 25-minute phone conversation, with the interviewer mainly asking questions, the interviewees' favourability rating, their personal commitment to having tax dollars support legal aid, went way up. This was true across all demographics.

As members of the justice community, we need to change the way we talk and how we act. Our goal is an equal, inclusive justice system that everyone

can take part in. To start, we need to listen to the public perspective and create inclusive forums for dialogue and accountability structures. True public ownership of the justice system will require more than enhanced consultation and dialogue though. We must also transform accountability structures to include public representatives. **Right now, Canadians think of the justice system as belonging to judges, lawyers and the government – this has to change. Canadians must perceive the justice system, including the courts, as belonging to them.**

Targets: By 2025, all provincial and territorial governments engage in dialogues with the public (e.g. community roundtables, town hall meetings) on a regular basis and demonstrate how the public perspective informs justice system policies and processes, innovations and reforms.

By 2020, Canadians have a greater sense of public ownership of the justice system.

Milestones:

- All governments hold dialogue sessions with the public (e.g. community roundtables, town hall meetings), in partnership with community groups, at least three to five times per year
- A principled framework for community dialogue (e.g. inclusion, respect, reciprocity) integrating evidence-based best practices is in place
- Justice reform captures the public perspective which informs policy and process development, innovation and reform to the justice system
- A suggestion from a member of the public is championed by an appropriate justice system participant and is successfully implemented

Actions:

- The CBA works with other justice system stakeholders to develop a public engagement strategy, including an interactive "My Justice System" campaign to learn more about public expectations of the justice system and to seek out concrete proposals for access to justice reforms

- *Provincial and territorial governments build on the consultative practices of legal aid providers and legal clinics to identify justice system user groups who should be included in consultation processes*
- *All justice system governing boards and advisory committees include more than one public representative and operate according to inclusive guidelines for communication and consultation*
- *Justice system stakeholders collaborate to increase the number and types of mechanisms to receive feedback from people accessing the justice system, including online discussion forums and surveys of people denied services; feedback is taken into account in reform strategies*

What do you think?

- Any feedback or suggestions?
- Who should be involved?
- Are you willing to help?
(write to: equaljustice@cba.org)

Building a Coherent Civil Justice System: Collaboration and Effective Leadership

There is effectively no coherent civil justice system in Canada. Fragmentation is to some degree a necessary consequence of institutional and individual independence of the parts of our justice system – the courts and judges, the legal profession and lawyers and the legislative and executive branches of government. Independence of the judiciary and of the bar and the separation of powers between branches of government are foundational principles of Canadian democracy that must be steadfastly preserved. At the same time, a rigid application of these principles can act as a shield against justice innovation and prevent necessary collaboration and coordination.

This overall lack of coherence is replicated on a practical level. The diffuse and complex nature of

delivery of civil justice services is exacerbated by the lack of effective mechanisms for coordination and collaboration. These conditions also exist in the criminal justice system, but it has achieved a higher degree of coherence through focused collaboration.

During the Summit closing plenary session, Colleen Cattell Q.C., a Vancouver mediator, asked participants to consider the unseen or unspoken interests that inhibit collaboration in the justice system. She used the image of an iceberg, with the tip above the water representing expressed positions, and the bulk hidden under the surface to suggest possibly unarticulated interests or fears at stake. A number of common themes emerged from these small group discussions at the closing plenary, shown in the “Iceberg of Hidden Hurdles to Justice Innovation” diagram below.

Acknowledging these barriers is an important first step in working together to overcome them.

This need for collaboration and cooperation is pervasive. None of us can meet these challenges alone. Many conversations begin with issues about authority and independence. I say let’s start with the problems and the solutions. Of course we have to be careful about roles and responsibilities and about the independence of the bar, the bench and the administration. But let us not start the conversation there. Let’s identify the problems together and try to solve them together, respecting our roles and responsibilities but never forgetting our shared responsibility to the administration of justice.

*Justice Thomas Cromwell, Keynote Speech
at Envisioning Equal Justice Summit,
April 2013*

Hidden Hurdles to Justice Innovation

What's below the surface?

- Fear of innovation
- No reward for taking risks
- Unwillingness to expose failures and inefficiencies
- No one has/takes responsibility (or joint responsibility), so everyone expects someone else will "do something"
- Finger pointing, blaming
- Fear of losing turf - institutional self-interest
- Overwhelmed by complexity and extent of the problem
- Self-preservation, fear of loss of control, status and work (e.g. fear of becoming a discount store lawyer)
- Sense of entitlement – we know more/better than people asking for change
- Belief that some issues are untouchable/ shouldn't be questioned (eg. judicial independence, role of law schools, self-regulation of profession, necessity of lawyers being sole providers of legal representation)



In addition to justice stakeholders' fears and interests, the current situation is exacerbated by our underdeveloped capacity for collaboration despite the clear human, social and economic costs of unequal justice. Summit participants noted that justice system players too often act in 'silos' and the lack of clear common goals or visions act as inhibitors to effective collaboration. We must acknowledge that we in the legal profession are better at competing than collaborating or recognizing our interdependencies. This competition reinforces inefficiencies and leaves out the broader community. Inertia and lethargy are natural responses to these conditions and active steps are required to overcome these tendencies and complexities to facilitate collaboration.

However, collaboration alone will not create a coherent civil justice system. Effective leadership is also essential. At the Summit, participants considered the question, 'how can we go forward when we don't know where we're going' because;

- The justice system is a body without a brain.¹⁹⁸
- We lack management capacity: there is no CEO of the justice system making coherent decisions.
- We need leaders, champions for change.
- There is plenty of diagnosis, but little attention to how to translate it into change/action.

If the justice system is a body without a brain or an organization without a CEO, then genuine leadership in the access to justice field must be developed to fill this void.

The Committee proposes that we build our capacity for collaboration and effective leadership in the civil justice system through two main avenues:

- establishing permanent and ongoing national, provincial, territorial and local collaborative structures; and
- the appointment of access to justice commissioners.

The expectation is that by 2020 these collaborative structures and commissioners would be functioning at a high level. A committee or commission can be set up quickly, but time is needed to develop the skills and processes necessary to work together effectively, cultivate membership, refine mandates, and gather resources and so on. The following discussions bring together the Committee's insights on what is required to meet this target of effective collaboration and leadership.

Equal justice will also be advanced through networking, sharing information and communication between collaborative forums. This is addressed in the next section on building the capacity for justice innovation. Here, the focus is on the skills, processes and structures needed to facilitate collaboration in the justice system.

¹⁹⁸ Rebecca Sandefur and Aaron Smith, "Access Across America: First Report of the Civil Justice Infrastructure Mapping Project" (American Bar Foundation, 2011).

Collaborative Skills, Processes and Structures

The National Action Committee is an important forum for bringing together justice system stakeholders, including a member of the public. Other collaborative forums are needed at the provincial, territorial and local levels. During the Summit, this requirement was expressed as the need for “a neutral umbrella leadership body to oversee justice system reform and bring together stakeholders”. Some jurisdictions have had access to justice committees for a specified period or for specific initiatives. These include two Alberta initiatives; the Justice Policy Advisory Committee and the Safe Communities Initiative. Lessons can be learned from the successes and the failures of these types of initiatives. At the Summit, Kurt Sandstorm, Q.C., Assistant Deputy Minister, Alberta Justice and Solicitor General, highlighted three specific lessons: establish separate forums for civil and criminal justice issues, keep collaborative structures small and develop a focused mandate and action plan.

Collaboration requires more than setting up committees. Certainly to reach equal justice we must develop collaborative skills, processes and structures. But, we also need to fundamentally change the way we work and carry out the business of justice. We need to build equal justice communities from the ground up, breaking down siloes and replacing them with effective means of communication, coordination and cooperation within and across sectors of the justice system.

We desperately need a more cooperative and collaborative approach - within sectors (eg among PLE providers, pro bono groups, etc); across sectors (judges, lawyers, court administrators, legal aid, etc); and across jurisdictions (eg. why develop essentially the same materials for self represented litigants 13 times?)

*Justice Thomas Cromwell
Keynote Speech at Envisioning Equal
Justice Summit, April 2013*

The first step to facilitate working across organizational boundaries includes inter-organization mapping on a given issue, strategic reviews and creating a shared understanding of problems across organizations.

The Australian Report on tackling wicked problems states the social complexity that accompanies nearly all such problems means “a lack of understanding of the problem can result in different stakeholders being certain that their version of the problem is correct”. Achieving a shared understanding of the dimensions of the problem and different perspectives among external stakeholders who can contribute to a full understanding and comprehensive response to the issue is crucial. The report goes on to say that, “... the Holy Grail of effective collaboration—is in creating shared understanding about the problem, and shared commitment to the possible solutions.” From this perspective, solving a wicked problem is fundamentally a social process: “Having a few brilliant people or the latest project management technology is no longer sufficient.”¹⁹⁹

Lessons from the US Access to Justice Commission Experience

In the US, Chief Justices are considered the ‘stewards’ of the entire justice system. Many Chief Justices have established access to justice commissions (ATJC) to enable them to work with other stakeholders to advance equal justice. In 2010, the US Conference of Chief Justices adopted a resolution supporting the “aspirational goal that every state and United States territory have an active access to justice commission or comparable body.” The resolution was in large measure a response to the remarks of Professor Laurence H. Tribe, Senior Counselor for Access to Justice, US Department of Justice. Tribe championed access to justice commissions as having achieved remarkable results and referred to them “as one of the most important justice-related developments in the past decade.”

In January 2011, the US Conference of Chief Justices adopted a resolution entitled “Leadership to Promote Equal Justice”. The resolution

¹⁹⁹ Australian Public Service Commission, *supra* note 189 at 28.

acknowledges that under the US constitutional structure, the judicial branch “shoulders primary leadership responsibility to preserve and protect equal justice and take action necessary to ensure access to the justice system for those who face impediments they are unable to surmount on their own.” Given the importance of judicial leadership and commitment, the resolution urges Chief Justices to establish partnerships with state and local bar organizations, legal service providers and others to:

1. Remove impediments to access to the justice system, including physical, economic, psychological and language barriers;
2. Develop viable and effective plans to establish or increase public funding and support for civil legal services for individuals and families who have no meaningful access to the justice system; and
3. Expand the types of assistance available to self-represented litigants, including exploring the role of non-attorneys.

At the Summit, Steven Grumm, Director of the ABA Resource Centre for Access to Justice Initiatives provided an overview and analysis of the US experience with ATJCs to date. The ABA defines ATJCs as:

- A blue ribbon commission or similar formal entity comprised of leaders representing, at minimum, the state courts, the organized bar and legal aid providers. Its membership may also include representatives of law schools, legal aid funders, the legislature, the executive branch, and federal and tribal courts, as well as stakeholders from outside the legal and government communities.
- Its core charge is to expand access to civil justice at all levels for low-income and disadvantaged people in the state (or equivalent jurisdiction) by assessing their civil legal needs, developing strategies to meet them, and evaluating progress. Its charge may also include expanding access for moderate-income people.
- Its charge is from or recognized by the highest court of the state or equivalent jurisdiction; the highest court and the highest levels of the

organized bar are engaged with the ATJC’s efforts and the ATJC reports regularly to them.

- Its primary activities relate to planning, education, resource development, coordination, delivery system enhancement, and oversight. It is not primarily a funder or direct provider of legal assistance.
- It meets on a regular basis and has ongoing responsibility for carrying out its charge.²⁰⁰

In some cases, ATJCs have been established by statute; more frequently they are created by state Supreme Court rule or order in response to a petition or request by the state bar, sometimes with formal support from other key stakeholder entities.

