



# **Development of Performance Standards in Civil Justice:**

## **A Discussion Paper**

### **“Into The Future Conference”**

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## A. The Objective

- This discussion paper is meant to:
  - Reaffirm the need to develop performance measures by which to measure progress over time in the field of civil justice reform
  - Provide a conceptual framework within which to make decisions about the scope and feasibility of establishing pan-Canadian performance measures
  - Stimulate thinking about the components of a short term Action Plan that would set out:
    - Agreement on a short term list of 5-10 dimensions or characteristics within which measures and indicators need to be developed or refined
    - A work plan for the development of future performance measures
    - The critical success factors required from a data development and collection perspective that will be required in the longer term
    - The respective roles of the justice partners in the development and implementation of a performance measurement platform

## B. The Vision

In the simplest of terms, there needs to be consensus about what it is we wish to measure. The vision of an accessible, effective, fair and efficient civil justice system ought to be the conceptual rubric within which performance measurement is discussed. This paper takes the intellectual underpinnings of the CBA Task Force as the starting point for discussion.

The authors of the report see a modern and effective civil justice system as being<sup>1</sup>:

- Responsive to the needs of users
- Encouraging and valuing public involvement
- Providing many options for litigants for dispute resolution
- Resting within a framework managed by courts
- Providing an incentive structure that rewards early settlement
- Resulting in trials being a mechanism of valued but last resort for determining disputes

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<sup>1</sup> "Report of the Task Force on Systems of Civil Justice", Canadian Bar Association, 1996.

### C. Access to the Civil Justice System or Access to Civil Justice?

In an article entitled “Access to Justice in Canada Today: Scope, Scale and Ambitions”, Roderick Macdonald<sup>2</sup> argues that there have been five waves of thinking regarding “access to justice” matters over the last 50 years. The first wave was characterized by a focus on access to lawyers and courts. In this first wave in the 1960s, issues of particular concern were cost, delay and complexity in the legal system. One such example of programmatic innovation was legal aid in all its manifestations.

The second wave, occurring roughly in the decade of the 70s dealt with institutional redesign. In a sense, the frame of inquiry was widened to examine performance in courts and the procedures utilized in courts. Most reforms were concentrated in the civil justice arena. It is during this period that proposals were made to create small claims courts, to permit class actions, to modify discovery rules, and to create various non-judicial institutions to deal with “mass adjudication”, most notably no-fault automobile compensation schemes, workers’ compensation tribunals, and criminal injuries tribunals.

Macdonald describes the third wave of the 80s as focused on the demystification of the law. The *Charter of Rights and Freedoms* brought with it the notion that equality meant “not just the equality in the capacity and opportunity to litigate, but also embraced equality of outcomes”. Worry about unmanageable workloads led to consideration of “case management”, “commercial lists”, and “streamlined procedures” for certain categories of cases. Along with new procedures, governments began to entertain thinking about alternative dispute resolution, “restorative justice”, and the consideration of innovation in both process and structure.

The fourth wave of the 90s dealt with preventative law. In this new wave of access to justice thinking, the belief arose that true access to justice would entail multiple non-dispute resolution dimensions. ADR was conceived, he argued, as vehicles to help citizens avoid conflicts or deal with them before they emerged as significant legal problems. Access to justice concerns spilled over to private standards organizations, binding decisions by private arbitrators and the like. The arena was enlarged.

The fifth wave – proactive justice today, deals with enhancing access to official and unofficial institutions. “True access to justice requires that all people should have an equal right to participate in every institution where law is debated, created, found, organized, administered, interpreted and applied”.<sup>3</sup> It is within such a broad perspective that academicians would be

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<sup>2</sup> Roderick A. Macdonald, “Access to Justice in Canada Today: Scope, Scale and Ambitions”, *Access to Justice for a New Century: The Way Forward*, ed. Julia Bass, W.A. Bogart, Frederick H. Zemans, Law Society of Upper Canada, 2005

<sup>3</sup> *Ibid.*, p. 23.

concerned with health, demographics, and the roots of the problems faced by the marginalized and the disenfranchised.

Given the scope of the CBA paper, and the need for a realistic frame within which to discuss performance measurement, this discussion paper is setting the scope of inquiry to access to the justice system, rather than access to justice broadly defined.