ATJCs have focused on a range of activities:

- Increasing public awareness of the civil legal needs of low-income people and the importance of civil legal assistance—through legal needs studies and other reports, hearings, evaluation reports and public awareness campaigns;
- Expanding efforts to educate federal legislators about the need for increased LSC funding and state policymakers about the need to augment state-level funding— through state appropriations, filing-fee surcharges, voluntary or mandatory bar-dues contributions, improvements in IOLTA (Interest on Lawyers Trust Accounts), and other means;
- Increasing pro bono participation among private attorneys—through pro bono initiatives such as mandatory reporting, rule changes, pro bono attorney—recruitment campaigns, websites, conferences, and state-wide data collection;
- Creating and expanding loan-repayment assistance programs for young attorneys with substantial student-loan debt, which serves as a barrier to taking lower-paid jobs in civil legal aid organizations;
- Assisting efforts to bring together the bar, courts, legal aid providers, and others to make

²⁰⁰ www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_atj_definition_of_a_commission.authcheckdam.pdf

the courts more accessible and user friendly and to address the challenges posed by the self-represented—through comprehensive plans, reports and evaluations, training and education, simplification of rules and forms, courthouse support, web- and technology-based tools, and other activities; and

- Developing new programs and state-wide collaborations to ensure effective coordination among providers, implement innovative technology-based systems and ensure systemic advocacy and services to special populations, such as immigrants and prisoners.

In Grumm’s opinion, the main function and virtue of ATJCs “has to do with the fact that they sit at altitude and can break down some of the silos that other actors in legal system might be living in and not realizing that they’re not communicating as well with their counterparts.” The effectiveness of ATJCs comes down to a question of leadership, the personality and dedication of the Chief Justice. Another key to ATCJ’s success is increased accountability. In almost all cases, ATCJs have to report annually, whether to legislature, the Supreme Court, and/or the bar association. This reporting feature pressures ATJCs to show concrete results. The greatest successes of ATJCs have been in advocating for additional funds for access to justice initiatives and services, particularly legal aid.

Grumm also outlined pitfalls and challenges experienced by some ATJCs, which tended to reflect the flipside of the advantages. For example, because ATJCs are blue ribbon committees operating at ‘altitude’, they can be removed from day to day problems and may therefore be better at creating strategic plans than carrying them out. Similarly, ATJCs focus on breaking down silos but can themselves project an air of elitism and may be perceived as exclusionary. Further, direct service providers have expressed concerns that an ATJC is just another player consuming time and funds and taking finite resources away from meeting the public’s legal needs. This concern has been overcome where ATJCs have been successful in generating additional resources.

The ABA provides support to ATJCs through its

Resource Centre for Access to Justice Initiatives,²⁰¹ which serves as a hub for the exchange of information, and facilitates an annual meeting of heads of ATJCs in conjunction with the Equal Justice Conference. The Access to Justice Commission Expansion Project²⁰² has established a fund from monies from private foundations to strengthen the ATJC movement nationally, facilitating the development of new ATJCs and enabling existing ATJCs to develop and test innovative projects. The fund makes grants to commissions for this purpose.

As part of the Access to Justice Support Project, the ABA has developed a number of access to justice tools, including a checklist and best practice guide. The checklist sets out common strategies employed to increase equal justice on several fronts: funding for civil legal assistance; pro bono; education, research, awareness; student loan repayment assistance; court access and pro se (SRLs); state agency administrative fairness; and program delivery and collaboration. The best practices guide recognizes that while no two states are alike, and every state’s access to justice efforts must be geared to local circumstances, some basic lessons can be discerned and shared. The guide’s twelve lessons from successful state access to justice efforts are set out below.

Several state ATJCs have prepared detailed handbooks for building access to justice communities. For example, leaders of the Washington Access to Justice Board have published a “roadmap for building an equal justice community”, providing step-by-step advice on building an access to justice structure at the state level.²⁰³

²⁰¹ www.americanbar.org/groups/legal_aid_indigent_defendants/initiatives/resource_center_for_access_to_justice.html.

²⁰² http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_atj_2013_innovation_grant_authcheckdam.pdf

²⁰³ Washington Access to Justice Board, *Equal Justice... The Noblest Common Denominator: A Road Map for Building an Equal Justice Community* (Washington: Jim Bamberger, 2001) www.wsba.org/Legal-Community/Committees-Boards-and-Other-Groups/Access-to-Justice-Board/~/_media/Files/Legal%20Community/Committees_Boards_Panels/ATJ%20Board/roadmap%20Part%20I.ashx.

12 Lessons for Effective Collaboration

1. Successful Access to Justice efforts are founded upon a strong partnership among the bar, the judiciary, and legal aid providers. Law schools can also be key partners, while representatives from outside the legal community can bring new perspectives and help broaden support.
2. Formal structures that are accountable to more than one partner can be more secure than informal structures or structures accountable to only one partner.
3. Judicial leadership – especially at the state Supreme Court level – greatly increases the effectiveness of Access to Justice initiatives.
4. Individual leadership is critically important for a successful Access to Justice effort.
5. New and emerging Access to Justice leaders should be cultivated.
6. Institutional commitment is necessary on the part of each of the key partners.
7. Assessing and publicizing accomplishments is a key task.
8. Access to Justice leaders should chart a compelling vision but avoid creating unreasonable expectations.
9. An effective staff capacity is essential for a successful Access to Justice effort.
10. Access to Justice structures should carefully consider how best to obtain meaningful input from client communities.
11. Access to Justice structures should be open and inclusive and place a priority on developing trust among the partners.
12. Partners should place a priority on promoting cooperation and consensus within their own community and strive to speak with one voice in public.

ABA Access to Justice Support:

www.nlada.org/DMS/Documents/1018712627.59/12%20Lessons.pdf

Access to Justice Commissioners

The US experience with ATJCs is not directly transferable to Canada, particularly given the differences in the role of the judiciary and the Chief Justices on either side of the border.

Blue ribbon committees may not be the best model to drive substantive access to justice reform in Canada. The willingness and ability to exert genuine leadership is built on passion and commitment, not on status and position. As the ABA has stated: “many of the most effective leaders have been volunteers with no formal responsibility in this area, who simply developed an Access to Justice vision and brought others along. An individual’s institutional role is far less important than the willingness to make a commitment to do what is necessary to further Access to Justice goals.”²⁰⁴ As the ATJC experience shows, not all Chief Justices are cut out to be the champion for change. Further, most senior leaders of the bench and bar are very busy and unable to free up the time required by this endeavor.

Champions for change are likely to emerge at a local level in connection with specific reforms – that is why the Committee’s target includes not only system-wide collaborative structures but also collaboration at the local level on specific initiatives. HiIL has created an awards program to recognize innovation leaders, saying that “[i]nnovators are motivated to improve and to implement their innovations across borders. Nominees and applicants for the Innovating Justice Awards will be able to share their setbacks, successes and best practices.”²⁰⁵ Access to justice commissions or committees can cultivate and celebrate equal justice champions, but it is rare for a collective body to actually carry out this role.

Given these realities, the Committee has concluded that while federal, provincial and territorial committees along the lines of the US ATJCs are necessary to reach equal justice, they are not a

²⁰⁴ http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_atj_definition_of_a_commission.authcheckdam.pdf

²⁰⁵ *Innovating Justice*, *supra* note 134. See also, J.M.Howell and C.A. Higgins, “Champions of Technological Innovation” (1990) 35:2 *Administrative Science Quarterly* 317.

sufficient measure. They are required to improve communication and coordination of efforts but do not guarantee the leadership and champions required for consistent, substantive change. As Muller pointed out at the Summit, current leaders of justice system organizations should not take the lead as it will likely result in “more of the same and no true collaboration.” Every member of an ATJC participates in her or his representative capacity bringing a unique and important perspective, but no one, including representatives of the public, represents the system as a whole.

First, unlike Apple, there really isn't a CEO of the justice sector. There's not one owner. I mean, who owns justice? Who's the CEO, who directs the justice system? If there is a very clear CEO, I think it almost, by definition, would not be a justice system but a dictatorship.

Sam Muller, Hiil, at CBA Envisioning Equal Justice Summit

The Committee is also concerned that ATJC would not be adequately resourced to carry out this important reform work. It is time to stop trying to bring about equal justice from the corner of our desks. Something new and distinctive is required to ensure progress on equal justice: the Committee suggests access to justice commissioners at the federal, provincial and territorial levels. Access to justice commissioners would be an individual and office dedicated to justice sector reform to ensure equal justice as their sole focus. They would have the advantage of an independent perspective and a full-time, resourced position focused on this objective alone. This proposal is not for a CEO of the justice system – that model is incompatible with Canada's constitutional and legal order. No one person can dictate how independent branches of government and the profession carry out their responsibilities. In the Canadian tradition, commissioners, like auditor generals, would have other types of ‘super powers’ to use their individual reputation, office, persuasion and other skills to facilitate change. Important to the success of these positions is reporting to the public

on progress on achieving reform goals, through regular communications and annual reports. It is not envisioned that access to justice commissioners would have a grievance or complaints function. Rather, the office would operate in a proactive fashion. Equal justice requires many champions and collaboration among equal justice communities, but also desperately needs concentrated, effective leadership that can only be offered through independent offices of access to justice commissioners in each jurisdiction.

Learn more: about Resources for Building Equal Justice Communities

Access to Justice Commissions in the US: www.americanbar.org/groups/legal_aid_indigent_defendants/initiatives/resource_center_for_access_to_justice.html

Washington Access to Justice Board, “EQUAL JUSTICE...The Noblest Common Denominator: A Road Map for Building an Equal Justice Community” (Washington: Jim Bamberger, 2001): www.wsba.org/Legal-Community/Committees-Boards-and-Other-Groups/Access-to-Justice-Board/~media/Files/Legal%20Community/Committees_Boards_Panels/ATJ%20Board/roadmap%20Part%20I.ashx

For a complete list, see: www.americanbar.org/groups/legal_aid_indigent_defendants/initiatives/resource_center_for_access_to_justice/state_atj_commissions.html

Some websites:

(North Carolina): www.ncequalaccesstojustice.com/

(Massachusetts): <http://www.massaccesstojustice.org/>

(Illinois) : www.isba.org/probono/illinoisupremecourtaccesstojustice

Conference of Chief Justices. “Resolution 8: In Support of Access to Justice Commissions.” 28 July 2010:

www.ccj.ncsc.dni.us/AccessToJusticeResolutions/resol8Access.html

Target: By 2020, effective, ongoing collaborative structures with effective leadership are well-established at the national, provincial, territorial and local levels, including through the appointment of access to justice commissioners.

Milestones:

- Access to justice commissioners are in place in every province and territory and at the federal level
- The performance of collaborative structures is reviewed every two years, with lessons and improvements integrated into their operations. Evidence about collaborative best practices is widely-shared.

Actions:

- The National Action Committee, its successor or another national organization is properly resourced as a national collaborative structure with a mandate to support and coordinate provincial and territorial efforts
- The National Action Committee, its successor or another national organization works with other justice system stakeholders, including provincial and territorial committees, to organize an annual or biennial national conference
- Provincial and territorial governments establish collaborative structures to bring together stakeholders and establish networks between local equal justice communities and task-based collaborative initiatives
- Access to justice leaders create local equal justice communities including pathways for communication and collaboration with other communities and initiatives

What do you think?

- Any feedback or suggestions?
- Who should be involved?
- Are you willing to help?

(write to: equaljustice@cba.org)

Building the Capacity for Justice Innovation

Our greatest challenge in reaching equal justice is addressing what the National Action Committee has identified as ‘the implementation gap’.

The justice system’s capacity for innovation is underdeveloped and undernourished. For the most part we know what needs to happen, but we are not as clear on how to do it.

At the Summit, there was considerable discussion as to how we acknowledge that justice reform is hard, while facilitating dialogue about building capacity and creating an environment conducive to innovation. The centrepiece of this dialogue was a conversation between two international experts on justice innovation, Geoff Mulherin, Director of the Law and Justice Foundation of New South Wales (LFNSW) and Sam Muller, Director of the Hague Institute for the Internationalisation of Law (HiIL). This section builds on that conversation and the published contributions of these two leading access to justice organizations, notably *Innovating Justice* and *Legal Australia-Wide Survey*.²⁰⁶

Keys to Justice Innovation

Being Clear on Success Criteria

Among the most essential lessons learned about justice innovation is the necessity of being clear on what will constitute success. Muller used the example of the Millennium Development Goals as a clear set of success criteria for a complex policy problem: eradicating poverty. Progress has been made because the clear goals and sub-goals have become the focus of many organizations’ work. This initial stage is crucial: understanding the problem, understanding what you’re trying to innovate, and developing terms of reference as to what your innovation must achieve.

Mulherin also highlighted the importance of this step by comparing it to the first principle of war: selection and maintenance of the aim. He cautioned

²⁰⁶ Note that the many quotations and references in the following section of the Report are not individually footnoted, but refer back to these two sources and conversations at the Summit. *Innovating Justice*, *supra* note 134; LAW Study, *supra* note 23.

that it is rare to actually have a shared, agreed aim: “It’s actually harder than you think. We think we have concepts that we share. We don’t. People have conversations without ever agreeing exactly what the purpose of this is actually about.”

What is success when you’re trying to put innovations into place in the justice system? What does it look like? How do we know we’re going to get there and how do we have the vision of where we want to end up?

Our vision of what we’re trying to achieve is often constrained by what we do: publishers publish, judges judge, advocates advocate, and so on. It is hard to move beyond these perspectives to really collaborate and agree on success criteria. Success criteria must be clear, unambiguous and measurable.

Connecting Macro and Micro Approaches

Justice innovation requires a balance between macro (top-down) and micro (bottom-up) approaches: again, we need to think systemically, act locally. Mulherin reports that most innovations are generated by the people working on the front line. For example, this might be the people working at a community legal centre, seeing the same problems day in and day out. Increased access to justice can mainly be characterized as: “a tentative, iterative buildup of micro-level changes in a general direction, preferably engaged or led by a group at the lower level, the community level, but supported by sufficient people at the top end to sort of bring that change through.”

Muller concurred with this description of the dynamic between micro and macro approaches to justice innovation. Change emanates from the bottom up: “The best innovations come from the people that face the same issue every single day and are so sick of it that they want to change it, so that’s where the innovators are.” At the same time, support is needed from the top to connect small scale innovations into broader change. Changes

in one part of the justice system may be beneficial but incompatible with changes in other parts. We have to consider the inter-operability of technical systems. The challenge is to connect the macro and the micro: “the innovators need somehow to be clever to link to the top and ... the top needs to be clever to empower those guys down below.”

Creating a Nurturing Ecosystem

HiiL’s *Innovating Justice* succinctly offers the key to success: *Innovation requires an extensive ecosystem nurturing the process.* Justice innovation experts have identified components of this ecosystem, including:

- Adopt a ‘Yes AND’, not a ‘Yes, BUT’ mentality
- Forget about the rules
- Treat “failure” as an entrée to adaptation and eventual success
- Be clear on who benefits: an innovation is not just an idea
- Nurture a champion
- Ensure the time is ripe
- Engage a critical mass
- Provide incentives and resources
- Cultivate a diversity of skills and knowledge and partnerships.

Innovation begins with a mindset and belief that change is possible. For many, this glimmer of possibility has been eroded by past failures or the sense that change is realistically impossible. HiiL refers to this as a “Yes, BUT” attitude, and suggests a “Yes, AND” approach is needed to generate ideas, build on those ideas, and establish and maintain a safe and creative environment.

The first lesson in innovation, whether you're designing iPods or new procedures, is forget about the rules to start with. Real innovators, when they start, they don't give a toss about the rules. They have something they want to achieve and the rules can be changed if you need that at one point. So don't start with the rules.

Sam Muller, HiiL, at CBA Envisioning Equal Justice Summit

Conditions that allow experimentation and create a safe environment are key. Innovation processes are not linear: sometimes a prototype will fail, but the reaction should be to adapt and make it a success, rather than give up. Rules have the opposite effect: they act as inhibitors of innovation. Rules are the centrepiece of the justice system, so it is a natural reflex for lawyers and judges to respond to change by saying 'that's against this rule or that principle'. But the HiiL work emphasizes that getting rid of rules is key: "Don't think about those rules when you're working on innovation and keep the end in mind. Always start with the end in mind – that should be our frame of reference."

Muller pointed out that "a successful innovation is not the same as a good idea." Innovations are always connected to "a very clear problem, a very clear need, or as we negatively say, huge pain somewhere. If there's no huge pain, then it generally remains a great idea." We need to be clear on who will benefit from the measure, what 'pain' it is going to assuage. Mulherin made the flipside of this point even more emphatically: it is imperative not to change only for the sake of change. Change is disruptive and disruption can have a disproportionate impact on members of society living in disadvantaged conditions. The bottom line here is 'first do no harm'.

In HiiL's analysis of successful justice innovations, a common factor was that each effort had what they call an 'innovation champion': "Somebody who does not stop against all odds. And it usually is a person or two or three people. A committee is never an innovator." *The Innovating Justice*

handbook contains numerous examples of such champions. At the Summit, Muller highlighted a Kenyan example of innovation to tackle delays in the criminal courts. The courts and legal profession developed many complex delay-reduction strategies, but the successful innovator was a young woman who championed a prison paralegal program, where prisoners were taught to offer assistance to other prisoners. He described her story: "she fought and fought and fought and fought and went on and on and on and you could imagine the resistance she had. It's now being rolled out in more prisons. But it comes down to a person."

Mulherin emphasized that timeliness is a factor. The time has to be ripe for a given innovation, and a critical mass from the broader community has to be engaged. In his view, "mere sympathy is not enough", a specific innovation has to be moving in the same direction as a broader movement. This critical mass is needed to influence decision makers so that an environment at the top supports the innovation. The top does not have to be the champions, but the top does have to be supportive. The HiiL report points out that innovation comes in waves or patterns and describes the importance of "surfing the innovation wave."

In the private sector, innovation is fostered through incentives and resourced through a research and development budget, data about the subject area, knowledge about the market and users, good research capacity, a vision with lots of diverse perspectives and teams with a variety of skills and smart partnerships. Muller contrasted this with the justice sector, where innovation is starved. We have no time for innovation. Regular overload of work, constant pressure to deliver services and meet deadlines and heavy administrative burdens are all obstacles to innovation. Further, a valid concern expressed during the Summit closing plenary was that resources to facilitate change likely mean cuts elsewhere.

Our knowledge base is very thin. We don't know enough about what people want from the justice system and we have limited capacity to measure public satisfaction with service delivery in the justice sector. We know even less about how to effectively meet needs. In Mulherin's summary of what it takes

to innovate he said: “I’d like to say also, ‘driven by research’ but I’m afraid it’s too often not the case for me to actually say that.”

Both within and across justice institutions, our skills tend to be homogeneous, while creativity requires diversity. Muller pointed out the justice system also lacks partnerships, for example, with academia and research bodies. In contrast, he noted that innovation in the IT sector includes endless, very creative partnerships between public and private sectors. Mulherin reinforced this point noting that: “Law is an opinion-based discipline. You are inculcated with ... opinions when in actual fact we should be talking much more social science.” And it rarely happens that justice innovation is something one person can do alone.

Hiil’s Innovating Justice Model

Hiil offers advice on getting our “justice innovation act together” in *Innovating Justice*, a collection of best practices based on research, years of experience and interviews with leading justice innovators.²⁰⁷ The handbook breaks the innovation process into six phases and provides advice and examples for each phase. An overview of the Hiil model is presented in the form of the central questions to be posed and answered in each phase. This handbook should be at the top of our collective reading list.²⁰⁸

‘Incubation’, bringing people with innovation expertise together in one environment, has proven an effective approach. Hiil has developed an incubator in the form of a ‘justice innovation lab’, with three main features. First, the lab provides a physical space where people can be away from their daily work to concentrate on developing an innovation. Second, it contains a ‘neutral lab chief’ responsible for facilitating the process, keeping the work focused and moving forward, and generally characterized by Hiil as a ‘process pitbull’. The third ingredient is a variety of clever processes and techniques to ensure diversity of participants in the session, to understand the problem, to assist in setting the terms of reference (success criteria) and

²⁰⁷ *Innovating Justice*, *ibid.*

²⁰⁸ *Ibid.*

Now, if I go to the average ministry of justice, you have rules, hierarchy, rigid budgets, you don’t know the users, you have lots of compartments, changing visions or no visions, homogeneity in general, excessive workload--all things that are very, very bad for innovation. So... I really think there are a number of fundamental things that we could change and should change if we want innovation in courts, if we want innovation in ministries of justice.

And you don’t need to be Einstein to know what has to change. How many courts in the world have an innovation budget or an R&D budget? How many judges have 5% of their time to experiment? How many courts have a real safe environment in which we can just try something out? How many ministries allow that? I don’t know very many and I think there’s a lot you could change in that sense.

Sam Muller, Hiil, at CBA Envisioning Equal Justice Summit

evaluation framework, and so on.

At the Summit, Muller described one of these processes: moving quickly from discussions to creating a prototype using techniques from the IT sector called ‘scrum’. Scrums involve blocking off a short period of time and creating a high pressure environment, with the goal of generating a prototype quickly.

Dedicated time in the lab is key. While the Hiil justice innovation lab is a physical lab, the same approach can be taken in a ‘metaphorical justice lab’.

Filling the Justice Innovation Gap

The Canadian justice system has dedicated few resources to, and has limited capacity for justice innovation. An efficient way to fill the remaining gap is to establish a dedicated centre for justice innovation with a mandate to foster and support initiatives across Canada. In addition, all justice

Hiil's *Innovating Justice* model: Six phases of the innovation process

1. FOCUS ON CITIZENS' NEEDS

- Who will benefit from your innovation?
- How many beneficiaries are there now and how many more can you scale up to?
- What are the pressing needs?
- What causes citizens most pain?
- Who can be the lead customer (group)?
- Who is willing to pay or take action for this innovation?

2. RELEASE THE MIND

- Which ways of thinking and which rules constrain the best solution?
- Is there sufficient time and space? Think about the physical and environmental settings.
- Which skills, knowledge, backgrounds, personalities and cultures are involved already?
- And how could you involve more?

3. SHAPE SOLUTIONS

- What are goals and terms of reference?
- What are the characteristics of the innovation that are most essential to success?
- Do you have a prototype or model? Does it work? How was it tested?
- What makes the solution new and unique?
- Why is it better than what is already out there?

4. REFRAME THE CONSTITUTION

- What are the essential partners in the justice supply chain to make this innovation work?
- What do they need to do and why will they do it?
- What is the vision behind your innovation?
- Who are the champions for that vision?
- Who stands to lose from the innovation? What reaction can be expected and how should you respond?

5. JUDGE THE BUSINESS

- What is the value proposition?
- Can you quantify the benefits? What is the early stage investment needed? In time, money and other resources?
- How are you going to make your innovation financially viable? How can you make it sustainable, even after you stop working on it?