## D. Elements or Objectives of an Optimal Civil Justice System

### D1. The CBA View

The CBA Task Force identified the three main issues with civil justice as follows:

- delay
- costs
- complexity

In the CBA Task Force Report, the recommendations were focused on seven key areas of reform:

1. Create a multi-option justice system with the incorporation of dispute resolution options into the litigation process.
2. Reduce delay in the courts (by means including case flow management, fixed trial dates, timelines and rules for automatic dismissal of cases).
3. Reduce costs (through means including increased small claims jurisdiction, the use of summary trial procedures, incentives to encourage settlement, expedited & simplified proceedings, and reconsidering the role of experts, the use of discovery and interlocutory applications.)
4. Improve the public understanding (through public legal education, point of entry advice, unrepresented litigants and court user committees.)
5. Preserve the integrity of the courts (by providing the courts with tools for management, evaluation and assistance with technology.)
6. Focus on the needs of legal professionals (who will be working in a significantly changed civil justice system.)
7. Increase the focus on civil justice (through the collection of statistical information, a multi-disciplinary approach to reform and the creation of the Canadian Forum on Civil Justice).

Recommendation 52 led to the establishment of the Canadian Forum on Civil Justice to continue the focus on civil justice reform in Canada. The Forum was created in May 1998 by a joint agreement between the CBA and the Faculty of Law at the University of Alberta. The objectives of the Forum are drawn directly from Recommendation 52 of the CBA Task Force Report:

- to collect and organize information relating to the civil justice system;
- to carry out in-depth research on the operation of the civil justice system;
- to promote the sharing of information about the use of best practices;
- to function as a clearinghouse and library of information for the benefits of all persons in Canada concerned with civil justice reform;
- to develop liaisons with similar organizations in other countries in order to foster exchanges of information across national borders; and
- to take a leadership role on the provision of information on civil justice reform initiatives and to develop effective means of exchanging this information.

## D2. The View from Lord Woolf

Lord Woolf, a leader in civil justice reform, described the five main issues with civil justice as follows:

- Too long
- Costs too much
- Undue complexity
- Too much uncertainty
- Unfavorably weighted in favor of the financially stronger party

In a publication of the Department of Constitutional Affairs, ten criteria for measuring the success of Woolf's procedural reforms were offered<sup>4</sup>:

- Litigation will be avoided wherever possible
- Litigation will be less adversarial and more cooperative
- Litigation will be less complex
- The timescale of litigation will be shorter and more certain
- The cost of litigation will be more affordable, more predictable, and more proportionate to the value and complexity of individual cases
- Parties of limited financial means will be able to conduct litigation on a more equal footing
  - There will be clear lines of judicial and administrative responsibility for the justice system
  - The structure of the courts and the deployment of judges will be designed to meet the needs of litigants
  - Judges will be deployed effectively so that they can manage litigation in accordance with the new rules and protocols
  - The civil justice system will be responsive to the needs of litigants

Interestingly, Lord Woolf recommended the establishment of a permanent Civil Justice Council to oversee the implementation of his proposals. Some two years after the tabling of his report, the Lord Chancellor formed the Council in March 1998. The Civil Justice Council is charged with:

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<sup>4</sup> Right Honourable the Lord Woolf, Master of the Rolls, "Access to Justice Final Report", Department of Constitutional Affairs, 1996.

## Development of Performance Standards in Civil Justice: A Discussion Paper

- Reviewing the civil justice system
- Considering how to make the civil justice system more accessible, fair and efficient
- Advising the Lord Chancellor and the Judiciary on the development of the civil justice system
- Referring proposals for changes in the civil justice system to the Lord Chancellor and the Civil Procedure Rule Committee
- Making proposals for research

The Civil Justice Council produces an Annual Report that is available online, and it also commissions research that is disseminated.

## E. What to Measure: Dimensions of the Civil Justice System

Based on a review of the literature, the paper proposes that the following framework be used to explore the selection and prospective development of measures:

- Public confidence
- Responsiveness to clients' needs
- Addressing parties' relative strengths
- Appropriate infrastructure
- Accountability
- Clarity of responsibility between judiciary, the bar and the administration re: civil justice

The National Center for State Courts (NSCS) embarked on a program to establish performance standards for courts a number of years ago. In its first incarnation, *Trial Court Performance Standards*, some 68 measures were developed. Field experience indicated that the number was simply too unwieldy. The current set of court measures was developed and is called CourTools and is comprised of ten measures.