6. GET IT DONE

- What are your metrics for success and how do you measure them?
- How is the innovation organized in order to stay focused and to manage by results?
- How do you ensure that there is continuous learning and adjustment?

So for almost all the innovation processes that we're involved in, we spend a lot of time on terms of references and goals, and then it's locked down and sweat and pain to get to some kind of prototype fairly quickly, which you can then slowly improve and roll out.

*Sam Muller, Hiil, at CBA
Envisioning Equal Justice Summit*

system stakeholders, including law firms, need to increase their research and development capacities to explore ongoing innovations for the practice of law. Some service providers are beginning to offer

assistance to law firms and other justice sector institutions.²⁰⁹ The CBA Legal Futures Initiative has initiated a conversation about prospects for innovation in legal practice, and is consulting widely to obtain a broad diversity of perspectives about better ways to serve the public. Two mechanisms that have been employed to facilitate innovation in other sectors and have begun to be employed in the justice community are dedicated funding for research and development, and through competitions such as the US Legal Services Corporation competitive challenge grants.²¹⁰

²⁰⁹ See, for example: www.reinventlaw.com/main.html.

²¹⁰ www.lsc.gov/sites/default/files/LSC/lscgov4/PBTF_%20Report_FINAL.pdf.

Targets: By 2025, justice system stakeholders have substantially increased their innovation capacities by committing 10% of time and budgets to research and development.

By 2020, Canada has a Canadian Centre for Justice Innovation.

Milestones:

- Justice innovation leaders are recognized and share their best practices with others
- Regular environmental scans of justice innovations in Canada and abroad are carried out
- All justice system stakeholders, including law offices, develop innovation plans, with definite interim targets to increase their research and development functions in line with a 10 year goal of 10%

Actions:

- The CBA Legal Futures initiative use the results of its work to facilitate enhanced networking and exchanges of information on practice innovation
- The CBA works with other justice system stakeholders to develop a partnership with the Hague Institute for the Internationalisation of Law
- The CBA works with other justice system stakeholders to develop options for establishing a Canadian Centre for Justice Innovation to support local initiatives
- Law firms adopt models of compensation for lawyers that reward innovation
- Law schools establish innovation think tanks and involve a broad range of justice system stakeholders, including members of the public, consultants and experts on justice innovation

What do you think?

- Any feedback or suggestions?
- Who should be involved?
- Are you willing to help?
(write to: equaljustice@cba.org)

Access to Justice Metrics

Access to justice metrics are critical to support justice innovation. In Part I, the Committee underscored the limited ability to give definitive answers to even the most basic inquiries about barriers to access. We have only fragmentary data and no capacity to pull it together to get a complete picture of access to justice in Canada. The absence of an evidentiary base for action, and shared views on what to measure and how to measure it are serious obstacles to achieving equal justice.

We all know the maxim ‘you can only manage what you can measure’. We are far from having access to justice metrics to measure justice system performance. The development of metrics is an important pillar supporting justice innovation. Metrics serve a range of purposes, from informing the public about the justice system and grounding the day to day decision making of justice system participants, to supporting policy making processes and change processes. Metrics enhance people’s choices, enable comparison and learning, increase transparency and create incentives for improving access to justice.

As emphasized in the section on keys to justice innovation, we need success criteria, but we also need to be able to measure progress in attaining those criteria. In addition to citing the Millennium Development Goals, Muller also highlighted the sustainable living plan developed by Unilever as a potential model for justice innovation. Unilever is a multinational consumer goods company with a clear environmental sustainability plan. The company tracks progress towards their detailed goals on their website using red, yellow and green lights. Metrics of this kind are a powerful information tool that can contribute significantly to transparency and public confidence.

As noted earlier, in its 1996 report, the CBA Systems of Justice Task Force decried the lack of basic management information, concluding that the paucity of information was both indicative of and related to one of the five main identified barriers to access: inadequate management tools and resources. Some progress has been made in improving court-based data collection. Most notable are the 'Justice Dashboards' in British Columbia, which report basic criminal justice statistics.²¹¹ Plans are underway to expand these dashboards to the civil justice realm.

Many organizations collect some data, but their approach and methods reflect their own business practices and the data is diffuse. There are ongoing initiatives to gather more sophisticated data, particularly in costing aspects of the justice system through the Canadian Forum on Civil Justice's Cost of Justice initiative.²¹² Yet, we are far from a shared framework for gathering data, much less a sound knowledge base for justice system decision making. The Canadian Association of Provincial Court Judges and Association of Legal Aid Plans have committed to developing a common management information collection framework.

Canada is not alone with underdeveloped justice system data and evidence, but a concrete action plan to remedy this situation is past due. These issues are canvassed more thoroughly in the Committee's Discussion Paper on Access to Justice Metrics.²¹³ There is a growing consensus that we need to invest time and money to address the shortcomings on this front, although with some remaining uneasiness over how these goals can be met.

The Law and Justice Foundation of New South Wales has carried out pioneering work in this area in their "Data Digest" initiative, which collects, collates and analyzes data from the main public legal service providers (legal aid, community legal centres and so on). This initiative attracted the attention of the Australian government's Access

to Justice Task Force in 2009 paving the way for a more comprehensive initiative.

The Australian Attorney-General's Department has embarked on a multi-year collaborative initiative to build a robust evidence base for the civil justice system, described as "a long-term project that aims to remedy the current lack of consistent and comparable data across the civil justice system." This promising approach could serve as a model for a Canadian initiative. The Australian Attorney-General's Department has stated that the project would need the commitment of all, or at least the key stakeholders in the civil justice system. The project will be a long-term one that will require stakeholders to engage and commit some resources, if only in terms of time. In May 2011, the Department hosted a symposium to discuss with stakeholders how to move forward with this initiative, and a further forum was held in May 2012. A working group of all civil justice system stakeholders and data experts is developing a framework to guide the collection of consistent data to create an evidence base for the civil justice system. A research team was commissioned to scan recent empirical research and develop draft objectives for the civil justice system. The working group has assessed the quality and coverage of existing data in the civil justice system, paving the way for further refinement of the data collection framework. At the Summit, Mulherin reported that while the project recognized the importance of state participation (since people's legal problems and pathways do not neatly align with the federal division of powers), state governments have yet to fully come onboard with this initiative.

The Committee proposes that the federal government take the lead but work closely with all justice system stakeholders, with the goal of publishing a first report on Canadian access to justice metrics by 2020 and a comprehensive report by 2030.

Substantial feedback was received on the Committee's *Access to Justice Metrics* discussion paper, both in writing and in a Summit workshop. These insights are summarized here and should be taken into account in structuring a Canadian initiative to develop performance measurements and an evidence base for the civil justice system:

²¹¹ <http://www.ag.gov.bc.ca/justice-data/index.htm>

²¹² <http://www.cfcj-fcjc.org/cost-of-justice>.

²¹³ CBA Access to Justice Committee, *Access to Justice Metrics: A Discussion Paper* (Ottawa: CBA, 2013) http://www.cba.org/CBA/Access/PDF/Access_to_Justice_Metrics.pdf.

- Community voices should be integrated into framing of access to justice metrics. The Committee integrated the perspectives of members of communities living in marginalized conditions into its vision of equal justice in Part II and throughout this report.
- Inclusivity should be a measure of access to justice. Hughes paper for the Summit provides details for a framework for measuring inclusivity in the civil justice system.²¹⁴
- It is critical to “not to just go where the light is brightest”, for example, by focusing on court data. Mulherin warned of the “temptation to count what we can. And the problem is that what you count becomes what’s important.” In particular, court data does not tell the whole access to justice story.
- The development of access to justice data and metrics is clearly a government responsibility, but the approach, framework and data collection methods have to be developed collaboratively with the commitment of key stakeholders, including the public. There is some tension between government and the judiciary about data collection that needs to be resolved.
- The framework should be developed on a national basis, with room for provincial and territorial adjustments as needed.
- The variety of metrics required includes needs measurements, efficiency metrics, outcome measurements, and inclusivity measures. Efforts must include a measure of low-income persons who do not proceed through the justice system. Client satisfaction measures are insufficient as measurements need to incorporate broader background and context.
- If we are going to measure access to justice, the tools must be good – poor measurement is worse than no measurement at all.
- Data collection can be time-consuming and we should avoid adding too much burden on individuals and small organizations that provide services.
- Data collection should be forward-looking. The development of protocols to commit to moving to common data collection over time, as systems are upgraded, is key.
- Privacy issues have to be taken into account; data sharing agreements must include agreements to conceal private data. The idea of “justice identifiers” like health insurance numbers that help to ensure privacy while satisfying the need for robust information base is under discussion.
- A phased approach is most practical, given concerns over the resources required and to overcome other barriers to moving forward.

²¹⁴ Hughes, *supra* note 27.

Learn more: about Metrics

CBA Committee Access to Justice Metrics Building Block Paper:
www.cba.org/CBA/Access/PDF/Access_to_Justice_Metrics.pdf

CBA Committee Access to Justice Community Voices Paper:
www.cba.org/CBA/Access/PDF/Community_Voice_Paper.pdf

Patricia Hughes, "Inclusivity as a Measure of Access to Justice" (paper presented at the CBA Summit on Envisioning Equal Justice)

Link to LJFNSW website Data Digest: [www.lawfoundation.net.au/ljf/site/articleIDs/3D3EE18A9E1E9970CA257060007D4F9E/\\$file/data_digest.pdf](http://www.lawfoundation.net.au/ljf/site/articleIDs/3D3EE18A9E1E9970CA257060007D4F9E/$file/data_digest.pdf)

Martin Gramatikov, Maurits Barendrecht, and Jin Ho Verdonschot. "Measuring the Costs and Quality of Paths to Justice: Contours of a Methodology" (2011) 3 Hague Journal on the Rule of Law 349:
www.measuringaccesstojustice.com/

Australian Government, Attorney-General's Department, Symposium Paper: Building An Evidence Base for the Civil Justice System (May 2011):
<http://www.ag.gov.au/LegalSystem/Documents/Consultation%20paper%20for%20symposium%20May%202011.pdf>

Dr. Robyn Sheen and Dr. Penny Gregory, *Building An Evidence Base for the Civil Justice System – Civil Justice System Framework and Literature Review Report* (Australia Attorney-General's Department, September 3, 2012):
www.ag.gov.au/LegalSystem/Pages/Anevidencebasefortheciviljusticesystem.aspx

Target: By 2020, the first annual access to justice metrics report is released; by 2030, this report is comprehensive.

Milestones:

- *The federal government establishes a working group to develop a framework and action plan for the development of access to justice metrics*

Actions:

- *The CBA works with other justice system stakeholders to develop a proposal for assessment of the quality and coverage of existing data*
- *Building on initiatives of the Canadian Association of Provincial Courts and the Association of Legal Aid Plans, justice system stakeholders develop a protocol for the collection of a common standard data set*
- *The CBA encourages the courts and other key agencies in the justice sector to see the value of access to justice metrics and to commit to work to attain these targets*

What do you think?

- Any feedback or suggestions?
- Who should be involved?
- Are you willing to help?
(write to: equaljustice@cba.org)

Strategic Framework for Access to Justice Research

Canada is plagued by a paucity of access to justice research. This gap exists in tandem with the poor state of justice data collection and evidence. The lack of high quality, publicly available data detracts from scholarship and the lack of scholarship contributes to the poor state of data, since empirical research will help to determine which types of data should be collected. Other barriers

to research include: fragmentation of access to justice research across disciplines and under-development of interdisciplinary studies; lack of integration of recent methodological developments such as internet-based tools; and lack of connection between academics and practitioners.

At the Summit, Wayne Robertson, Executive Director of the Law Foundation of British Columbia, facilitated a roundtable discussion on a national access to justice research agenda. There, Mulherin summed up the current situation: past research, particularly the civil legal needs literature, has told us quite a bit about promising directions for reform. Now the focus should be on establishing evidence about *what works* and *what works at what cost*. The Law and Justice Foundation of New South Wales has a ten year research plan to provide answers to these central questions. Preliminary literature reviews of international research concluded there is very little quality evaluative research that can offer a sound basis for identifying effective reform to address specific needs.

A national research strategy is needed, not in the sense of a centralized master plan but rather to ensure coordination, avoid duplication and enable researchers to build on each other's efforts. Workshop participants affirmed the importance of quantitative, qualitative, empirical and anecdotal research, the latter being particularly powerful in motivating reform. The overarching priority is for research on what works to improve access to justice. More research should be carried out on a longitudinal and latitudinal basis.

Workshop participants also recognized that the research agenda engages numerous organizations and institutions: law schools and social science departments; law commissions and other agencies such as the Official Languages Commission, legal service providers, bar associations and so on. Attention is needed to build stronger bridges between academia and practitioners as the perception is that there is a "big gulf" between the two.

An ongoing American Bar Foundation initiative serves as a potential model for fostering access to justice research in Canada. In December 2012, the American Bar Foundation launched a multi-

year initiative to "kick start a sustainable access to justice research capacity." The workshop had three components: a poster session, a town-hall meeting; and a small by-invitation working session. The poster session and town-hall meeting were designed to bring together researchers and field professionals to discuss research needs and research findings. The workshop focused on three topics:

- The most important research questions, research needs, and/or knowledge gaps that exist today in access to justice research, services delivery, administration, and policy;
- Concrete research projects, including data sources, sites, partnerships, methods and funding; and
- Possible models for building a sustainable access to justice research program.

Workshop outcomes include a discussion paper on an access to justice research program, including research priorities and the development of a web-based network amongst researchers to facilitate ongoing discussion.

The Committee proposes that efforts be taken to double access to justice research by 2020, with a view to building to a sustainable national access to justice research agenda by 2025. Integral to this proposal is establishing a central independent research organization that assumes responsibility for developing and coordinating the required data sources and research activities. These proposals work in conjunction with the targets for increased research in law schools and for government-led initiatives to build an evidence base on the civil justice system.

A national access to justice research framework to contribute to equal justice should encompass three main objectives:

- generate new high quality research activity;
- ensure the coordination of research efforts; and
- improve the communication of research results, including aggregating and synthesizing research findings and program evaluations to make this information more accessible to decision makers and in policy-making processes and forums for public dialogue.

Targets:

By 2025, Canada has a sustainable access to justice research agenda with four minimum components:

- a) **available, high quality data that supports empirical study of effectiveness of measures to ensure access to justice**
- b) **a central independent research organization that assumes responsibility for developing and coordinating the required data sources and research activities**
- c) **effective mechanisms through which researchers and people in the field collaborate and coordinate research activities, and**
- d) **ongoing commitment to and adoption of best practices in access to justice research.**

By 2020, the amount of access to justice research conducted in Canada has doubled.

Milestones:

- *A central research organization continues to conduct – or support and coordinate – initiatives that synthesize and coordinate existing, and generate new research activity, including research that can inform policy*
- *A central research organization establishes – or supports the establishment of – a mechanism and methods for amassing quality data to support empirical access to justice research*

Actions:

- *The CBA, law foundations and other justice system stakeholders hold a workshop that provides an inventory of current and planned access to justice research initiatives, facilitates a dialogue between researchers and practitioners and considers potential mechanisms to coordinate existing and generate new research activity*
- *The CBA, law foundations, law faculties and other justice system stakeholders identify or develop a central organization that is able*

and willing to coordinate efforts to develop a national research agenda on an initial basis

- *The central research organization establishes international collaboration networks with access to justice research institutes including the Law and Justice Foundation of New South Wales and the American Bar Foundation*

What do you think?

- Any feedback or suggestions?
- Who should be involved?
- Are you willing to help?
(write to: equaljustice@cba.org)

Reinvigorated National/Federal Government Role

This report sets targets and actions that depend on strong national leadership on access to justice reform. While provincial and territorial governments have primary responsibility for the day to day functioning of the justice system, the federal government also has a critical role. Like healthcare, justice is a shared governmental responsibility. A reinvigorated federal role is imperative if we are to reach equal justice.

This needed shift is clearly reflected in declining financial contributions to the legal aid system across Canada in real terms. The federal government has primary or major jurisdictional responsibilities in criminal law, family law, immigration law, and assisting in ensuring basic needs are met through social security programs such as employment benefits and the Canada Pension Plan. Yet over the past two decades, the federal government has taken an increasingly limited view of its responsibility for ensuring access to justice in these or any areas of law. The federal government has fostered some access to justice initiatives through time-limited investment in justice innovations through the legal aid renewal fund and the existing justice innovation fund. Limited project or 'pilot project' funding, while helpful, does not come close to mitigating the damage to the justice system by

federal withdrawal from access to justice. The last time the federal government was actually an equal 50/50 partner was 1990/1991.²¹⁵

The CBA, provincial and territorial governments and other organizations have pressed the federal government to meet its responsibilities and to shoulder a significant share of the additional fiscal commitments required to ensure that the Canadian justice system is equally accessible to all. For example in June 2007, all provincial and territorial justice ministers united to call for increased federal funding for legal aid, calling on the federal government “to pay its fair share as a partner in the justice system.”²¹⁶ At that time, several of the provinces and territories estimated that their contribution to legal aid was four times that of the federal government. Importantly, this position was adopted by provincial and territorial ministers representing governments led by all major political parties.

Additional support for a renewed federal government role is based on the constitutional commitment to essential public services of reasonable quality across Canada, a commitment that can only be ensured through a robust national access to justice policy. Further, as discussed throughout this report, we now have a strong and growing understanding of the detrimental impact of unresolved legal problems on people’s well-being, an impact particularly profound on people living in marginalized conditions or who are otherwise vulnerable. Renewed funding for legal aid is critical, but federal leadership and support is required on other facets of justice innovation. Specifically, change can be achieved or supported through national initiatives such as the development of access to justice metrics and a centre for justice innovation.

National governments in other federal states have taken a stronger and more visible role in ensuring equal justice, despite sharing responsibility for these matters with state governments. Notably, the Australian and US national governments are much more active on the access to justice front

²¹⁵ Currie, *supra* note 39.

²¹⁶ See: www.scics.gc.ca/english/conferences.asp?x=1&a=viewdocument&id=92.

compared to Canada. In March 2010, the US Department of Justice established the Access to Justice Initiative (ATJ) to address the access to justice crisis in the criminal and civil justice system. ATJ’s mission is to help the justice system efficiently deliver outcomes that are fair and accessible to all, regardless of wealth and status. ATJ staff works in the Department of Justice, across federal agencies, and with state, local and tribal justice system stakeholders to increase access to lawyers and legal assistance, and to improve the justice delivery systems that serve people unable to afford lawyers. The initiative is led by Laurence Tribe, who reports to President Obama, underscoring the importance of these issues.

Learn more: about other Federal Governments’ efforts for Access to Justice

US Initiative:

www.justice.gov/atj/

Australia Attorney General’s Department:
A guide for future action – 2009:

www.ag.gov.au/LegalSystem/Documents/A%20guide%20for%20future%20action.pdf

www.ag.gov.au/LegalSystem/Pages/Accessstojustice.aspx

Australian Government A2J website:

www.accesstojustice.gov.au/Pages/default.aspx

New Zealand Justice System Improvements:

www.justice.govt.nz/policy/justice-system-improvements

The Australian Attorney-General’s Department has been even more proactive, working steadily to increase equal justice since a landmark 1996 report on access to justice. For example, the Department has adopted a strategic framework for access to justice and has embarked upon a number of major initiatives, including a national partnership agreement on legal aid and building an evidence-based civil justice system, described above.

The Committee suggests that this target is achievable by 2025, with an interim target of reinstating federal funding for legal aid to 1994 levels by 2020. Equal justice is about more than only the administration of justice in a province or territory: it is about the health, safety and security of all residents of Canada and ensuring good governance through a fair and effective legal system. These are national concerns, both as a matter of constitutional division of powers and good public policy. There is a growing consensus that re-engagement of the federal government in this field is imperative. The federal government can, should and must be a full partner in ensuring an equal inclusive justice system.

Targets:

By 2025, the federal government is fully engaged in ensuring an equal, inclusive justice system.

By 2020, the federal government reinstates legal aid funding to 1994 levels and commits to increases in line with national legal aid benchmarks.

Milestones:

- *The federal government commits to steady increases in contributions to legal aid funding including returning to 50% cost-sharing in criminal matters and establishing a dedicated civil legal aid contribution*
- *The federal government is a leader in supporting access to justice innovation*

Actions:

- *The federal government commits to supporting justice innovation by taking a leadership role in building the evidence base necessary to develop access to justice metrics, appointing an access to justice commissioner, supporting the creation of a centre for justice innovation and funding access to justice research*
- *The federal government makes funding for civil legal aid transparent and works with provincial and territorial governments and justice system stakeholders to regenerate legal aid*

What do you think?

- Any feedback or suggestions?
- Who should be involved?
- Are you willing to help?
(write to: equaljustice@cba.org)

CBA as an Access to Justice Leader

The CBA has contributed to access to justice in Canada since its inception, and improving access to justice is a core to the Association’s mandate. CBA contributions over the years have included task force reports leading to the adoption of policy statements on court reform, civil justice reform, administrative justice reform, equality in the legal profession and the administration of justice. Advocacy efforts have been based on these policies. In particular, the CBA has been active in lobbying for the establishment, protection and promotion of a national legal aid system for both criminal and civil matters. Efforts on this front have included numerous reports and resolutions, advocacy campaigns in collaboration with other organizations and test case litigation and various interventions. The consistent focus has always been on ensuring access to justice for low income people through effective legal aid services. For example, the CBA adopted a *Charter of Public Legal Services* in 1993 founded on the premise that for certain matters; legal aid is an essential public service akin to healthcare. More recently, the CBA has taken steps to foster pro bono work within the profession. CBA Branches are also active on these fronts.

The CBA established this Access to Justice Committee in 2011 with a view to consolidating and enlarging its work on these issues. The CBA fills an important role in national access to justice reform efforts but a stronger organizational commitment is required for the CBA to become an access to justice leader.

The Committee is committed to take action on six fronts, working in conjunction with other CBA entities, committed members and outside organizations:

- Encourage greater collaboration between

justice system stakeholders, including the public and coordinate of initiatives in a strategic framework;

- Develop and revise CBA policies to support improvements in the public and private delivery of legal services;
- Partner with the CBA Legal Futures Initiative on elements of its work that relate to education, practice and regulatory innovations that could have an impact on access to justice;
- Foster greater public ownership of access to justice issues;
- Develop tools for advocacy geared to improving publicly funded access to justice, including legal aid; and
- Support and encourage CBA members to enhance the legal profession's contributions to equal justice through the practice of law.

The priority given to access to justice issues has waxed and waned over the years – a natural cycle in the life of a professional association with a broad mandate, operating on member-driven initiatives. The Committee proposes that the CBA takes the necessary steps to ensure that it is in a position to be an access to justice leader, by increasing its capacity to support initiatives in this field.