The National Center for State Courts asserts that there are five reasons to assess court performance<sup>5</sup>:

- Performance data allow everyone to test assumptions of how well things are going
- Multiple indicators permit courts to respond to the varied concerns of constituents, litigants, the bar, witnesses, jurors, the public, and the funding authorities
- Setting desired outcomes help staff better understand their individual contributions
- Performance data assist in budget formulation
- Formal performance provides the means for courts to demonstrate the value of services delivered.

Three criteria were used to select the ten measures:

1. the measures ought to reflect fundamental court values
2. the measures ought to reflect a balanced perspective on the work of the court
3. feasibility and sustainability

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<sup>5</sup> "CourTools: A Court Performance Framework", National Center for State Courts, 2005, p. 1.

Respecting court values, the measures which will be outlined below relate to providing access to justice, reducing delay, and various success factors linked to “management effectiveness that are relevant to all public institutions, such as fiscal responsibility, client-customer satisfaction, and the effectiveness and efficiency of internal processes”<sup>6</sup>. The second criterion suggests that the most important dimensions of court performance need to be examined. In addition, the third criterion requires measures that are limited in number, are readily interpretable, and are durable over time.

From a methodological point of view, the following discussion lays out the steps in the measurement design process. A researcher or tasked group begins the measurement process by conceptualizing and operationalizing each variable of interest. A conceptual definition is a definition in abstract theoretical terms, such as public confidence, or responsiveness to clients’ needs. Then the researcher develops an operational definition, meaning a definition in terms of specific operations, measurement instruments or procedures. From the operational definition, the researcher develops measures and then indicators. In the following table, column 1 connotes the conceptualization, column 2 the measure, and column 3 the indicator, or the set of questions that would help in the development of an indicator.

Where the National Centre for State Courts has developed performance measures for State Court Administration, these “CourTools” are identified in the chart below in italics. Additional performance measures and key questions are being offered for consideration.

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<sup>6</sup> *Ibid.*, p. 4.

**F. A SUGGESTED WORK PLAN FOR THE LONGER TERM**

It is recommended that attendees consider the civil justice conceptual constructs as detailed in the chart below, and determine what future research is required to develop new measures that might lead to the creation of a Justice Index over time. In short, a longer term plan of action needs to be developed.

Key steps:

**Question #1:** What dimensions of civil justice ought to be included in a Justice Index?

**Question #2:** Amongst justice partners, what data are currently collected?

**Question #3:** What criteria need to be developed to guide the developmental/research work that might be required?

**Question #4:** What research needs to be conducted?

**Question #5:** What resources are required?

**F1. Public Confidence**

Sub-characteristics	potential measures	work required-key questions required for indicator development
Transparency	Openness to public scrutiny and encouragement of public participation	Who is the public? What is scrutiny? In what functions might the public be properly involved?
Public perception of fairness and confidence in access to civil justice system	<i>CourTool</i> <i>Access and fairness</i>	<i>Rating of court users on fairness, equality and respect</i>

## F2. Responsiveness to Client Needs

sub-characteristics	potential measures	work required-key questions for development of indicators
Consistent high quality services	<p>Collaborative relationships exist with all key participants in the courthouse</p> <p>Continuous legislative and policy reviews aimed at improving court services and processes</p> <p>Wait time measures at the counter</p> <p>Bar of each jurisdiction has developed best practices that are disseminated</p>	<p>Who are the players? What types of collaboration exist?</p> <p>What is the desired frequency?</p> <p>What is the appropriate time standard for different lines of business?</p> <p>Which areas need to be covered in best practice?</p>
<p>Accessibility</p> <p>Access</p> <p>Physical</p> <p>Geographical</p> <p>Linguistic</p>	<p>Systemic barriers are identified, and reduced or eliminated</p> <p><i>CourTool</i> <i>Access and Fairness</i></p> <p>Compliance with Disability legislation</p> <p>Steps have been taken to increase access to remote locations</p> <p>Standards have been developed for court interpretation</p>	<p>What are the barriers? What steps have been taken to eliminate or reduce them?</p> <p><i>Ratings of court users on the court's accessibility</i></p> <p>Presence of elevators, number of entrances, location of screening devices, adaptation for disability in courtrooms</p> <p>What is the quality of public access to transportation to the courthouse?</p> <p>Is there technological access to remote courts?</p> <p>What signage is available in other languages? What cultural sensitivity training occurs for court staff?</p>

sub-characteristics	potential measures	work required-key questions for development of indicators
Timely and efficient case processing	<p><i>CourTool</i></p> <p><i>Time to disposition</i></p> <p><i>Age of active pending caseload</i></p> <p><i>Clearance rates</i></p> <p><i>Trial date certainty</i></p> <p><i>Reliability and integrity of case files</i></p> <p>Time to release reserve judgments in a percentage of cases</p> <p>Time to process (dispose) appeals in a percentage of cases</p> <p>Case backlogs are being eliminated</p>	<p><i>The percentage of cases disposed or otherwise resolved within established time frames</i></p> <p><i>The age of the active cases pending before the court, measured as the number of days from filing until the time of measurement</i></p> <p><i>The number of outgoing cases as a percentage of the number of incoming cases</i></p> <p><i>The number of times cases disposed by trial are scheduled for trial</i></p> <p><i>The percentage of files that can be retrieved within established time standards, and that meet established standards of completeness and accuracy of contents</i></p> <p>What is the appropriate metric?</p> <p>What is the appropriate metric?</p> <p>What is the appropriate measurement?</p>
Proportionality	<p>Proportionality indicator</p> <ul style="list-style-type: none"> <li>-Simple procedures for simple cases</li> <li>-Specialized approaches to complex cases</li> </ul>	<p>How is complexity defined?</p> <p>What are the different procedures?</p>
Availability of processes for early dispute resolution in civil and domestic family cases	<p>Mediation services are available to promote early resolution</p>	<p>What is the appropriate time dimension?</p>

### F3. Addressing parties' relative strength

sub-characteristics	potential measures	WORK REQUIRED- key questions for indicator development
Cost	<p>Develop measure for provision of <i>pro bono</i> services as a percentage of billing</p> <p>Develop measure for provision of legal aid as a percentage of billing</p> <p>Measure re: number of unrepresented clients as percentage of all clients by business line</p> <p>Measure re: self-represented</p>	<p>What is the appropriate metric?</p> <p>What is the appropriate percentage?</p> <p>What is the appropriate percentage, by type of case?</p> <p>How would this be determined?</p> <p>How would this be determined?</p> <p>What is the appropriate metric?</p>
Availability of information	<p>Steps taken to provide assistance in completion of court forms</p> <p>Provision of information in civil and family matters at the courthouse</p>	<p>What materials and staff support are made available to clients?</p> <p>What information supports are there?</p> <p>What technology is available to support information requests?</p>

### F4. Appropriate infrastructure

sub-characteristics	potential measures	work required- key questions for indicator development
Human resources	<p>Resourcing models provide an objective base for determining court office staffing needs, judicial and justice of the peace complement</p> <p><i>CourTool</i></p> <p><i>Court Employee Satisfaction</i></p>	<p>What resource models are used for budgetary purposes?</p> <p><i>Ratings of court employees assessing the quality of the work environment and relations between staff and management</i></p>

sub-characteristics	potential measures	work required- key questions for indicator development
	<p><i>CourTool</i> <i>Effective Use of Jurors</i></p>	<p><i>Juror yield is the number of citizens selected for jury duty who are qualified to report to serve expressed as a percentage of the total number of prospective jurors available. Juror utilization is the rate at which prospective jurors are used at least once in trial</i></p>
Case management	<p>Case management tools</p> <p>Resolution targets are established for different stages in the litigation process (e.g. % of cases settled at pre-trial conference; % of cases settled within one year of claim)</p>	<p>What type of case management is used by business line? Is there variation within a business line across the jurisdiction?</p> <p>What is the degree of standardization of case management across a jurisdiction?</p>
Information technology	<p>Courtroom technology supports efficient case processing and continuous monitoring of case volumes; enables access to court information, files and schedules, court decisions and remote court appearances</p>	<p>What technology or application would be monitored?</p>
Risk management	<p>Operational and financial risks are identified early and are effectively managed</p>	<p>What tools are used to identify risk?</p>
Revenue generation	<p>Strategies are in place to review fees on a regular basis and to generate new fee revenue where appropriate</p> <p><i>CourTool</i> <i>Collection of monetary penalties</i></p>	<p>How is ability to pay taken into consideration?</p> <p><i>Payments collected and distributed within established timelines, expressed as a percentage of total monetary penalties ordered in specific cases</i></p>

## F5. Accountability

Sub-characteristics	indicators for consideration	development work required
Continuous program evaluation	Programs and local practices are continuously evaluated	What evaluation takes place? What is the consequence of evaluation activities?
Management information system	Management information reports are available to support ongoing program reviews, the analysis of case processing trends, resource allocation decisions, client satisfaction with services	What is the quality of information, How comprehensive is the information?
Public annual report	Annual report is disseminated	What is contained in the Annual Report? How is the report disseminated?
Enforcement	Measure exists to monitor enforcement of civil and/or small claim court judgments	What is the appropriate measure?