Targets: By 2020, the CBA has increased its capacity to provide support to access to justice initiatives

Milestones:

- *The CBA provides support to its members so they can participate actively in increasing equal access to justice*
- *The CBA takes a leadership role in encouraging public engagement with the justice system and changing the conversation in support of achieving equal justice*
- *The CBA continues and expands its collaboration with other justice system stakeholders, including members of the public, in support of inclusive access initiatives*

- *The CBA substantially increases resources provided to access to justice initiatives*

Actions:

- *The CBA Access to Justice Committee develops a multi-year workplan to implement the actions in this report*
- *The CBA Access to Justice Committee develops resolutions to update CBA policies consistent with this report for consideration by CBA Council at the 2014 Mid Winter Meeting*
- *The CBA Access to Justice Committee provides many avenues for interested members and others to participate in the development of its initiatives and to share their ideas and experiences*
- *The CBA Access to Justice Committee seeks out and cultivates access to justice champions in the legal profession*

What do you think?

- Any feedback or suggestions?
- Who should be involved?
- Are you willing to help?
(write to: equaljustice@cba.org)

EPILOGUE:

Imagining 2030

This report has set out the Committee's vision for reaching equal justice, framed as 31 concrete, measurable targets to be achieved between 2020 and 2030. This vision is ambitious, but possible. The road to achieving these targets may appear long and difficult to navigate, but it can be travelled one step at a time, each of us doing our part, thinking systemically and acting locally. The Committee has initiated a description of this journey through some examples of actions intended to get us started and by setting out a few milestones we can aim to achieve along the way. There is no question that action must be initiated right away to join ongoing efforts – if not, we are likely to face a situation in 2030 that is dramatically worse for access to justice.

Despite the Committee's best attempt to offer concrete vision of equal justice, it still remains difficult to fully picture the transformation required to move from the dire state of access to justice in Canada today to the envisioned world of 2030, where the justice system is equally accessible to all, regardless of means, capacity or social situation. What does 100% accessibility look like?

To take this envisioning process one step further, the Committee will return to the stories of the nine people denied equal access to justice in Part I, to illustrate the impact of transformed paths and outcomes following our successful efforts toward equal justice.

So, imagine the year is 2030, and the justice system takes into consideration different legal needs, providing timely, holistic and personalized assistance to achieve lasting and just outcomes. People are empowered to manage their own legal matters, with a strong emphasis on prevention where feasible and public participation in overseeing the justice system. As a result, people feel a strong connection to the justice system, and a strong sense of ownership. Practices are evidence-based and the justice system is a nurturing environment for innovation. It consists of learning organizations committed to continual improvement.

Remember Winsome?

The 75 year old housecleaner who co-signed for her grandson's car loan? She didn't understand what she signed and when her grandson fell behind in his payments she could not access legal information or advice so she panicked and paid \$2500 from her meagre savings to pay the debt.

Imagine instead that Winsome saw a notice for legal capability training at the local library. She signed up, for two hour classes on four Saturdays. When her grandson asks her to co-sign for a car loan, she wants to help, but remembers what she learned. She insists on taking the documents home to read them carefully before she signs. She stops at the library and uses the legal information website that she'd learned about in her training course, to find out what would be involved in signing the papers. When she gets frustrated because she isn't used to working on a computer, someone at the library is available to help. Then, she stops by the courthouse, and is referred to a consumer advocacy centre staffed by pro bono lawyers. She calls them, and they make a suggestion. Winsome and her grandson return to the local dealership and she agrees to sign if the dealership removes the clause that gives it a mortgage on her home and adds a clause agreeing to give her two weeks' notice of any problems before they begin their usual process. The salesperson knows Winsome and her grandson and agrees.

Later, when she receives notice that her grandson is behind by \$2500 in his payments, she talks to him. Her grandson explains that he was waiting for his income tax return and he didn't think the car dealership would act so quickly. Winsome writes the cheque for \$2500 and mails it to the company, but her grandson pays her back two weeks later. He promises it will not happen again.

Remember Phuong?

She inadvertently left a drugstore without paying for prescriptions she had picked up. Then she pled guilty to a charge of shoplifting when she couldn't get legal aid. As a result she lost her job as a personal care worker.

Imagine instead that Phoung's call to legal aid goes differently. Rather than being told that they can't help her because her charge won't result in jail time, they consider Phoung's application by phone, looking at the whole situation. Legal aid has done recent outcomes-based research. The representative says that because of her immigration status and that English is not her first language, she should go to a community centre in Canora for help from a court support worker. The centre is welcoming, and the support worker listens to what happened. He sends a report to a duty counsel lawyer at the courthouse.

On the day Phoung goes to the courthouse, she meets with the duty counsel lawyer who again reviews what has happened. The lawyer speaks with the crown prosecutor and explains that Phoung had no intention of stealing, but was exhausted after dealing with a sick child all night and simply overlooked the prescriptions. She is employed and always pays her way. When the judge appears, the lawyers jointly recommend to the judge that the charges be withdrawn, and the judge agrees.

Remember Monique?

The 66 year old accounting clerk who didn't return to the lawyer's office after the first consultation? She slipped into a depression and her debt mounted and bills went unpaid. The bank started foreclosure proceedings.

Imagine instead that Monique's first consultation with the lawyer went differently. Monique's lawyer had attended a CBA legal education course many years ago and had been inspired to offer legal health checkups to his clients. He was also an avid reader of the many access to justice research papers generated by governments and law schools. After hearing Monique's story, the lawyer realized that more was going on than simply legal issues. He suggested that Monique take advantage of the "legal health check" program offered by paralegals in his office, and talk to one of the social worker members of the team. As a result of the meeting with the social worker, Monique was referred for counseling. The paralegal uncovered further details and did some research on Monique's legal health. She advised Monique and the lawyer that the title to the home was vulnerable, and that Monique needed credit counseling. With the support of the social worker, Monique spoke to a credit counselor who helped consolidate her debt, and she stopped using her credit cards. She retained the lawyer to draft a separation agreement and her legal affairs were in order in a few months. Monique's children paid the lawyer, and she repays them a bit each month. She also manages to put a bit of money away each month.

Remember Anna?

Anna came from Mexico to Ottawa with her daughters seeking asylum as she was fleeing a violent husband. She lost her bid for asylum due to the late delivery of necessary documents from Mexico and lack of legal aid funding for an appeal.

Imagine instead that the Canadian Centre for Justice Innovation has recently completed a comprehensive review of policies and priorities, and through its evidence based research activities, has identified barriers for refugees seeking justice and the legal needs they generally experience as “essential”. The lawyer refers Anna to a community centre that assists refugees in various ways, including with their legal proceedings.

The centre’s staff writes to the local police force in Mexico explaining the urgency of the situation, and asking for help. They make several follow up requests by phone but are unable to secure the paperwork in time for the hearing. They then provide Anna bus fare to go to the hearing in Montreal.

After Anna’s claim for refugee status is refused, she applies for more legal aid for the appeal. Due to increased federal government funding for legal aid for immigration matters, the plan has reinstated funding for lawyers to write an opinion about the merits of the case to legal aid. The lawyer’s opinion letter is successful and Anna gets a lawyer for the judicial review and stay of proceedings. Anna’s appeal is granted and she and her children are allowed to remain in Canada.

Remember Jill?

She was refused legal aid and had to borrow a lot of money to have representation when the judge refused to allow her to represent herself. Her ex-husband was suing her for custody as their three daughters refused to see him. Jill had an unsatisfactory child support award as she could not prove her ex-husband's cash income.

Imagine instead that Jill qualifies financially for legal aid and does not have to borrow a lot of money. She then spends some of her own money on a private investigator who is able to confirm that Jill's ex-husband makes additional income that he has not reported on his tax return.

Jill's province has been recording their access to justice metrics and realizes that the wait for court appearances in Fredericton is much longer than in other parts of the province. Resources are provided to decrease the delays.

At the first court appearance, the Judge refers the custody issue to mediation. In mediation, Jill and her husband can discuss the issues surrounding the breakdown in the relationship between father and daughters. They are referred to an external agency for counseling and resolve the custody issue provided the counseling occurs.

The support issue went forward in court. Jill got an order for arrears of support and for increased child support going forward that reflected her ex's actual income. The judge told her ex that there were methods of enforcing child support orders that could be used in future if necessary. Jill never had to return to court.

Jill was pleased with the outcome for her children on the custody issue. She volunteered as a subject in the local law school's access to justice research centre. In doing so, she gave the researchers her perspective on the options available to working poor parents dealing with custody and support issues.

Remember Glynnis?

She trafficked in marijuana to make ends meet for herself and her daughter. She pled guilty to possession of marijuana for purposes of trafficking and went to jail, and her daughter went into a group home hundreds of kilometres away from her.

Imagine instead that the NWT government is part of a collaborative FPT initiative considering how to provide better legal services for citizens in smaller towns underserved by lawyers. The First Nations of NWT have engaged in community roundtables with the territorial government on options for aboriginal people charged with drug offences. Through both initiatives, research tools and funding have been provided to a local law office. Glynnis' lawyer was able to present detailed "Gladue" arguments at sentencing, stressing Glynnis' background and the obstacles she had overcome, and her success as a parent in spite of her own upbringing. Court services were sufficiently resourced to arrange a referral for treatment through her band, and helped Glynnis find suitable care for Destiny while she got treatment. The two were reunited a few months later, and Glynnis was able to find employment, while supported by ongoing narcotics counseling.

Remember Eugene?

He is schizophrenic and waiting to be evicted from his apartment. No one can help him.

Imagine instead that BC has an access to justice commissioner who has been reviewing the Access to Justice metrics report released last year. He is concerned about the lack of access to legal services for citizens with mental health issues. The commissioner has engaged the health sector and the justice sector to create collaborative services. Now when Eugene calls his income assistance worker, she tells him about a new community help centre in his town, staffed by a social worker, nurse and paralegal. The paralegal helps Eugene negotiate an arrangement to repay the landlord what he owes over the next three months. The social worker helps him to manage his money better, and use the food bank regularly until he's out of trouble. The nurse helps with his medication, and together the nurse and social worker realize that Eugene isn't taking advantage of subsidies available for medication. With the additional support that he now receives, Eugene is more secure financially, and doesn't worry about money all the time.

Remember Dave?

Dave couldn't afford legal services related to custody matters and a no-contact order placed on him by his spouse. As a result, he does not have dependable access to his young children and he is aware that his wife has a substance abuse problem.

Imagine instead that Dave called a number he saw at the bus shelter, for a clinic run by law students. The student said that with the help of his supervising lawyer, they would represent him on the no-contact order. They suggested that Dave contact the courthouse to enroll in a diversion program that included six hours of counseling for each parent in a custody dispute. There was a cost for this, related to your income, but Dave was willing to pay, as he was anxious to get counseling instead of going to court. After individual counseling, Dave and Mona were seen together. They agreed on a shared custody arrangement with each of them having the children a week at a time.

Dave agreed to pay child support after he accessed a free computer at the local law library where he could look up the Child Support Guidelines. He went back to the student law clinic to have his custody and support terms reviewed before he signed the final agreement.

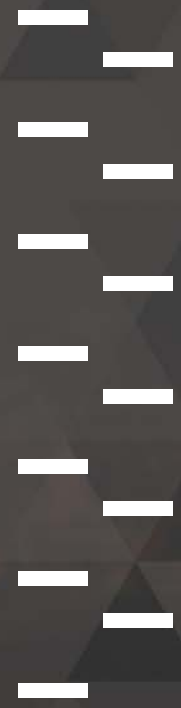
Remember Arthur?

He was the businessman who represented himself in family court proceedings. He had difficulty navigating the court forms and the clerk's office would not help him. Exhausted and overwhelmed, he settled with his wife's lawyer, but had no idea if the deal was fair.