## F6. Clarity of responsibility between the Judiciary, the Bar and Administration

theme	indicators for consideration	development work required
Clarity	MOUs between Judiciary, the Bar and Ministry/Department of Justice	What are the key elements that need to be defined?  What processes would be used?

## G. A SUGGESTED SHORT TERM WORK PLAN

It is recommended that attendees develop a short-term action plan to construct a set of performance measures for civil justice in Canada based on the measures incorporated in CourTools, given its theoretical backdrop and the experience gleaned from adoption in many states. Each measure would be reviewed and assessed in terms of relevance, feasibility and sustainability.

Key steps:

**Question #1:** What criteria need to be established by which to choose among the CourTools?

**Question #2:** What do we wish to measure?

**Question #3:** What data do we currently collect?

**Question #4:** What further research is required?

**Question #5:** What is the appropriate sequencing of work activity?

courtool measure	DESCRIPTION <sup>7</sup>	feasibility analysis
<p><i>Access and Fairness:</i></p> <p>Ratings of court users on the court's accessibility and its treatment of customers in terms of fairness, equality and respect</p>	<p>Research indicates that positive perceptions of court experience are shaped more by court users; perceptions of how they are treated in court, and whether the court's process of making decisions seems fair. This measure provides a tool for surveying all court users about their experience in a courthouse. Comparison of results by location, division, type of customer, and across courts can inform court management processes.</p>	
<p><i>Clearance rates</i></p> <p>The number of outgoing cases as a percentage of the number of incoming cases</p>	<p>Clearance rate measures whether the court is keeping up with its incoming caseload. Knowledge of clearance rates can help a court pinpoint emerging problems and indicate where improvements can be made</p>	

<sup>7</sup> CourTools: Trial Court Performance Measures – Brochure”, National Center for State Courts, 2005, pp1-2.

courtool measure	DESCRIPTION <sup>7</sup>	feasibility analysis
<p><i>Time to disposition</i></p> <p>The percentage of cases disposed or otherwise resolved within established time frames</p>	<p>This measure along with clearance rates and age of active pending caseload, measure 4, is a fundamental management tool that assesses the length of time it takes a court to process a case.</p>	
<p><i>Age of active pending caseload</i></p> <p>The age of the active cases pending before the court, measured as the number of days from filing until the time of measurement</p>	<p>This measure addresses the following questions: Does a backlog exist? Which cases are problems? Given past and present performance, what is expected in the future?</p>	
<p><i>Trial date certainty</i></p> <p>The number of times cases disposed by trial are scheduled for trial</p>	<p>This measure provides a tool to evaluate the effectiveness of calendarization.</p>	
<p><i>Reliability and integrity of case files</i></p> <p>The percentage of files that can be retrieved within established time standards, and that meet established standards for completeness and accuracy of contents</p>	<p>This measure provides information about (a) how long it takes to locate a file (b) whether the file's contents and case summary information match up and (c) the organization and completeness of the file.</p>	
<p><i>Collection of monetary penalties</i></p> <p>Payments collected and distributed within established timelines, expressed as a percentage of total monetary penalties ordered in specific cases</p>	<p>Integrity and public trust in the dispute resolution process depends in part on how well court orders are observed and enforced in cases of noncompliance.</p> <p>This measure focuses in the extent to which a court takes responsibility for the enforcement of orders requiring payment of monetary penalties.</p>	

courtool measure	DESCRIPTION <sup>7</sup>	feasibility analysis
<p><i>Effective use of jurors</i></p> <p>Juror yield is the number of citizens for jury duty who are qualified and report to serve, expressed as a percentage of the total number of prospective jurors of the total number of prospective jurors available.</p>	<p>The objective of this measure is to minimize the number of unused prospective jurors- the number of citizens who are summoned, qualified, report for jury service and who are not needed.</p>	
<p><i>Court employee satisfaction</i></p> <p>Ratings of court employees assessing the quality if the work environment and relations between staff and management</p>	<p>Knowing how employees perceive their workplace is critical to organizational effectiveness.</p>	
<p><i>Cost per case</i></p> <p>The average cost of processing a single case, by case type</p>	<p>Monitoring cost per case is a practical way to evaluate existing case processing practices and to improve court operations.</p>	

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