Imagine instead that when Arthur started in business for himself, he took a basic legal information course from the local community college. He also signed up for legal expense insurance, which provided some capped services for family law.

When he was served with his wife's request for university expenses, he contacted the insurance company. The lawyer provided by the insurance plan said she would prepare all the paperwork for his defence, and after that, he could represent himself or he could retain a private lawyer on a limited scope retainer.

Arthur then researched the legal issues online. He had an elementary idea of the issues, but knew he needed more assistance. He called a family law firm and asked for help on a limited scope retainer. He met with a family law lawyer who simplified the legal concepts for him and advised him of the appropriate range of support that he should pay based on the facts. With this knowledge, Arthur went to court alone. His ex wife's lawyer arrived and spoke to him about a possible settlement. Arthur was able to negotiate a more equitable deal than was first proposed.



PART IV

project description,
acknowledgements and reflections

Project description, acknowledgements and reflections

The CBA's Access to Justice Committee was created in September 2011. The Committee members were:

Melina Buckley, Ph.D., Chair

John Sims, QC, Vice-Chair

Sheila Cameron, QC

Amanda Dodge

Patricia Hebert

Sarah Lugtig

Gillian Marriott, QC

Gaylene Schellenberg, Project Director

Each member came to this work with different personal and professional backgrounds and perspectives. Rather than being a hurdle, these differences have enriched our discussions, and our efforts to tackle the wicked problem of reaching equal justice.

The Committee would like to acknowledge the help and encouragement it has received throughout the Equal Justice Initiative.²¹⁷ The Committee is deeply indebted to Gaylene Schellenberg for her hard work and dedication to this initiative. She had the difficult job of turning our ambitious goals into the reality and her invaluable assistance did in fact make this vision possible.

In launching the Equal Justice Initiative, the Committee took note of the significant efforts and resources currently devoted to improving access to justice, from so many different and influential factions of the legal profession and justice system.

²¹⁷ The CBA Equal Justice initiative has occurred in two phases. The first phase, called Envisioning Equal Justice, involved research and consultations to develop a common vision of equal justice, one that includes the perspective of people living in marginalized conditions. The second phase is called Reaching Equal Justice, where a strategic framework for action to lead to that vision was developed.

Given the scope of these efforts, more substantial progress on the issue nationally could be expected at this point, but instead they seem plagued by a lack of coordination, strategic framework or common vision. The willingness to embrace change without leadership or coordination of the various efforts has sometimes resulted in moving ahead on promising ideas, without always considering fully the ramifications and the underlying tough questions that they might suggest.

The Committee first identified four major barriers in the way of substantive progress:

- shortfalls in information;
- lack of political will and public awareness of the issues;
- insufficient coordination and collaboration; and
- absence of tools to measure progress or define what we mean by equal justice.

The Committee then developed three main strategies to address what we perceived as those main barriers to progress.

- First, we planned a consultation and research strategy, to create the knowledge foundation for our initiative.
- Second, we planned to use what we found in the first strategy to change the conversation about equal justice – to ask the hard questions and pull people out of acting in silos toward a more common goal.
- Finally, we would find ways to build ongoing collaboration and coordination, to enable those who are committed to equal justice to work together more effectively and productively.

The Committee began by informing the legal profession and justice system participants describing the initiative. Judges, government officials and politicians, law societies and law foundations, legal aid leaders and many more offered help and support. They provided ongoing feedback as work progressed. The Committee also consulted with justice system participants through conferences, and meetings of CBA Council. This engagement from all justice sectors bodes well for achieving an ambitious but possible innovation agenda.

Different forms of consultation were used for other specific purposes. To inform thinking about how to define 'access to justice', and what 'equal justice' means for the people who need justice services, community consultations took place in Nova Scotia, New Brunswick, Québec, Ontario, Saskatchewan and Alberta, with different communities living in marginalized conditions. Local lawyers and community partners were instrumental in helping to organize and facilitate these consultations, and linking the Committee to community members who attended and shared their often painful experiences.

The Committee is grateful for the many individuals and organizations who arranged and participated in these community consultations including:

Calgary

- Eileen Bell and Barbara Poole, Discovery House Family Violence Prevention Society
- Gillian Marriott and Cecilia Frohlick, Pro Bono Law Alberta

Maritimes

- Michelle Poirrier, Phoenix Youth Programs (Halifax)
- Rhonda Fraser and Betty Kalt, Chrysalis House (Kentville)
- Karen Hudson, Kai Glasgow, Megan Longley and Linda Rankin, Nova Scotia Legal Aid Commission
- Sheila Cameron, Actus Law Droit, Moncton
- Chantal Landry, YWCA Moncton

Montreal

- Garage a musique, Centre de pédiatrie sociale en communauté de Hochelaga-Maisonneuve
- Hélène (Sioui) Trudel, Alliance droit santé fondation du Dr Julien

Saskatoon

- Alison Robertson and Nicole Braun, Saskatoon Food Bank and Learning Centre
- Candice Kloeble and Brenda Warnke, SIAST
- Deidrie Lavalley, Saskatoon Tribal Council Justice Program
- Amanda Dodge, Community Legal Assistance Services for Saskatoon Inner City (CLASSIC)

Toronto

- Beverley Dooley, Canadian Hearing Society
- Lucy Costa, Empowerment Council
- Ayshia Musleh, Ethno-Racial People with Disabilities Coalition of Ontario
- Edgar-Andre Montigny, Ivana Petricone and Yedida Zalik, ARCH Disability Law Centre

In addition to the Community Consultations, Pro Bono Students' Canada identified a group of committed law students, and they conducted video interviews with people 'on the street' from across Canada. We combined this footage with more offered by the Canadian Forum on Civil Justice. Town hall consultations have been held in recent years in British Columbia, Manitoba and Ontario, and the results were also used by the Committee. Legal aid lawyers, community legal workers, and paralegals were surveyed for their views on current issues, and legal aid plans were very helpful in this effort, both in commenting on the survey and in ensuring its broad dissemination.

Five research and discussion papers were prepared and circulated broadly to justice system participants for comment. Each paper addresses a "building block" of reform, an area that the Committee identified as requiring further exploration and debate:

- access to justice metrics;
- national standards for legal aid;
- legal aid service delivery innovations;
- the tension between pro bono and legal aid and
- underexplored options for ensuring access to justice for the middle class.

(see: www.cba.org/cba/equaljustice/about/project.aspx)

Throughout the preparation of the discussion papers and the consultations, several law students, social science students and young lawyers helped by developing background reports or conducting interviews. The Committee acknowledges these contributions by Shahdin Farsai, Elena Haba, Stefanie Carsley, Mieka Buckley-Pearson and David Parry (research and writing) and Alexis Chernish, Christina

Kwok, Elina Nakhimova, Faiza Hassan, Irene Fatehi, Theresa Kennedy, Lindsey Cybulskie, Chris Clarke, Marie-Christine, Gariépy-Assal, Samantha Clarke, and Will Goldbloom (interviewers). We received useful feedback on the discussion papers both through written comments and at workshops at the National Pro Bono Conference in Montreal in November 2012 and the Summit.

These various strategies came together at the Envisioning Equal Justice Summit in Vancouver on April 25-27, 2013. The event brought together about 250 lawyers, community advocates, judges, paralegals, law foundation and law societies, and members of the public. As we hoped, it marked a turning point to start a different more productive and coordinated conversation about access to justice, where justice system participants work together to solve the challenge of equal justice.

The Summit asked participants to leave their “day jobs” at the door, and tackle the big challenges in a new, more collaborative and collegial way. At the closing plenary, all participants worked in small groups to offer their best advice for going forward. The Summit was the focal point of the Committee’s strategy to change the conversation about access to justice.

The Summit would not have been possible without the generous contributions of more than 90 plenary and workshop speakers, including international guests from Australia, the Hague and the US, and the Summit sponsors: Law Foundation of British Columbia; Law Foundation of British Columbia/ Legal Services Society Research Fund; DAS Canada; CBA BC; Alberta Justice; Law Society of British Columbia; Law Society of Upper Canada; and Actus Law Droit. Special thanks are due to Heather Block and Hillary Gair, and a raft of volunteers for facilitating the opening night poverty simulation, and to the Board of the United Way of Winnipeg for supporting this initiative.

We would like to express our gratitude to all Summit participants who came together to have a different, renewed conversation about equal justice at this unorthodox event. From the simulation on the opening night, where those present were asked to “live” a simulated month in poverty (in an hour), requiring them to provide for their families and

negotiate a maze of social services with limited resources, through to the closing plenary, people engaged. Here are some comments following the event:

“I was blown away by the level of engagement and the ‘buzz’ of meaningful conversations in every corner of the meeting, eating and even washroom spaces! You attracted people from so many different jurisdictions, with such interesting perspectives and openness to hearing others. It was an injection of much-needed energy into the ongoing fight for equal access to justice, and I know it will have an ongoing impact for years to come.” **Caroline**

“Congratulations on bringing it all together. It has momentum, optimism, ideas for action, engagement - everything you need to carry on with renewed hope.” **Vicki**

“Right from the opening simulation through the few days until the dinner last night I thought it was a wonderful event. It was very motivating to see such a proportion of the profession (and those associated with it) devoting so much time and effort to trying to achieve what you are trying to.” **Geoff**

“I don’t think I’ve ever been in a place and surrounded by so many people where I felt like everyone was thinking on the same page, open to ideas, and willing to work together.” **Danielle**

The final strategy is to consider how to encourage greater collaboration and coordination of efforts moving forward. In addition to integrating a collaborative approach throughout its work, the Committee has participated in three ongoing national projects: as a member of the National Action Committee on Access to Justice in Civil and Family Matters as well its Steering Committee and several working groups; the Canadian Forum on Civil Justice Costs of Justice Project; and Professor Julie Macfarlane’s National Study of Self-Represented Litigants.

In preparing this report, the Committee again

reached out to the broader justice community for assistance. We asked ten external reviewers to read a draft of this report and again were immensely rewarded by the encouragement and support offered by these busy individuals. We thank Dr. Ab Currie, Justice Thomas Cromwell, Professor Doug Ferguson, Allan Fineblit Q.C., Karen Hudson Q.C., Sharon Matthews Q.C., Professor Mary Jane Mossman, Danielle Rondeau, Allan Seckel, Q.C. and Erin Shaw. Their comments were instrumental in assisting us to clarify and fully develop this strategic framework.

The Committee is also grateful for the editorial assistance provided by Tamra L. Thomson, and administrative and technical support, particularly from Lorraine Prezeau and Denise Poulin, all at the CBA National Office. Finally, the Committee wants to acknowledge, with appreciation, the financial support it has received throughout the Equal

Justice Initiative from the CBA and the Law for the Future Fund.

Going forward, the Committee will continue with its main strategies of working with others to build the knowledge base as a foundation for effective change, changing the conversation by engaging more directly with the public about their justice system, and seeking ways to support collaborations at the national and local levels. This report calls for the CBA to be an access to justice leader and we are preparing an action plan to make this goal a reality.

The Committee has styled this report as an invitation to envision and act and it is therefore fitting to end it with personal reflections on how this initiative has changed our perspectives and commitment to “think systemically, act locally”.

Changing the conversation: this emerged as our overarching theme at our very first Committee meeting. Our two-year journey of reflection, hard work and reaching out to the justice community has me more convinced than ever about the absolute need for novel and creative approaches to generating dialogue, enlarging conversations and finding ways to build bridges between conversations and connecting thoughtful communication to thoughtful action to achieve equal justice. What I treasure most about the Summit was the way that we, all of the participants, created an energized space where the commitment to equality and positive change reverberated in intimate conversations between participants, around the tables, and in the larger workshop and plenary groups, in formal sessions and in the nooks and crannies in between. I came away thinking – what steps can we take to facilitate this conversation on a larger, more inclusive scale? I am committed to thinking systemically about a national conversation on reaching equal justice and to facilitating local dialogue within it. I am hopeful that this report is a first step, but mindful of the reality that reports don’t make change, people make change.

Melina Buckley

In 2013, the New Brunswick family court system had become increasingly mired in delays, leaving us with a system where a date for a first appearance for custody, child support and spousal support could take 7-8 months. As I watched the system fail to respond to the needs of its clients, my faith in the process diminished.

After the Summit, I returned to New Brunswick with a renewed hope for real change. The feeling from the 200+ people in the room at the closing of the summit was overwhelming; there was a palpable desire for a paradigm shift in the way we resolve legal problems in Canada. But I was still left with the ‘what now?’ question – how do I help my clients right now, while the bigger change issues get worked on for the next number of years.

I recalled the “think systemically, act locally” mantra from the summit. I then set in motion a series of meetings that ultimately resulted in a local pilot project for September 2013 so simplified motions for custody, child support and spousal support will be heard within 6-8 weeks of filing. The project has been announced to the local bar and we are waiting with anticipation for its commencement.

Sheila Cameron

Sometimes the amount of work to be done to effect change seems overwhelming. After the Summit, though, it felt as if we were all speaking with one voice and that much more seemed possible. The change, for me, was keeping my eyes open for every opportunity to improve access and seeing how every community member was a potential agent of change. At a recent meeting with Queens’ Bench Justices on another issue, we discussed our court’s triage project and found we could open discussions that could better coordinate these developments with other parties in the process. At a charity lunch, an executive of a large local business was telling me about an initiative they were doing to promote services for mental health. After a short discussion, we found that I could introduce them to partners so they could expand their project to assist in accessing justice for more members of the community with mental health issues. The opportunities are there, the partners are there and they are willing. It may take only a few moments and some knowledge (thinking systemically!) to create more champions in our local communities.

Patricia Hebert

I came away from the Summit - and from our work on this Report - thinking about partnerships. I am convinced we can work together to achieve equal access once we have a common vision of where we want to go and how we can get there. Just last week, our Law Society's CEO had a great suggestion for a public-private partnership to deal with the family law cases our student legal clinic must turn away due to conflict of interest. The clinic is now exploring this option. If we continue to think creatively about potential partnerships and opportunities for mutual support, within a common vision, there is so much we can do.

Sarah Lugtig

My, "take away" both from the committee's work and the Summit echoes Sarah's to a certain extent in that I agree that it is through partnerships and collaborative efforts that we will be able to move forward to addressing the access to justice issues that we face. However, as someone involved in the "local" action, I also was reminded that it is crucial that we look to the bigger picture and that we encourage and reinforce the necessity of the "system" changing to address the changing needs and requirements of our society. The Summit was a crucial piece to this as it brought together individuals who I don't believe had ever put it together that they "all" need to be at the table. The energy and enthusiasm of the Summit moved people in a way I don't think they expected and that was very exciting and encouraging. I came away from the Summit thinking that we could "actually" achieve our goals and that we could positively impact the access issues. It was inspiring and to see that it has already led others to look at opportunities demonstrates that we can move forward and effect change. Thank you to all of you for including me on this journey!

Gillian Marriott

The main thing that I will take with me from our committee's work and the dialogue at the Summit is the primacy of inclusivity. It's absurd, really, to think that we could develop and run an effective system without consulting the system's users. More than just enhancing our effectiveness, listening and responding to the voices of the people we are attempting to serve is about authentic relationship building. As our Elder taught us, maintaining power imbalances through one-way service provision is unsustainable; there must be recalibration to incorporate reciprocity. I think this is an important, redemptive message for all of us in the justice system; I hope our Committee's report stimulates thinking and action toward inclusivity.

In terms of "acting locally", CLASSIC has made a commitment to host community conversations each year, multiple times throughout the year if possible, to hear the community's voices: identifying their priorities for justice initiatives and their recommendations to improve our service delivery. In my Masters studies this fall, I will be focussing on authentic partnership with marginalized communities toward meeting their social justice goals.

Amanda Dodge

I feel I left the Summit with new eyes. The optimism and renewed energy of those at that conference helped me see that change actually is possible. We don't have to accept – we shouldn't accept – the barriers that for too long have denied effective justice to so many people. I am more confident than ever that, together, we can make real progress in improving access to justice.

John Sims

This Committee may have arrived at our first meeting expecting that this would be 'just another project', 'another report', but I think we soon shared a feeling that we had a special opportunity - to imagine how our civil justice system in Canada might work to be truly available to everyone. I've come to recognize the importance of taking the time to develop that vision, and a solid plan for achieving it, so people have a sense that their work is contributing in a coordinated way toward a common goal. The Summit was a major test – could we encourage others, many worn down from years of trying, to join us in this optimistic exercise? It worked, people came and joined in the spirit of the event – it was amazing and energizing. Whether our suggestions here are right or wrong, more likely partially right, partially not, I hope they will be received as a sincere attempt to offer our ideas on how we can move forward differently to see real progress toward equal justice.

Gaylene Schellenberg

PLEASE LET US KNOW WHAT YOU WILL DO TO CONTRIBUTE TO EQUAL JUSTICE!

Resources

All material developed as part of the Envisioning Equal Justice initiative is available on the CBA website. For ease of reference these documents are listed here:

“Building Blocks” – five research and consultation projects:

- *Access to Justice Metrics* (www.cba.org/CBA/Access/PDF/Access_to_Justice_Metrics.pdf) looks at the potential of measurement and evaluation tools, and more precise definitions, to improve access to justice.
- *National Standards for Publicly Funded Legal Services* (www.cba.org/CBA/Access/PDF/TowardNationalStandards.pdf) and *Future Directions for Legal Aid Delivery* (link) deal with different challenges to providing publicly funded legal services. National Standards looks at principles and a sound policy underpinning to ration those services.
- *Future Directions for Legal Aid Delivery* (www.cba.org/CBA/Access/PDF/FutureDirectionsforLegalAidDelivery.pdf) emphasizes the need to use existing knowledge about people living in poverty and their legal needs when innovating legal aid delivery.
- *“Tension at the Border”*: Pro Bono and Legal Aid (www.cba.org/CBA/groups/PDF/ProBonoPaper_Eng.pdf) considers reasonable parameters for the profession’s voluntary efforts, and proposes a continuum of responsibility between public funders, pro bono efforts and private market forces to ensure essential legal services are provided to everyone. A summary of feedback can be found at (www.cba.org/CBA/Access/PDF/Summary_Feedback.pdf).
- *Underexplored Alternatives for the Middle Class* (www.cba.org/CBA/Access/PDF/MidClassEng.pdf) proposes a broader range of legal services at different price points, giving the middle class a greater range of options for legal help.

Envisioning Equal Justice Project Description

- **Introductory letter to Justice Community, with project description** <http://www.cba.org/CBA/equaljustice/pdf/Access%20to%20Justice%20public%20letter%20Generic.pdf>

Background research reports

- Shahdin Farsai, *“Pro Bono Annotated Bibliography”*
- Elena Haba, *“Selected Inventory of Initiatives to Improve Access to Justice for the Middle Class”*
- Stefanie Carsley, *“Innovations in Legal Aid Delivery”*
- Miika Buckley Pearson *“Annotated Bibliography”*
- Amanda Dodge, *Envisioning Equal Justice Community Consultation report* (See also, Community Engagement Framework below)
- David Parry, *Legal Aid Survey Results* http://www.cba.org/cba/equaljustice/PDF/CBA_Survey_Results.pdf
- [Summit agenda](#)
- [Summit summary](#)

Appendix A

Community Engagement Framework: Practical guidance for initiating dialogue with community members about the justice system.

This framework was developed by representatives of the Committee through a collaborative process in Saskatoon in 2012. It was pilot tested in several sites and then employed in 13 consultation sessions held in 2012 and early 2013.

Ethical Framework

We recommend implementing the following ethical principles in community engagement:

- **Honour the values of inclusion and collaboration, affirming the diversity of the community**
 - o Design and execute the community engagement by involving community members themselves. Ensure that the conversation is framed by them.

- **Honour the values of reciprocity and empowerment**
 - o Recognize and compensate participants for their time and contributions in genuine and meaningful ways.
 - o Look for ways to empower and equip the participants and their communities through this process.
- **Honour the value of humility**
 - o Acknowledge that the participants have knowledge and a voice.
 - o We are seeking to hear it because it has value.
- **Honour the value of equity**
 - o Maintain an awareness of, and take steps to avoid as much as possible the imbalances of power between facilitators and participants.
- **Respect the dignity, rights and interests of the participants**
 - o Ensure free, informed and ongoing consent of participants.
 - o Be non-judgmental, accepting and respectful of the participants.

Practical Steps

A first step will involve partnering with community-based organizations, such as food banks or open door societies. Look for organizations that are trusted by, and provide a safe space for community members.

Generally, engagement will simply involve conversations with community members. One-on-one conversations are possible, but group discussions are likely more effective and efficient.

Community discussions should not be solely facilitated by a member of the established legal community (e.g. lawyer, judge, government representative), as that may inhibit or prevent candid responses from the participants. To elicit the

most authentic feedback from community members, the discussions should be facilitated by, or at least co-facilitated by, a community representative. Ideally, the community representative will be someone whose identity and experience reflects that of the group being engaged. Alternatively, the community representative will be someone who works closely with the community and is known and trusted by the community members. This could be someone who works at the community-based organization being partnered with, and/or is a respected leader in the community.

To promote participation, it is best if the discussions are informal, round-table style, and the groups are relatively small (10-12 members maximum). Larger, town-hall meetings can also elicit authentic feedback, however with a large group many attendees will be too shy to participate.

Prior to the discussions, consult with community leaders about cultural norms and attitudes within the group, and any relevant protocol and spiritual practices followed by the group.

At the outset of the discussions, informed consent will need to be obtained, ideally in writing with a plain language form. The informed consent should include:

- A statement as to:
 - o the purpose of the discussion
 - o who is conducting the discussion
 - o its expected duration
 - o the nature of anticipated participation
 - o how the participants' feedback will be used
- A comment as to any mutually beneficial goals, including and in particular:
 - o how it may help participants and their communities
 - o how it may enhance the capacity of the participants' communities
 - o how it may address long-term community needs

- Assurance of anonymity:
- Assurance of participants' ability to withdraw from the consultation at any time without prejudice to their entitlements

It is best to read and explain the provisions of the informed consent form orally, so to address any literacy challenges. At the time consent is considered, the co-facilitators should speak to how these consultations may benefit the community members and how they can access data recorded from the discussion.

During the discussion, the facilitators should focus on listening, not talking. They should be mindful

of the group's protocol and practices, and be alive to ongoing dynamics in the group. Feedback may be captured through note-taking or recording the session. Ensure that the participants are aware of, and consent to how their feedback is being captured, and whether their identity will be anonymous.

There are practical ways to incorporate the principle of reciprocity. It is important to provide refreshments for participants during the discussion, as well as providing honoraria of some kind (e.g. cash, gift card) to the participants, to reflect the value of the time and feedback they are providing.



equaljustice 

balancing the scales



THE CANADIAN
BAR ASSOCIATION

L'ASSOCIATION DU
BARREAU CANADIEN

INFLUENCE. LEADERSHIP. PROTECTION.